

● SANQIANG QU

COPYRIGHT IN CHINA



FOREIGN LANGUAGES PRESS BEIJING

COPYRIGHT IN CHINA

Sanqiang Qu
LL.B, LL.M, Ph.D.

FOREIGN LANGUAGES PRESS BEIJING

First Edition 2002

Website:

<http://www.flp.com.cn>

Email Address:

Info@flp.com.cn

Sales@flp.com.cn

ISBN 7-119-02931-2

©Foreign Languages Press, Beijing, China, 2002

Published by Foreign Languages Press

24 Baiwanzhuang Road, Beijing 100037, China

Distributed by China International Book Trading Corporation

35 Chegongzhuang Xilu, Beijing 100044, China

P.O.Box 399, Beijing, China

Printed in the People's Republic of China

图书在版编目 (CIP) 数据

中国知识产权 / 曲三强著.

—北京: 外文出版社, 2002.2

ISBN 7-119-02931-2

I. 中... II. 曲... III. 知识产权—中国—英文

IV. D923.4

中国版本图书馆 CIP 数据核字 (2001) 第 079211 号

责任编辑 胡开敏

英文审校 张民捷 黄雪莲

封面设计 席恒青

印刷监制 冯 浩

外文出版社网址:

<http://www.flp.com.cn>

外文出版社电子信箱:

info@flp.com.cn

sales@flp.com.cn

中国知识产权

曲三强 著

*

©外文出版社

外文出版社出版

(中国北京百万庄大街 24 号)

邮政编码 100037

三河实验小学印刷厂印刷

中国国际图书贸易总公司发行

(中国北京车公庄西路 35 号)

北京邮政信箱第 399 号 邮政编码 100044

2002 年 (大 32 开) 第 1 版

2002 年 2 月第 1 版第 1 次印刷

(英)

ISBN 7-119-02931-2/Z.617 (外)

06000 (平)

17-E-3475P

SYNOPSIS

This book is a comprehensive research upon copyright law and its jurisprudential basis in the PRC. The examination focuses on both the external conditions which may affect or restrict the formation and development of copyright law and policy in China, and the internal structure of the law, which deals with liabilities for infringement of copyright.

The thesis reviews the tortuous process of development of copyright theory and law in China. It explores the underlying influences of Chinese traditional culture and the socialist political system upon this process. It also analyses the significant influence of Western concepts of copyright on the theoretical and practical development of a Chinese system of copyright protection.

This book argues that the fundamental barriers to the development and operation of copyright law in China result from the persistent gap between notions that are forced upon the legal system and those embodied in social axiology. The conflicts and tensions created by this have affected both the making and the enforcement of copyright law.

The conclusion of the book is that the traditional values inherent in Chinese theories and law of copyright are now being challenged by contemporary Western copyright ideas. The economic reform program and "open door" policy currently being implemented in China have intensified this challenge. To resolve this tension, China needs to adjust its law and policy to conform with standards of copyright protection commonly accepted by international communities.

By harmonizing its approach to copyright China should eventually escape from the dilemma of socialism versus capitalism. However, this objective is still a long way from realization and, with little internal incentive or enthusiasm for enforcing copyrights, there is no

reason to expect much progress in the near future unless pressure is applied from outside China. This would be a discouraging observation, were it not for the steady progress towards a market economy where investors at last have the freedom to enforce their own rights.

However, the residual strength of traditional values ingrained in the socialist system means that copyright law in the PRC will continue in the foreseeable future to be determined by political as well as economic considerations, and the direction and pace of its development will fluctuate according to the relative influence of these factors, as it has in the past.

PREFACE

Ever since China decided to open its door to foreign investment and trade in the late 1970s, intellectual property, more precisely its protection, has been a “hot” topic in and outside China, both in political and legal arenas. The accession of China to the World Trade Organization (WTO) can only make the topic even “hotter”. Indeed, one of the first actions taken by the Chinese authorities in Beijing after the Qatar meeting, at which China’s accession to WTO gained approval, was to announce a long list of pirated American movies (on VCD or DVD) whose distribution, sale and circulation are banned in China.

Important in its own right, intellectual property protection is also part of the big issue in the Chinese media of “the WTO and Legal Reform”. This reform is, as Chinese scholars would often remind us, evidence of the globalization of law. If China has been caught up in that process, the nature of that process has changed in the last twenty years of legal reform. First, there was a perceived need for Chinese law to be acceptable to foreign investors and traders so that the much-needed foreign funds, technologies and management expertise may be attracted into China. Then there came the demands for better protection of foreign investment, both of capital and technologies. In between, there were calls to learn from foreign experiences and to adopt “advanced and useful” aspects of foreign and international laws. But, in all these, China would decide which aspects or part of international and foreign laws are to be used for “reference”.

The membership of WTO now changes the rules of the game, especially in relation to intellectual property protection. China is not to choose which part of the rules to comply with; China is to fully comply with a set of rules without much freedom of choice. Missing from this process of globalization of law in China is the question: will the adopted laws clash with the traditional conceptions of and attitudes towards law in China and, hence, will the adopted laws be

effective? Here enters the new book of Dr Qu Sanqiang: *Copyright in China*.

A few years ago, Mr. Qu Sanqiang came to us to do a Ph.D at La Trobe University, one that he completed successfully and in good time. He came with a strong conviction that the real problems of settling intellectual property law in China lie with the conceptual and philosophical foundations of Chinese law in general and the history of Chinese intellectual property protection in particular. He explained to us that the formation and development of copyright law and policy in China needed to be re-examined. Understanding would come from an appreciation both of the external conditions impinging on China and the underlying influences of traditional culture and the socialist politico-economic system. He argued that, unless these factors and their relative influences are fully appreciated, one will continue to be disappointed by the failure of law enforcement in China in relation to copyright protection and the protection of other rights.

The present book is the result then of four years of hard work, thorough research, and endless intellectual exercise devoted to executing these ideas. As well as providing the necessary context for understanding the law, Mr. Qu Sanqiang worked systematically through the essential elements of copyright law. Unlike many writers, he gave particular attention to the difficulties of conceptualizing liability for infringement of copyright and of relating that crucial, practical aspect of copyright law to the general principles of liability in Chinese law. With the urgency given to compliance by China's international obligations, we have little doubt that readers will find the book both interesting and valuable for an understanding of current Chinese intellectual property law and its development.

As his supervisors, sharing in this intellectual exercise was challenging but rewarding. Most of all, it was a great pleasure, to be his friends as well as his supervisors.

Christopher Arup and Jianfu Chen

Melbourne, Australia

INTRODUCTION

TOWARDS AN UNDERSTANDING OF INTELLECTUAL PROPERTY OF CHINA

I. Copyright Protection in the PRC

Copyright protection has become a significant worldwide issue in relation to international political, economic, scientific and technological as well as cultural exchanges. International bilateral and multilateral negotiations concerning the subject, in particular the *TRIPS*, have raised worldwide copyright protection to a new level.¹

Copyright protection has long been a controversial issue in the People's Republic of China (the PRC, here referred to simply as "China"), and continues to be so. For various reasons to be discussed below, China began to work out its copyright system relatively recently. Although China is credited with having contributed to the world the great inventions of paper, moveable type and ink,² it has not yet developed a comprehensive system of protection for what is created through the application of inked type to paper, or via other more recently developed media.

Certainly, there has been no shortage of efforts to promulgate formal legal protection for copyright.³ Since the late 1980s China has taken major steps in legislation to bring its copyright law into close conformity with the requirements of the international community. The original impetus for the introduction of copyright protection in China was the desire to open its door to trade and the accompanying foreign currencies by encouraging investment and the transfer of much-

¹ See *Intellectual Property Protection in China*, issued by the Information Office of the State Council of the PRC, *Beijing Review*, June 20-26, 1994, 8.

² For details of the history of these innovations, see Ch'ien, 1973, *Paper and Printing*, Macdonald & Co., London.

³ See Alford, W.P., 1995, *To Steal a Book Is an Elegant Offence: Intellectual Property Law in Chinese Civilisation*, Stanford University Press, California, 1.

needed technologies from the West⁴ These developments notwithstanding, copyright protection remains to a certain extent more a matter of rhetoric than reality.⁵ As some Western scholars have pointed out, the laws embodying the norms that have been transplanted from foreign legal systems have frequently faced substantial implementation problems in China. The experience of many Asian countries during the colonial and post-colonial periods shows that legal regulation is less relevant to social reality than are customary norms.⁶ Where imported legal concepts do not correspond with entrenched societal values, people may be unwilling to adjust their behaviours to fit the new legal standards.⁷

This argument explains to some extent what has happened in the field of copyright protection in China during the past two decades. Since the 1980s China has begun the process of establishing a copyright system substantially drawn from both Anglo-American law and Continental law prototypes. China is seeking to pin its future on the adoption of Western economic models, and for continued development it needs to further expand economic linkages with the Western world. Thus, a legal system acceptable to foreign investors has become a key factor in attracting Western support. However, the adoption of such a system necessarily entails a clash between the norms as expressed in the law system and pre-existing attitudes as they have evolved under current and past regimes.

II. Major Arguments and the Structure of This Thesis

A. Major Arguments

This thesis examines the main problems China is confronting in establishing its legal scheme for copyright protection, especially concerning the liability for infringement of copyrights. It will be argued that the problems are mostly derived from the persistent gap

⁴ Wheare, H.J.H., "Intellectual Property: China's Unrewarded Efforts?" in *China Law and Practice*, Hong Kong, July/August 1996, 38.

⁵ See Alford, fn. 3 at 1.

⁶ For an analysis from this perspective of various Asian countries other than the PRC, see Chiba, M. (ed.), 1986, *Asian Indigenous Law: in Interaction with Received Law*, KPI Limited, London.

⁷ See Potter, P., 1997, *Foreign Investment in China*, Hong Kong University Press, Hong Kong, 1.

between the legal norms enforced by the law regime and the notion that is embodied in social axiology. Not only has China adopted Western legal norms against a cultural background unfamiliar with, or even hostile to, the impartial application of universal rules, it has applied them in the context of a political system which for many decades denied law any role whatsoever in societal regulation. Such an analysis is further complicated by the profound influence of Marxism, itself largely a Western construct, on China's underlying normative reality during the 20th century.

Over the past two decades, many researchers, both in China and abroad, have been occupied in dealing with the doctrinal aspects of copyright in China. These researchers have made certain contributions to the enhancement of copyright protection in China. Based on this background, as well as the analysis of the existing copyright system of China, this thesis seeks to suggest a means to redress the imbalance that exists in the copyright relationship by examining how copyright law actually operates within China's institutional, political and social framework. It also endeavours to propose a rational and enforceable doctrine concerning liability for infringement of copyright.

Basically, this thesis advances several significant propositions which have been largely ignored by academic research. The propositions are as follows: first, there was no copyright norm in Chinese feudal history. Copyright originally was a purely Western concept, which was introduced into China in the early 20th century under pressure from the Western powers. Second, the modern notion of copyright, in essence, is in contradiction to Chinese traditional culture. Third, copyright, as a sort of monopolised right over intellectual creation, is basically inconsistent with the Marxist and socialist ideology. Fourth, copyright in Chinese law, to a large extent remains a means to an end, rather than an end itself. Fifth, by and large, the system of acknowledging the rights of authors prior to the economic reform of the 1980s was only a product of the planned economy; at any rate, it was incomplete in the sense of a modern copyright system. Sixth, in dealing with liability for infringement of copyright, Chinese law emphasises the interests of the society over the interests of individuals. Finally, in adjustment of the copyright relationship, Chinese law is more inclined to resort to administrative or criminal liability to deal with this than to employ civil liability.

All these propositions indicate that the development of a copyright system in China has gone through a process of mixing Western notions with Chinese tradition and political culture. The elementary dynamic behind the process is the demand for economic development. The process has framed the fundamental features of Chinese copyright law: on the one hand, the law has attempted to conform to the basic standard of copyright protection of Western countries; on the other hand, it stubbornly clings to the preservation of Chinese traditions and socialist notions. As a result, Chinese copyright law is caught in a dilemma. Much of the inconsistency apparent in the apportionment of liability for infringement of copyright can be traced to this dilemma.

A final solution to the dilemma seems to rest with the political and economic reforms that are now under way in China. The reform process has already considerably changed traditional notions of copyright protection, and it will eventually remove the irrational factors from which the dilemma was produced. Meanwhile, as an important part of the wider reform, improvement of the legal system has led to significant strengthening in enforcement of copyright.

B. Structure

This thesis contains extensive discussion of the social context for the formation and exercise of copyright in China, with an accompanying focus on analysis of the regime of liability for infringement of copyright. Each chapter therefore considers a different aspect of the nature and characteristics of Chinese copyright theory and law.

Chapter One reviews the general background of copyright protection in China, giving a broad overview of historical and cultural factors affecting the development and operation of the Chinese copyright system.

Chapter Two focuses specifically on the copyright law and theory of socialist China, examining the various relationships and factors which influence the formation and enforcement of the law, as well as the exercise of copyright in practice.

The following three chapters look in greater detail at particular aspects of the Chinese copyright system. Chapter Three deals with the objects of copyright, and certain limitations to their scope and application. Chapter Four analyses the special relationship between

authorship and copyright in Chinese law. Chapter Five considers several important principles concerning the relevance of the accused's mental state in determining civil liability for infringement of copyright.

Chapter Six offers a thorough examination of the nature and characteristics of various infringements in Chinese copyright, with attendant discussion of the relative significance of civil and administrative liability. Concrete examples of the ineffectuality of China's current legislation in dealing with infringements of copyright are followed by suggestions for improvement of the regulatory regime.

Chapter Seven discusses the specific copyright issues involved in the development of computer software, and the ways in which the existing Chinese copyright system deals with infringements in this area of rapid technological change.

The focus of Chapter Eight is on the characteristics of criminal infringement of copyright, and the sanctions applied to such infringements under Chinese criminal law.

Chapter Nine is freshly made in a hurry just before this book is published. Due to the fact that China has become a member of WTO, a recent revision of copyright law as well as other regulations related to intellectual property is under going in order to meet the standards required by the *Trips Agreement*. Many changes have/are actually taken place in this regards. Therefore, this Chapter, for supplying as much information as possible, stresses to provide a comprehensive glance at these changes. However, as the time is so limited, it would be understandable if any immature thinking, repetition or incomprehensive analysis occurred.

Chapter Ten draws these strands together to create a coherent picture of the present Chinese copyright system and a vision of what it may yet become.

CONTENTS

Preface

Introduction

Chapter One	Historical Development of Copyright Law in China	1
1.	Introduction	1
2.	A Question of Indigenous Copyright Protection in Feudal China	3
	2.1. Economic Reasons	4
	2.2. Traditional Culture	5
	2.3. Purpose and Conditions of Education	8
	2.4. Political Culture	10
3.	A Tortuous Road: Development of Copyright Protection in China	15
	3.1. Increasing Western Pressure	15
	3.2. Late Qing Efforts to Protect Copyrights	20
	3.3. The KMT Attempt to Create a Copyright System	25
	3.4. The Communist Approach to Law and Social Control	28
	3.5. The Development of Copyright Protection in the PRC	33
	3.6. Law Reform in the 1980s: a Part of the Global Struggle over Copyright Protection	40
4.	Concluding Remarks	48
Chapter Two	The Rationale of Socialist Copyright	53
1.	Introduction	53
2.	The Notion of Copyright in Western Legal Literature	54
3.	General Notion of Copyright in Socialist Countries	57
4.	The Conception of Copyright in Socialist China	60
	4.1. The Situation Prior to the Economic Reform	60
	4.2. The Situation Since the Copyright Law 1990	67
5.	The Nature and Characteristics of the Chinese Conception of Copyright	70

5.1. Dualism of Copyright	70
5.2. Moral Concerns and Economic Emphasis	75
6. Concluding Remarks	82

Chapter Three Objects of Copyright and Their Limitations 86

1. Introduction	86
2. Objects of Copyright: An Incomplete Notion in Chinese Law	87
2.1. Concept of Copyright Work	88
2.2. Qualification Requirement for Copyright Works	89
3. More Limitations to Copyright: A Copyright Law with a Socialist Colour?	101
3.1. Fair Dealing as a Legal Limitation to Copyrights	104
3.2. Exhaustion of Copyright	117
4. Control over Copyrights for Political and Social Considerations	129
4.1. Debates on the Legal Nature of Banned Works	129
4.2. Copyrightability of the Work Created by a Person Deprived of Political Rights	134
5. Concluding Remarks	135

Chapter Four Authorship and Copyright 138

1. Introduction	138
2. Authorship and Copyright in Chinese Law: A Mixed Conception	140
2.1. The General Notion of Authorship in Western Jurisprudence	140
2.2. Notion of Authorship and Copyright in Chinese Law	143
3. Special Relationships Concerning Authorship and Copyright	147
3.1. Employee/Employer Relationship: An Intersection of Authorship and Copyright	147
3.2. The Commission Relationship: Predetermination of Authorship and Copyright	151
3.3. Co-authored Relationship: A Conceptual Extension of Individual Creation	154
4. Transferring Copyright	166
5. Concluding Remarks	168

Chapter Five Mental State of the Infringer in Attribution of Liability 172

1. Introduction	172
2. Doctrine of Fault Liability as a Traditional Concept	175

2.1. History of Development of the Doctrine of Fault Liability	175
2.2. The Content of Fault Liability	180
3. The Principle of No-fault Liability	182
3.1. A General Review	182
3.2. The Fault Principle: No Longer Adequate for Infringements of Copyright	193
3.3. Dual Criteria of Attributing Liability Should Be Established	198
4. Concluding Remarks	209

Chapter Six Civil and Administrative Liabilities for Infringement of Copyright 213

1. Introduction	213
2. The Notion of Infringement in Chinese Law	214
2.1. Nature and Position of Infringement for Attribution of Liability	214
2.2. Classification of Infringements	216
3. Infringements under Chinese Copyright Law	219
3.1. Infringements Which May Lead to Civil Liabilities	219
3.2. Infringements That May Incur Both Civil and Administrative Liabilities	245
4. Concluding Remarks	256
4.1. Chinese Copyright Law Is Not Yet a "Charter of Rights"	256
4.2. Changes Are Expected on Chinese Copyright Law	258

Chapter Seven Infringements of Copyright in Computer Software and Their Liability 261

1. Introduction	261
2. The Options for Protection of Computer Software	267
2.1. Many Nations, Many Choices?	267
2.2. The Development of China's Software Law	271
3. Copyright Law as a Legal Basis for Protection of Software	275
4. Authorship and Ownership of Computer Software	277
4.1. A General Standard Provided by the Law	277
4.2. Nature of Works of Computer-Assisted Creation	280
4.3. A Procedural Limitation Imposed upon Ownership of Computer Software	282
5. Unauthorized Reproduction of Copyright Software	284
6. Plagiarism of Computer Software	290
7. Unauthorized Distribution of Computer Software	293
7.1. Legal Grounds for Prevention of Unauthorized Distribution	293

7.2. Developer's Liability	295
7.3. Supplier's Liability	296
8. Concluding Remarks	297
Chapter Eight Criminal Liability for Copyright Infringement	301
1. Introduction	301
2. Historical Development of Criminal Liability for Infringement of Copyright	304
3. Concepts Underlying Copyright Protection	309
4. Character and Constitution of Criminal Infringement of Copyright	313
4.1. Crime of Infringing Copyright Works	314
4.2. Crime of Selling Infringing Copies	318
5. Establishing Evidence of Criminal Infringement	320
5.1. Ownership	321
5.2. Performance of Prohibited Activities	322
5.3. "First Sale Doctrine"	324
5.4. Criminal Intention	327
6. Concluding Remarks	330
Chapter Nine Facing Up WTO: China Is Changing Its Law with International Standard	333
1. Introduction: Socio-Economic and Cultural Dimension	333
1.1 Birth of Copyright Protection in China	335
1.2 Fundamental Principles for the New Amendments	342
1.3 Preparations for Amendment of the Copyright Law	343
2. The Related International Treaties After WTO	344
2.1 A Glance over International Copyright Treaties	344
2.2 The Berne Convention Under WIPO	346
2.3 The MOU Between PRC and USA	349
2.4 The Trips Agreement Under the WTO	355
3. China Puts New Copyright Law into Effect	358
3.1 Basic Principles of the New Amendments	359
3.2 Extent of Copyright	362
3.3 Subject Matters of Copyright	364
3.4 Neighboring Rights	369
3.5 Limitations of Copyright	375
3.6 Collective Management of Copyright	381