

# Introduction

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The real measure of a nation's wealth is the stream of goods and services that it creates.<sup>1</sup>

Copyright as a legal concept originated in the United Kingdom (UK) under the 1709 Statute of Anne, which was introduced as an act to promote the encouragement of learning. Thereafter, copyright has developed from a domestic law that regulated the rights of copying in the publishing industry to a generally established global regulation that has extensive influences on almost every modern industry.

In the modern world, copyrighted works are protected both by national laws, in individual countries, and international laws such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The Berne Convention sets out the international aspects and standard of copyright protection, including the limitations or exceptions to copyright. The exceptions to copyright are justified through the use of the “three-step test”, which is the critical measurement for defining all copyright exceptions. It states that firstly, limitations or exceptions to exclusive rights must be confined to certain special cases; secondly, these cases must not conflict with the normal exploitation of a work; and thirdly, these cases must not unreasonably prejudice the legitimate interests of the copyright holder. The three-step test was first set out in the Berne Convention and was then incorporated and enhanced in other international treaties, such as the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994, the WIPO Copyright Treaty (WCT) 1996, the WIPO Performances and Phonograms Treaty (WPPT) 1996 and the EU Copyright Directive 2001.

Recognised lawful uses in situations where an exception to copyright may be claimed are threefold: the direct consent of the authors or right owners; permitted acts such as fair use or fair dealing; and the public interest. The last category is not expressed in the Berne Convention, but is derived from the need to defend and balance the rights of the copyright

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<sup>1</sup> E. Butler, *Adam Smith: A Primer* (2007), 38.

owners with broader public interest requirements, primarily in relation to education, research and access to information.<sup>2</sup>

Conceptually, copyright originated and evolved from a desire to expand the public interest and was progressed through legal statute in order to enable the encouragement and promotion of knowledge. The law provides authors and copyright owners with exclusive but limited rights in order to safeguard their rights and needs for the protection of copyrighted works, whilst balancing this against the broader public interest aspiration to encourage the spread of information and knowledge. This is the fundamental and critical balance that copyright aims to uphold, through the specific public interest exemption granted by national copyright laws.

The Berne Convention has provided the overarching common standards of copyright protection, but the development of copyright law in each country may differ owing to the significant effect of individual political, economic, social or cultural circumstances. For instance, whilst the UK, the mother country of modern copyright, enacted the Statute of Anne in 1709 and the United States of America (US) derived its federal copyright law from this model in 1790, it was not until 1990 that modern copyright law came into force in the People's Republic of China (China). Copyright law and its legal structure have developed rapidly in China over the past three decades, being primarily based on the Western model and also being regulated by international standards.

The development and enforcement of copyright in China has been both unique and problematic, being strongly influenced by various factors such as its own history and culture, as well as international pressure. The copyright system in China has been strongly advocated and influenced by the international community including the US and the UK, but also reflects traditional Chinese culture and the values of socialism. In accordance with the Constitution, Chinese copyright has three specific aims. These are to protect the copyright of authors in their literary, artistic and scientific works and their copyright-related rights and interests; to encourage the creation and dissemination of works; and to promote the development and prosperity of science and the socialist culture. The public interest, in the Chinese copyright regime, is not only a fundamental principle emphasised by the law and a recognised legal defence for copyright exemption, but is also a justification in its own right that regulates works free from copyright. Furthermore, it provides the legal basis for administrative copyright enforcement in China, which grants the relevant administrative authority a quasi-judicial power.

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<sup>2</sup> See Preamble, Berne Convention.

So as to develop a more dynamic understanding of what the public interest means in relation to modern copyright and to facilitate the evolution and development of Chinese law and policy in this respect, this book aims to study and evaluate the topic primarily under the Chinese copyright law, but also making reference and comparison to UK and US law, as appropriate. The generation and circulation of information and knowledge is a fundamental mission of educational establishments, retaining a wealth of information and data in libraries and archives and in so doing protecting and developing the public interest by making available and building upon this diversity of material and resources. As key institutions in China have greatly benefited from Western concepts and experiences, the application of copyright in these areas and the topical issues arising within them have been selected for discussion in this book, together with the administrative enforcement of Chinese copyright and the development of the Internet in China. Administrative enforcement is sanctioned by Chinese copyright law in the name of the public interest. The development of the Internet is of significance not only to copyright law in China, but also to Chinese society in general and, in this respect, the Chinese approach to Internet regulation has been heavily criticised by the international community.

The book consists of six chapters. It should be noted that most of the chapters include a comparison with the UK and US positions. This is because (1) modern copyright law is absolutely foreign to China, the formation of the Chinese copyright system being very much a direct product of the US-China trade agreement; (2) as the copyright system originated in the UK and is well developed in the US, the enforcement of relevant laws is rather effective in both countries, whilst copyright protection together with the legal system in China is still in for the long haul; (3) Chinese stresses 饮水思源, “When drinking water think of its source.” Hence the foremost copyright law makers share the experience of studying in the UK and have been influenced by the UK copyright model. Chinese law is therefore in fact akin to the UK provisions in many ways. Above all, it is hoped that such a comparison may facilitate a better understanding of the universal law of copyright despite the typical division of continental and Anglo-American laws, thus allowing an objective evaluation of current Chinese copyright, which most importantly may assist future law-making improvements in particular areas.

Chapter 1 provides an historical background, explaining the diverse Chinese traditions and China’s legal culture, as well as the development of the Internet in China, which is of importance to the country’s opening up to the rest of the world, its integration into the global economy and a changing notion towards law and the public interest. Chapter 2 offers an introduction to Chinese copyright law and different aspects of the

public interest. It also presents relevant knowledge, understanding and an appreciation of this field. With a brief history of the development of copyright and the public interest, the chapter outlines, firstly, how legislation is developing in China; secondly, how the Chinese concepts of copyright together with the public interest and the entire system are affected by international influences; and thirdly, how these laws are enforced in cyberspace. Chapter 3 introduces the Chinese system of copyright enforcement and focuses on administrative copyright enforcement, the quasi-judicial power of the administrative authority, which is granted in the name of the authorship public interest and which results from long-standing cultural and legal practice in China. Particularly, this chapter explores the origin of administrative enforcement in China and its jurisdiction, implementation and coordination with the rule of law, in the light of an up-to-date case analysis. Chapter 4 presents the framework of Chinese education, which is modelled on the Western system and which explores the diverse legal attitudes towards copyright implications within educational institutions on the ground of the public interest. UK and US practices are discussed in order to demonstrate the distinction between the Chinese and Western approaches. Chapter 5 observes the exceptions provided in national copyright law for libraries and library users. It highlights the issue of copying in both actual and virtual environments and looks into how copyright is imbued with the public interest concept and how the legislation balances the interests of the right holders and the users in the context of public libraries. The position in China is contrasted with that in the UK and in the US. The focus of Chapter 6 is the opening of public archives in China and the relevant issues arising in the public's access to and use of archives, which are of particular interest to the Chinese archives sector as well as the public, together with other topical issues such as access to government information and state claims of copyright. Again, the position in China is contrasted with that in the UK and in the US.

The book finishes with conclusions based on the chapters outlined above. It does not summarise all the views and suggestions on the subject matter of the book, but rather focuses on the Chinese system, discussing the prospects for Chinese copyright and its enforcement in the impacted sectors and beyond.

## 1. AN EMPIRICAL STUDY IN 2007 AND 2008

In order to examine the adaptation of copyright laws in Chinese educational institutes, including their libraries, and to determine the extent of

genuine knowledge about the use of copyright works in these sectors, an empirical study was conducted in 2007 and 2008, when 17 institutes and 55 people were surveyed, including 25 university staff and 30 university students. It was decided to perform the study in Shenzhen and Baotou, owing to their differing and representative characters. Shenzhen exemplifies the fast-growing cities along the east coast, whilst Baotou is representative of numerous prosperous cities in the north and the centre of China. The two cities are different in many ways and it is notable that these differences are reflected in the survey.

## 2. INTERVIEWS IN SZU

Shenzhen is the oldest Special Economic Zone in South China and is situated close to the border with Hong Kong. It is also the fourth richest city in the country and the GDP in 2007 was over RMB 6000 billion yuan.<sup>3</sup> Adopting semi-structured interviews, the survey was carried out at SZU in order to gain an understanding of up-to-date copyright practices within the university and its library and to understand the awareness and opinions of students and staff relating to the use of copyright works.

The interviews at SZU were conducted with eight staff, including the president of SZU and the head of the university library, and 30 students, between December 2007 and January 2008. Each interview ran for around 60 minutes with the exception of the head of the library, which lasted for over 90 minutes. In the last five to ten minutes of the interview, interviewees were encouraged to make open remarks, and these were duly noted. Two slightly different sets of topics were designed for the university staff and students and for the head of the library respectively, as set out below.

- For the university staff and students the topics for interview included courseware (including its design and photocopying), rights relating to lesson plans and exam questions, recording of lectures, digitisation of works, use of library collections, photocopying and downloading, any concerns regarding photocopying and downloading, copyright notices and knowledge about copyright laws in relation to educational use.
- The topics for interview with the head of the library included the

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<sup>3</sup> See [http://www.szjt.com/pub/sztjpublic/tjfx/tjbg/t20080128\\_10070.html](http://www.szjt.com/pub/sztjpublic/tjfx/tjbg/t20080128_10070.html), retrieved on 22 March 2011.

topics above, but also covered library collections, legal deposits, declaration forms, copyright notice and licensing schemes, services including photocopying and downloading, differences between copying for commercial and non-commercial purposes, charges for photocopying and distribution, interlibrary loans, digitisation and lending and copying of audio, video and other materials.

Overall, the interviews were well received and there appeared to be very positive interaction during the interviews. All interviewees were happy to have these conversations used in any research materials and did not request that their anonymity be protected.

The findings of the interviews are outlined below:

- Of the staff, eight were aware of copyright when designing courseware and acknowledgements were normally given unless “some are too small or minor”. However, they did not think it was necessary to obtain permission since it was for an educational rather than a commercial purpose. Of the students, 21 had no opinion on this topic “because I am a student”, whilst nine thought it would be better if the lecturers were conscious of copyright requirements.
- A total of 6 staff and 30 students thought that it was not only appropriate but was also more efficient if courseware was photocopied for and distributed to students by the lecturer, which was the most common method at the university. One member of staff pointed out that photocopying for students may be disputed by modern law, but is definitely supported by Chinese custom.
- Seven members of staff thought that the copyright of lesson plans should be owned by the university, unless the lesson plans were not developed for the university curriculum. Of the students, 12 believed that the copyright should be owned by the lecturer, 5 thought it should be owned by the university, 8 said they did not know and 5 said that they did not care.
- Although eight members of staff agreed that exam questions were intellectual and time consuming, six of them believed that exam questions should not be copyrighted for academic benefit and the public interest, whilst two thought it should be further discussed. Of the students, 28 strongly disagreed that the composition of exam questions should have copyright, “otherwise”, 17 of them commented, “what would be the differences between our country and the capitalist ones?”, whilst two students said they had no opinion on this topic.
- Of the staff members, seven thought that teachers should have

copyright over their lectures and 1 was not sure, whilst 10 students thought the lecturer must have the copyright, four thought the university would be the proper owner, 13 did not think there was any copyright over lectures and three did not have an opinion.

- In respect of the recording of the lectures, four members of staff thought that the teacher should own copyright of the talk while copyright of the recording itself should be owned by the person who recorded the lessons unless “they were recorded in secret”, whilst another four said they were not sure and were not able to say more because they had never thought about that topic before. The members of staff jokingly advised, “It would not be a problem to me anyway.” The opinions of the students were largely the same as for the previous topic, except that 3 out of the 13 above who did not think that there was copyright covering lectures thought this time that “copyright of any recording should be owned by the person who recorded the stuff”.
- A total of seven members of staff and 27 students thought digital databases were very helpful for their teaching or study and they were satisfied with the university library’s digital collections. In addition, they thought digitisation of works would be necessary to enable distance learning and would also be the future trend for education. They would be comfortable with their works being digitised, but would be “very careful” about the digitisation of others’ work. Nine students mentioned that digitisation was more environmentally friendly, whilst one member of staff and two students claimed themselves to be “old fashioned” and did not pay attention to and did not like digital “stuff” at all. The university library had lawful subscriptions to many popular databases and a good collection of digitised works, which allowed campus users to access the material through the Internet, without the need for authorisation for the use of each work. A general text of “we will remove your work immediately if you object” was published on the website.
- Regarding the use of library collections, all interviewees except one member of staff said that they would not spend time checking if materials were pirate copies.
- Five members of staff and five students were copyright-conscious when photocopying and downloading at the university, whilst the rest of the group thought it was unnecessary because “the purpose would not be for making money”.
- The main concern for the members of staff when photocopying was the number of copies they made and whether an entire book was being copied, whilst for the students it was the cost.

- Apart from two members of staff, no interviewees knew anything about copyright notices. Of those surveyed, six members of staff and 19 students thought that these notices would help to improve copyright awareness, whilst two members of staff and 11 students felt it would make no difference, but believed that having a notice would be better than having none.
- All the staff and students believed firmly that there must be exceptions for educational uses of copyright works, although only three staff and two students knew even a little about the relevant legal provisions.

### 3. A QUESTIONNAIRE SURVEY IN BAOTOU, INNER MONGOLIA

Inner Mongolia is one of the autonomous regions in the northern border area of China and Baotou is its largest and most developed city in the Province with 5 universities, 11 colleges and over 660 schools.<sup>4</sup> The GDP in 2007 was RMB 1010 billion yuan,<sup>5</sup> making Baotou the 60th richest of around 3500 cities in China.<sup>6</sup>

The survey in Baotou was conducted from July 2006 on. Initially, short ten-minute duration telephone conversations were held with representatives or persons in charge of five universities, five colleges and six schools, mainly in order to secure the survey. Then, a four-section comprehensive questionnaire, covering topics on both educational and library uses of copyright works, were distributed to all of the 16 institutions interviewed. The distribution and collection of the questionnaires was kindly performed by the Beijing Normal University.

The purpose of these interviews was similar to those conducted at SZU, but this survey sought the relevant information from the institutions rather than individuals and was interested in exploring if any diversity existed because of regional or economic differences. The findings of the survey are outlined below:

- All 16 institutions confirmed that the courseware is designed by individual teachers and as such the school has no control over

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<sup>4</sup> See <http://www.baotou.gov.cn>, retrieved on 7 March 2011.

<sup>5</sup> See <http://www.nmggtt.gov.cn/msshow.asp?id=1051>, retrieved on 7 March 2011.

<sup>6</sup> See <http://ccd.v.people.com.cn/GB/81438/85932/5861827.html>, retrieved on 7 March 2011.

the material, but they encouraged teachers to acknowledge all the references used.

- A total of 13 institutions had no limitation on printing courseware prepared for students, but three would provide copies only if students so requested.
- Of the respondents, 14 thought that copyright for lesson plans should be owned by the institutions, whereas two thought that teaching or other academic activities would not be impacted irrespective of who owns the copyright.
- Of those asked, 13 respondents insisted that the absence of copyright over exam questions would stimulate learning and teaching. However, one thought that exam questions should be seen as copyright work and two thought that a collection of exam questions may be seen as a database and, as such, should be protected by copyright.
- A total of 13 respondents replied that the recording of lectures should be owned by the teacher and the institution, whilst 3 considered that the party who recorded the lecture should be the copyright holder.
- Regarding the digitisation of works, 11 institutions had no experience of this because there was no Internet access in the institution, whilst five admitted that the institution had never obtained any permission, but advised that no dispute had arisen to date.
- Six institutions had no photocopier machine in the library and it was therefore not their method of printing, whilst one institution said there was one but it was broken. The main concern for the institutions when photocopying was the cost.
- No institution posted copyright notices.
- All respondents were generally aware of copyright exceptions for educational institutes and whilst four had a good understanding of the law, eight knew a small amount and four knew very little.
- A total of 11 respondents made very thoughtful and valuable comments in relation to Section 4 of the questionnaire, which highlighted up-to-date knowledge of copyright implications in the Chinese educational sectors. Three comments and their translations are noted below:

版权是对创作者的一种保护形式，应予以尊重，但也要有益于知识的传播，发挥其促进社会进步的作用。对教师而言一方面应给予鼓励，另一方面也应给予必要的约束。

[Copyright is a legal protection to the special labour, which should be respected. However, it must also benefit the spread of knowledge and exert its function of stimulating progress of the society. People who are interested in using copyright works should be encouraged on the one hand, and be properly restricted on the other.]

我认为版权必须要有许可；学校图书馆和档案  
应该用电子服务。要最大限度满足师生需要。人工借阅  
太落后。充分利用学校现有电脑和局域网。使资源充分利用。

[I think “copyright” must have licences; schools’ libraries and archives should provide “electronic” service to satisfy teachers’ and students’ needs. . . . We . . . should maximise the exploitation of resources.]

目前学校的教材出售出现了一些问题，学生不买学校的教材  
而从其他地方买价格便宜的教材。这种现象存在普遍，我  
认为属于盗版教材，对这种现象国家有关部门应当干预。

[Currently, certain problems have occurred as regards the selling of textbooks in schools. (For instance) the students buy their textbooks somewhere else rather than in the school because of the cheaper price. This phenomenon is now quite common. I think those cheap textbooks are pirated copies and the relevant national organs should interpose themselves into this issue.]

#### 4. SOME COMMENTS

The concept of copyright was not known by the public in China in the 1990s, even though the Chinese copyright law was adopted in 1990. The use of works in the educational sector and government offices reflected the situation at that time, effectively a copyright-free China where the general public had no awareness about the existence of copyright. This situation arose from the collective tradition in China and possibly to a greater extent by the lack of effort by the Chinese government to promote the law. In the late 1990s, copyright law was finally spread throughout the country, primarily to meet the requirements of international treaties and the busi-

ness sectors and accordingly most of the public saw copyright as a foreign concept and felt that the law was promulgated to protect foreigners' interests. At that time there was a yawning gap between the understanding of copyright in a Chinese educational institute and that to be found in the Western counterpart.

China has changed extensively with regard to copyright in recent years. The Chinese authorities have strengthened not only the advancement of laws and regulations but also their promotion. Most Chinese people are now aware of the phrase "copyright" and some issues arising from this concept. Nonetheless, more endeavours are still required. As demonstrated in the empirical study, the public still do not have clear and correct knowledge of the legitimate provisions of copyright. Obviously, China will prioritise its aims of developing the national economy and reducing the gap between the richer and poorer areas throughout the country in order to benefit the greater population, as echoed in the empirical study. However, it should also be acknowledged that copyright protection is of significance in today's global economy and, as such, an effective copyright system will benefit the country's wealth in the long term, which calls for increasing the public awareness of copyright.

The empirical study demonstrates a perception of strong public welfare and social value concern, together with some newer thoughts or issues in relation to copyright in the education sector. Examples of the comments made in this respect by the surveyed educational institutes are highlighted below:

- While works are seen as "special labour" that justify copyright protection, the social and collective benefits are stressed, which demands an interest-balanced approach within the protection of copyright.
- The collective management and licensing of copyright, currently under development in China, is urged by Chinese educational institutes.
- The Internet has grown rapidly in China and has also made a great impact on the educational sector where users demand convenience, but where copyright clarification is also required. This should be progressed through regulation and guidance provided under Chinese law.
- Piracy is a big problem for both foreign and Chinese copyright owners. Educational institutes are also challenged in this aspect, for instance in relation to their textbooks. Copyright laws should be not only rationally made but also effectively promoted and enforced, as has been requested by both Chinese and foreign copyright owners.

- The demand made by Chinese educational institutes for a crack-down on pirated textbooks reveals that at present the administrative authorities are still the Chinese public's first preference to resolve copyright disputes, which reflects a long history of administrative enforcement in the country. This will be discussed in more detail.