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A Comparative Study of Copyright and the public interest in the United Kingdom and China

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Abstract

This paper aims to study the public interest in copyright law on a comparative basis, mainly between the United Kingdom (UK) and the People's Republic of China (China) in order to help the development of Chinese law in this respect.

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1. Introduction

Works subject to copyright are protected under law by chiefly two separate entities: International law, i.e. the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and National law. Initiated in 1886 and updated in 1979, the Berne Convention governs the international aspects of copyright protection in over 100 signatory countries. This is supplemented by National law,¹ which can differ widely between individual countries due to the influence of diverse political, economic, social and cultural backgrounds.

Nonetheless, the Berne Convention has provided the minimum standards of copyright protection. Thus, for example, all exceptions to copyright are required to be within the so-called three-step test, which was first applied to the exclusive right of reproduction by the Berne Convention in 1967.² Since then, it has been transplanted and extended into the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is the agreement that must be adhered to by all members of the World Trade Organisation (WTO), subject to some transitional provisions for developing countries; the WIPO Copyright Treaty; the EU Copyright Directive 2001/29/EC and the WIPO Performances and Phonograms Treaty. The three-step test is an overriding qualification to the permitted exceptions in national copyright laws; it states that limitations or exceptions to exclusive rights must be: (1) confined to certain special cases; (2) these cases must not conflict with the normal exploitation of a work; and, (3) these cases must not unreasonably prejudice the legitimate interests of the right holder.

Based on the limitations or exceptions to exclusive rights, the main defences for copyright recognised by the Berne Convention are, firstly, copyrighted works can be used with the direct consent of the author. Secondly, 'acts permitted', more commonly known as 'fair dealing',³ which constitutes copying works for the purposes of private study, research, criticism, review or newspaper summary. Fair dealing with a work does not require the permission of the copyright owner or the payment of royalties; it is most often used as a defence to an action for copyright infringement.

The last defence to copyright infringement is termed 'public interest', which is a newer and less well-developed defence in the copyright field compared with others, whereby the work is deemed important for wider distribution and fair dealing is not applicable. Although the defence of public interest is not literally included in the Berne Convention, it is recognised by the Convention that there is a need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.

Copyright originated and developed within public interest.⁴ The fundamental purpose of copyright is to serve the public interest by encouraging learning and the

¹ Common standard may be adopted by some united countries, for instant the European Union (EU). In order to harmonise the laws within the member states of the EU, certain European Directives have been passed, the most recent being the EU Copyright Directive (May 2001)

² Article 9(2)

³ In the United States, 'fair use' is the statute term

⁴ G Davies, *Copyright and the Public Interest* (2002)

advancement of knowledge through a system of exclusive, but limited, rights for authors and copyright owners. Therefore, copyright law must balance the exclusive rights of authors, publishers and copyright owners with the users' right and need for the free flow of information. The public interest granted by national copyright laws plays a key role in maintaining this significant balance.

Hence, this paper aims to study the public interest in copyright law on a comparative basis, mainly between the United Kingdom (UK) and the People's Republic of China (China) in order to help the development of Chinese law in this respect. It intends to outline, first, how copyright legislation is developing in the UK and China; and, second, how the concepts of copyright together with the public interest and the entire system are affected by international developments and Chinese culture - the special factors which exist regarding copyright in China.

2. In the UK courts

On 30 August 1997, the day before their deaths, Princess Diana and her boyfriend Dodi Fayed visited Villa Windsor, Mr Mohammed Al Fayed's property in Paris. Mr Al Fayed was Dodi's father. That visit, including timing, was recorded on videotape by security cameras. Murrell, an employee of the security company, gave a copy of printed stills which showed the time of the couple's arrival and departure to *The Sun* in return for payment. *The Sun* published the stills on 2 September 1998, disputing Mr Al Fayed's assertion made two days earlier in the *Daily Mirror* that Princess Diana and Dodi were making marriage arrangements, and that the couple had been at Villa Windsor for at least two hours with an interior designer. The stills showed that Mr. Al Fayed had given false information about the length of the couple's visit to the villa.

The security company which owned the videotape commenced proceedings for infringement of copyright and sought summary judgment. *The Sun* claimed that the use of the stills was fair dealing for the purpose of reporting current events under s30(2) of the Copyright Designs and Patents Act 1988 (CPDA) and was in the public interest.

These were the facts and the legal arguments in the famous case, *Hyde Park v. Yelland*.⁵ Jacob J, at first instance, upheld both defences and the security company appealed. Jacob J's judgment was then overturned in the Court of Appeal, where the leading judgment was given by Aldous L.J.

In reply to the defences, the Court of Appeal accepted that the use of the stills related to 'current events', although the publication of the stills occurred over a year after the August 1997 Villa Windsor visit. The claims made by Mr Al Fayed in the *Daily Mirror* had given the August visit fresh impetus, and the resulting media coverage made the use of the stills 'current'.

The Court of Appeal stated that for the purpose of deciding whether the fair dealing defence was allowed it was appropriate to take into account the motives of the alleged infringement, the extent and purpose of the use and whether that extent was necessary for the purpose of reporting the events in question. The court had to judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner that *The Sun* did. In this case the court's

⁵ *Hyde Park Residence Ltd. v. David Yelland*, [1999] RPC 655-672; [2000] 3 WLR 215-241

view was that it would not. A fair minded and honest person would not pay for dishonestly taken stills and publish them when their only relevance was that the couple had stayed at the villa for only 28 minutes.

The court stated that there was no defence of public interest to an action for infringement of copyright in this case. However, the courts did have an inherent jurisdiction not to allow their process to be used in certain circumstances. That jurisdiction could be exercised in the case of an action in which copyright was sought to be enforced just as it could be exercised in the case of enforcement of a contract which offended against the policy of the law, for example, because the contract was immoral. The difficulty was to define the circumstances in which that was appropriate. Since copyright is assignable, the circumstances have to derive from the work in question not from ownership of the copyright.

A court would be entitled to refuse to enforce copyright if the work was, for example, immoral, scandalous, contrary to family life, injurious to public life, public health and safety or the administration of justice. In this case, the stills may have been of interest to the public, but there was no need in the public interest to publish them when the information could have been made available by *The Sun* without infringement of copyright.

According to the *Hyde Park* case, if the allegedly infringing act is in the public interest, this will provide a valid defence against the alleged infringement, despite the fact that the Copyright, Design and Patents Act 1988 (CDPA) did not give the court any general power to enable an infringer to use another's copyright in the public interest. Instead the public interest defence is based on the court's inherent jurisdiction to refuse an action for infringement of copyright where the enforcement of copyright would offend against the policy of the law. This inherent power has been preserved by section 171(3) of the CDPA, which provides that "nothing ... affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise". The public interest concept will allow the courts in such a case not to enforce that copyright and infringers will no longer be liable for copyright infringement. It also depends on the status of the work from which a substantial part is copied. If that work is not published or confidential, the defence is unlikely to succeed.

This was further developed in a later case, *Ashdown v Telegraph Group Ltd.*⁶ The claimant in this case was a Member of Parliament and the former leader of the Liberal Democrat Party. In October 1999, he made a minute of a meeting he attended with the Prime Minister, a copy of which was disclosed to the defendant newspaper. The defendant subsequently published a number of articles incorporating substantial sections of the minute. In December 1999 the claimant commenced proceedings against the defendant for breach of confidence and infringement of copyright. On the claimant's application for summary judgment of the copyright claim, the defendant contended that it had good defences to the claim under section 30 and section 171 of the CDPA. The defendant also contended that, under article 10 of the European Convention on Human Rights, "freedom of expression", in every action for infringement of copyright the court was required to consider all the individual facts to ascertain whether the restriction on the right of freedom of expression was necessary

⁶ *Paddy Ashdown MP PC v Telegraph Group Ltd*, [2001] WLR 967-981; 1368-1391

in a democratic society, notwithstanding that the facts did not bring the case within any of the statutory exceptions or defences.

The defence was rejected at both the first instance by Vice-Chancellor and the Court of Appeal.

The Vice-Chancellor acknowledged in his judgment that it was arguable that the publication was in the public interest and he rejected a submission that an arguable public interest defence to the copyright claim could be fashioned from Article 10, or from section 171(3) of the CDPA construed in the light of Article 10.⁷ The court accepted that copyright could act as an illegitimate restriction on freedom of expression in certain circumstances. The court held that in such circumstances, a general public interest defence would be available, for which section 171(3) provided the foundation; nonetheless, the court was obedient to the principle laid down by the Court of Appeal in *Hyde Park*, that public interest defence preserved by that section is confined to copyright in works which are (i) immoral, scandalous or contrary to family life, (ii) injurious to public life, public health and safety or the administration of justice, or (iii) incite or encourage others to act in a way referred to in (ii).

The Court of Appeal disagreed with the Vice-Chancellor on some of the points and also disagreed with the approach of Aldous LJ on the question of public interest as a defence to a copyright claim. The Court of Appeal considered whether the newspaper could claim the defences of fair dealing or public interest pursuant to the CPDA. Fair dealing was held to be not applicable, since it was unnecessary for so much of the minute to have been reproduced verbatim. The publication was not held to be in the public interest, when only the most colourful extracts from the minute had been reproduced for the purposes of increasing the newspaper's profits.

In the end, the Court of Appeal concluded that there may be circumstances in which the public interest required the verbatim publication of copyright material. However, these were rare.

Nevertheless, both Aldous LJ and Jacob J cited the impressive judgment given by Ungood-Thomas J in *Beloff v Pressdram Ltd*,⁸ which first affirmed that the public interest defence is available to an action for infringement of copyright. The claimant was a political correspondent with *The Observer*. Without the claimant's consent, a journal called *Private Eye* reproduced the secret memorandum about a conversation between the claimant and a senior politician. *Private Eye* defended its action on the ground that the disclosure of the memorandum was in the public interest.

Although the defence of public interest did not apply in the case (because the publication of the memorandum did not disclose any iniquity or misdeed), Ungood-Thomas J stated that "public interest is a defence outside and independent of statutes, is not limited to copyright cases and is based on a general principle of common law."⁹ *Beloff v Pressdram Ltd* was the first case to recognise clearly the public interest defence for the infringement of copyright.

It is confirmed by the courts that the public interest exists and such a defence may override copyright in rare circumstances. Indisputably, the exclusive right granted to

⁷ para 35

⁸ *Beloff v Pressdram Ltd* [1973] All ER 241-273

⁹ para h, p259

copyright holders is limited not only in time, but by important limitations upon the extent of copyright protection which have been developed by the courts. These judicial and statutory limitations on copyright protection are designed not only to benefit society by allowing certain limited uses of copyrighted works, but also are intended to benefit subsequent authors by giving them free rein to use ideas, facts and other public domain material contained in prior works, and by permitting use of portions of protected expression when the subsequent author's use is (1) "transformative" rather than "superseding"; (2) reasonably limited in scope; and (3) unlikely to usurp or cause significant harm to existing or potential markets for the prior work.

Notwithstanding the appeals of harm to the public by defendants in copyright matters or by proponents of "free access" to copyrighted works,¹⁰ a broader and longer term perspective of the public interest reveals that the copyright law, and a long history of copyright jurisprudence have worked together to attempt to harmonise the author's and public's interests.

3. Legislative developments in China

To facilitate a better understanding of Chinese copyright and the public interest, a brief historical review has been carried out.

3.1 Ancient copyright protection

Copyright emerged with the invention of printing. Thus, to trace the protection of copyright in China, a general review of printing is necessary. Compared with the 'European invention of printing in the fifteenth century, the technique of printing had existed in China centuries earlier'.¹¹ In 1907, Aural Stein discovered in Mogaoku (Dunhuang, China) a copy of a Chinese version of the Diamond Sutra. It was printed in the ninth year of the reign of the Xiantong Emperor Yizong of the Tang Dynasty (AD 868).¹² Furthermore, it was for many years recognised as the first book ever printed from wooden blocks in the world, until another Chinese version of another Buddhist sutra, which was printed in Tianbao, Emperor Xuanzong of the Tang Dynasty (AD 704-751), was found in South Korea in 1966. As Zheng has pointed out, because Chinese is composed of characters rather than a phonetic alphabet, the mere ability to print from engraved plates led to the publication of books on a comparatively large scale.¹³

Copyright existed in ancient China one hundred years after the invention of printing by movable type (AD 1042), by Bi Sheng of Song Dynasty. According to Shi Yi by Luo Bi of the Song Dynasty, the Imperial Court, in order to protect the Imperial College edition of the Nine Chinese Classics, issued orders forbidding their engraving and printing by unauthorized persons. Those who wanted to engage in the engraving and printing of these books had to apply to the Imperial College for approval. That

¹⁰ F W Grosheide, Copyright Law From a User's Perspective [2001] EIPR 321-325

¹¹ UNESCO The ABC of Copyright (1981) Chapter one

¹² Y Liu, Printing in China (1987)

¹³ ChS Zheng, Copyright Law in China (1991)

was in substance a measure taken for the protection of the exclusive right of the Imperial College to print and publish its own edition of the Nine Chinese Classics.

Another example in the Song Dynasty, a book entitled Biographical Sketch of the Capital of the Northern Song, was printed with a stamp of declaration, which is similar to the modern copyright notice:

Printed by the Cheng Family of Mei Shan. The right has been registered with the competent authority. No reprinting without authorisation is allowed.

The form of ‘copyright notice’ for purpose of copyright protection lasted from the Song Dynasty until the Qing Dynasty, the early twentieth century.¹⁴

3.2 Between 1903 and 1949

In 1903, the Qing government signed the Renewed Sino-American Treaty of Trade and Navigation with the US, and for the first time, the word ‘copyright’ appeared in China. Furthermore, in 1910, based on Japanese law, the first Chinese copyright law – the Authors’ Rights in the Great Qing Empire – was promulgated and the law introduced copyright for authors and a number of punishments for unapproved use.¹⁵ Thereafter, two more copyright laws were published. The first was the 1915 Law on Authors’ Rights, which was published by the government of the Northern Warlords of China and based on the 1910 Law; and the second was a 1928 Law on Authors’ Rights, published by the Kuomintang government.

3.3 From 1949 to 1979

‘New China’ - the People’s Republic of China - was proclaimed by the victorious revolutionaries in 1949. The period after 1949 was marked by a degree of ‘peace and prosperity’; however, the Cultural Revolution is called ‘the ten-year catastrophe’ by Chinese. That was a blank period not only for the development of copyright in China but also for the market economy. From 1949, ‘the planned economy’ was carried into effect all over the country until 1979. Under ‘the planned economy’ policy, everything was under governmental control and was rationed to citizens by different levels of authorities.

Copyright legislation did not develop except for three contracts drafted by the People’s Publishing House (PPH). The first was the PPH Standard Contract for the Submission of a Manuscript, the second was for Publication of a Work, and the third was the PPH Measures Governing Remuneration.

3.4 Modern copyright law

After the Cultural Revolution, the remuneration system, i.e. the convention of a contribution fee to authors, was revived in China, as were many other ‘cultural’ institutions. In 1979, China set about building a modern legal system which included a copyright system. The drafting of a copyright law, however, was directly promoted

¹⁴ ChS Zheng & M Pendleton, Chinese Intellectual Property & Technology Transfer Law (1987)

¹⁵ note 14 above

by a 1979 trade agreement with the US. “The agreement committed China to reciprocate copyright protection for US works under Chinese law and with due regard to international practice”.¹⁶ Over the last two decades, the copyright system in China has experienced a rapid development from a low base and has made major achievements. It has almost taken shape and been constantly improved since the first Copyright Law was enacted in September 1990.¹⁷ While building up and refining the domestic copyright system, China also actively fulfils international obligations in protecting copyright.¹⁸ In summary, the related international treaties signed by China are shown in the following table.

Table 1. International Intellectual Property treaties signed by China

Year signed	Treaty
1980	Convention establishing the World Intellectual Property Organisation
1985	Paris convention for the protection of industrial property
1989	Treaty on intellectual property in respect of integrated circuits
1989	Madrid agreement concerning the international registration of marks
1992	Berne convention for the protection of literary and artistic works
1992	Universal copyright convention
1993	Geneva convention for the protection of producers of phonograms against unauthorized duplication of their phonograms
1994	Budapest treaty on the international recognition of the deposit of microorganisms for the purposes of patent procedure
2001	Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Copyright is of a territorial nature, and it should be acknowledged that before 1st June 1991, any use by Chinese persons of foreign works did not constitute copyright infringement in China; thus piracy was not recognised as such in China.¹⁹ The situation fundamentally changed when China entered the 1990s. China has now a modern Copyright Law system and has acceded to international copyright conventions to begin the mutual protection of copyright with other member countries. Reproducing and distributing the works of others (including foreigners) may amount to infringement. In short, there have been three different stages in the evolution of copyright protection in China.

Between 1979 and 1989, focused on whether there should be a system of intellectual property, and whether copyright should be protected.²⁰

¹⁶ P Goldstein, 1984 – cited in Feng *Intellectual Property in China* (1997), 49

¹⁷ M Oksenberg & PB Potter & WB Abnett, *Advancing intellectual property rights: Information technologies and the course of economic development in China* (1998)

¹⁸ RG Shen, *Combat Piracy and Protect* (1998)

¹⁹ JC Lazar, *Protecting ideas and ideals: Copyright Law in the People’s Republic of China* (1996)

²⁰ JT Simone, *China’s Draft Copyright Law* (1989)

Until the mid-1990s, related to the existence of a ‘positive’ position in the implementation of the first copyright law due to the small number of the copyright owners and the large percentage of imported technologies. However, the public in general considered copyright legislation as a rule benefiting foreign ventures.

In recent years, people are beginning to be in a more ‘active’ position since they are aware of the fact that the protection of copyright is not only required by international standards but also by high technology industries inside the country.

Incontestably, compared with many other industrial countries, China has had a rather late start in establishing the modern copyright system. Although a great deal of work has been done in the last decade or so and results have been achieved, attracting worldwide attention, the sense of copyright in society as a whole is still somewhat hazy. Copyright owners still lack sufficient awareness and capability to take up the weapon of the law to protect their own rights and interests. Since the implementation of the Copyright Law, acts of infringement still occur from time to time. In certain localities, such aggravated infringing activities as piracy of other’s books, audiovisual products, and computer software are still quite rampant.

The Chinese government has recognised the importance of copyright in contemporary society. After establishing the State Intellectual Property Office (SIPO), the Chinese government set up National Copyright Administration of the People’s Republic of China (NCAC) in 1985. Moreover, in September 1998, the Copyright Protection Centre was established in Beijing.²¹ Meanwhile, to promote public awareness of intellectual property rights issues, China declared 26th April every year International Intellectual Property Day and held activities and training sessions to mark the occasion. Normally, this kind of collection management will improve the environment for copyright-use and will enhance the copyright protection system in China. The main copyright legislation in China is listed below.

Table 2. Copyright legislation in China

Year	Action
1990/2001	Copyright Law
1991/2002	Regulations on the Implementation of the Copyright Law
1991/2002	Regulations on the Protection of Computer Software
1994	Resolution of the Standing Committee of the National People’s Congress on Punishing the Crimes of Copyright Infringement
1994	Regulations on the Administration of Audio – Visual
1992	Provisions on the Implementation of the International Copyright Treaties

Due to the rapid changes in and progress of digital technology, the copyright protection field has become the centre of attention in China. In 1997, with the purpose of strengthening “the security and the protection of computer information networks

²¹ Source from <http://www.chinadaily.com>

and of the Internet, and to preserve the social order and social stability”, the Computer Information Network and Internet Security, Protection and Management Regulation was promulgated; and also the Revised Provisional Regulations Governing the Management of Chinese Computer Information Networks Connected to International Networks, which is formulated to reinforce “the management of computer information networks connected to international networks and safeguard the healthy development of the international computer information exchange”.²² Moreover, China adopted an amendment to the Criminal Law devoting a special section to crimes related to intellectual property (IP) infringement in the same year.²³ It stipulates that violators who gain huge profits through piracy should be sentenced to prison for no more than seven years. In addition, an official website, <http://www.sipo.gov.cn>, was set up to advocate the protection of IP rights and provide information on various court decisions. Above all, the Standing Committee of the National People’s Congress in China approved the amendment of the Copyright Law in October 2001.²⁴ In compliance with the Berne Convention and TRIPS, the Copyright Law 2001 provides for the maintenance of protection throughout the author’s life and up to fifty years after his or her death. Mainly, the amendment extended the scope of the law to involve more subjects, including acrobatic performances, architectural designs and literary and artistic works published via the Internet.²⁵ According to the amendments, the Regulations on the Implementation of the Copyright Law and the Regulations on the Protection of Computer Software were both revised in 2002.

4. The special factors affecting Chinese copyright legislation

Developing and enforcing copyright protection in China is strongly affected by economic, cultural, political, social, and external influences. The special factors to be discussed in this section are, firstly, the external and, second, the cultural aspects.

4.1 The impact of international copyright

The development of copyright in China is connected closely with an important factor – an external factor – international pressure. Such pressure, with the threat of sanctions and trade wars, can be a productive method of ensuring that effective measures for combating copyright piracy are provided and enforced. The Chinese government has been pressured by the international community to improve IPR protection, most notably by the UK, the United States (US) and Japan. To understand the nature of this pressure, it is necessary to give brief consideration to the copyright laws of these countries.

²² Article 1

²³ MN Schlesinger, Intellectual property law in China: Part I – complying with TRIPs requirements (1997)

²⁴ XY Jiao, Law amendments protect IPR (2001)

²⁵ ChS Zheng, Looking into the Revision of the Trade Mark and Copyright Laws from the Perspective of China’s Accession to WTO (2002)

4.1.1 UK, the mother country of modern copyright

The concept of copyright and the body of laws regulating them originate in the fifteenth century invention of the printing press. In 1476 the printing press was introduced in England. The printing press revolutionised information storage, retrieval, and usage, and duplications became easier and more accurate. Starting in 1529, laws were passed requiring manuscripts to be licensed before publications. An important consideration, at least for the Crown, was the numerous dissident tracts made available through the printing press. In early modern England, there were two “parallel systems” of press regulation: one was printing patents, based on the royal prerogative; and the other, the Stationer’s Company system, based on the “by-laws of the guild”.²⁶ To be brief, copyright was a controlling mechanism for the government. Essentially, it was not only in Britain, but also in other European and American countries.²⁷

The 1688 revolution in England provided an opening for the emergence of a debate on liberty and property. After the 1688 revolution there was a stronger emphasis on liberty and property in public discourse.²⁸ While not complete, this new discourse helped build foundations for the author as proprietor in the early eighteenth century. Corresponding notions of rights in tangible property helped things along. Making the link between tangible and intangible property was a critical aspect of the emerging discourse over proprietary authorship.

Prior to 1710, printed matter was controlled via the Licensing Act which allowed authorities to prohibit publication of anything “dangerous.” The Licensing Act, repealed in 1694, mandated all books to be licensed by registering them with the Stationers’ Company. Once registered with the Company, the work became the “copy” of the Stationers’ Company. Registration occurred when the book was entered into the register. The Company recorded who owned the “copy-right”. The Stationers’ Company, the body established to censor printed material by the Crown, had a virtual monopoly over all printed matter. The emergence of the “copy-right” is the Stationers’ Company right to copy rather than the author’s right to own.²⁹

In 1710, “an Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned” was enacted - that was the famous Statute of Anne - the first copyright law in the world. Contrary to the description of “a response to demanding a copyright for author” and “address the public interest issue”,³⁰ Rose claimed that, while entitled “an act for the encouragement of learning”, the Statute of Anne was not intended as a copyright protection act, but as a trade-regulation act. Its principal function was to regulate the book trade. Among other things, the Statute of Anne reduced the copyright term to 14 years, with a possible renewal for another 14 available to the author. It made statutory copyright protection available to anyone, not just the

²⁶ M Rose, *Authors and owners: the invention of copyright* (1993)

²⁷ JC Ginsburgh, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America* (1990)

²⁸ M Woodman & P Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (1994)

²⁹ M Rose, *Authors and owners: the invention of copyright* (1993)

³⁰ G Davies, *Copyright and the Public Interest* (2002)

stationers. Finally, copyrights in already published material were extended 21 more years; however, thereafter the book would enter the public domain. This last provision specifically addressed the concerns of the London booksellers and their already existing copyrights.

It should be recognised that the Statute of Anne was passed almost immediately after the unification of England and Scotland in 1707. The intent of the Statute of Anne was twofold. First, to protect against future monopolies in the bookselling trade and, second, to draw Scotland under some form of copyright law. Of course, in reacting to the latter and wishing to avoid the former, the Statute of Anne succeeded in conferring all rights in a book to publishers for a limited amount of time instead of some rights for an unlimited amount of time.³¹

In 1774, the Statute of Anne finally reached the House of Lords for a definitive construction, when *Donaldson v. Beckett (Donaldson)* came before the House of Lords, on an appeal from an injunction against publishing a book, whose statutory term of copyright had expired.³²

Sixty-five years since its enactment, fundamental changes had occurred between the enactment of the statute and its construction by the Courts.³³ In 1769, the publishers won a victory in *Millar v. Taylor (Millar)*.³⁴ This decision, which was overturned five years later by *Donaldson*, succeeded in fixing the idea of copyright as an author's right. After seventy years and numerous arguments about the natural rights of an author, *Donaldson* became the landmark case:

Donaldson addressed the common law versus statutory author's rights. The case found that an author of a literary text had a common law right of ownership that was held in perpetuity. The Statute of Anne restrained, or pre-empted, this common law right, and limited an author's rights to statutory ones. The decision was rendered to break the bookselling monopoly. However, while copyright had transformed from a publisher's right to an author's right, the publisher was still the beneficiary of the protections. The Battle of the Booksellers may not have provided publishers with a perpetual copyright, but it served its function by creating the proprietary author and the literary work as legal concepts which define the centre of the modern literary system.³⁵

Even though *Millar* was overturned, *Donaldson* conceptually created author's rights in their work. Future law, even though it limited this right, began with the assumption that an author had rights invested in their work. In a somewhat tricky manoeuvre, this coup ultimately benefited the booksellers.³⁶ The change, however, was less a boon to

³¹ M Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship* [1988] 23 *Representations* 51-85

³² *Donaldson and another vs. Becket and another*, *Parliamentary History*, Vol. 17, 953

³³ also M Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship* [1988] 23 *Representations* 51-85

³⁴ The question of an author's copyright at Common Law, first came to a decision by the court of King's Bench in 1769, in the case of *Millar vs. Taylor*. Three of the Justices, Willes, Aston, and Lord Mansfield, decided in favor of the right; one, Justice Yates, opposed it. 4 *Burrows* 2303, 2398

³⁵ M Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship* [1988] 23 *Representations* 51-85

³⁶ B Sherman & A Strowel, *Of Authors and Origins: Essay on Copyright Law* (1994)

authors than to publishers, for it meant that copyright was to have another function. Rather than being simply the right of a publisher to be protected against piracy, copyright would henceforth be a concept embracing all the rights that an author might have in his published work. And since copyright was still available to the publisher, the change meant also that the publisher as copyright owner would have the same rights as the author.³⁷

Resulting in the framing of the Berne Convention, the International Copyright Act was passed in 1886. The 1886 Act abolished the requirement to register foreign works and introduced an exclusive right to import or produce translations. British copyright law was extended to works produced in British possessions. The UK ratified the Berne Convention, with effect from December 1887.

Due to the advent of new technology around the turn of the twentieth century, musicians and publishers called for a revision of the law, which resulted in the Copyright Act 1911. The 1911 Act brought provisions on copyright into one Act for the first time by revising and repealing the earlier Act. It abolished the requirement to register copyright with Stationers Hall, and the common law copyright protection in unpublished works, apart from unpublished paintings, drawings and photographs.

Furthermore, due to the speed at which technology developed, two further laws were passed, the Copyright Act 1956 and the Copyright, Design and Patents Act 1988 (CDPA). The 1956 Act took into account further amendments to the Berne Convention and the UK's accession to the Universal Copyright Convention, administered by [United Nations Educational, Scientific and Cultural Organization \(UNESCO\)](#). Films and broadcasts were protected in their own right for the first time by copyright in this Act.

The CDPA provided another major overhaul and updating of copyright law, but the process has continued since then with a number of amendments, many implementing various European Directives. It afforded protection to copyright owners and, at the same time, the duration and exception of copyright works. In the CDPA, for the purpose of research and private study, criticism, review and news reporting etc, fair dealing was fixed in detail within Chapter III: Acts Permitted in relation to Copyright Works. Additionally, the copyright term was expanded to seventy years after author's death.

In order to improve protection for rights owners in the information society, to harmonise copyright protection throughout the EU, and to enable the EU to ratify the earlier WIPO Copyright Treaties, which have already been implemented in the USA, the Copyright and Related Rights Regulations came into force on 31st October 2003. The Regulations introduce a number of changes to the CDPA, including reproduction right, technical protection measures and rights management information, sanctions and remedies, right of communication and making available to the public, and exceptions from copyright. Apart from regulating exceptions for sound recordings, broadcasts and cable programmes and etc., the main changes made include:³⁸

1. a new exception for making temporary copies, for instance, transient or incidental, or an integral and essential part of a technological process;

³⁷ M Rose, *Authors and owners: the invention of copyright* (1993)

³⁸ Part 2, the Copyright and Related Rights Regulations 2003

2. the exception for research is limited to non-commercial purposes, and an acknowledgment is required;
3. the exception for fair dealing with a work for the purpose of criticism, review and news reporting only applies if the work has been lawfully made available to the public;
4. the exceptions for educational activities only apply if done for non-commercial purposes and a sufficient acknowledgement is required; in addition, where a recording is communicated to the public within an educational institution, the exception will only apply if the communication cannot be received by any person outside that institution;
5. the exception for librarians now requires the librarian to be satisfied that the person supplied with a copy requires it for non-commercial or private study research only, and will not use it for any other purpose.

In short, a brief summary of the centuries' development of copyright law in the UK is listed below.

Table 3. The UK copyright legislation

Year	Action	Year	Action
1710	Statute of Anne Period of protection: 14+14 years	1870	The Copyright Act
1776	Law of England	1912	The Copyright Act 1911 Period of protection: 28+28 years
1802	Protection of 'Engravings, etchings, prints'	1956	The Copyright Act Period of protection: 50+50 years
1831	Protection of 'music and cuts'	1988	The CDPA Period of protection: life+70 years
1831	The Copyright Act Period of protection: 28+14 years	2003	The Copyright and Related Rights Regulations

4.1.2 *Superman, the US*

Copyright law in the US was first derived from English copyright law (Statute of Anne) and the common law in 1790. Unlike many other laws in this country, which are state-based, the framers of the US Constitution made copyright law purely federal: 'the Congress shall have power . . . to promote the progress of science and useful arts . . . by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries'.³⁹ All US copyright power, therefore, derives from this clause. Following the single federal policy, the Congress subsequently enacted the Copyright Act of 1790; the major developments after 1790 are shown in the following table.

³⁹ The US Constitution, Article 1, Section 8

Table 4. The US copyright legislation

Year	Action	Year	Action
1909	Revision of the US Copyright Act	1994	CONFU
1976	Revision of the US Copyright Act	1995	S.989 and H.R.483
1976	Classroom Guidelines	1995	Release of the White Paper
1976	CONTU Process	1996	TRIPS Agreement
1988	Berne Convention	1996	Database Protection Legislation
1990	Circulation of Computer Software	1998	Digital Millennium Copyright Act
1990	Immunity of State Governments	2001	Copyright Technical Corrections Act
1992	Amendment to Sec. 304 of Title 17	2002	Intellectual Property Protection Act
1993	Copyright Royalty Tribunal Reform Act & NII Initiative		

In addition to Table 4, several points should be noted as follows:

The US became a signatory to the Berne Convention in 1988. The major changes for the copyright system as a result of this were greater protection for proprietors, new copyright relations with 24 additional countries, and elimination of requirement of copyright notice on a copyrighted work.

The Working Group on IP Rights was established to explore the application and effectiveness of copyright law and the National Information Infrastructure (NII) in 1993. The NII is described as ‘a seamless web of communications networks, computers, databases, and consumer electronics’;

In addition to making legislative recommendations in the White Paper, the Working Group sponsored a Conference on Fair Use (CONFU). CONFU participants have been working toward the development of guidelines for a number of areas including: interlibrary loan, electronic reserves, visual images, and distance education;

The S.989 and H.R.483 provided a copyright term extension, which endures for the author’s life plus an additional seventy years after the author’s death, and brings US law into line internationally, especially with other Berne signatories;

The TRIPS Agreement which forms part of the final Act of the Uruguay Round of the General Agreement on Tariffs and Trade, covers works of foreign origin which are currently in the public domain in the US.

Referring to the defence of fair use, the law states that fair use for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.⁴⁰ In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

⁴⁰ Section 107, Limitations on exclusive rights: Fair use

2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. the effect of the use upon the potential market for or value of the copyrighted work.

Moreover, the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

4.1.3 US-Chinese Relations

The US industry associations were the catalyst for recent campaigns; their lobbying of Congress has led to IPR protection gaining an important place on the agenda of all trade negotiations in China. The US 1974 Trade Act, Section 301, includes IPR infringements as an unfair trade practice. Industry complaints are investigated, then a 'Watch List' and a 'Priority Watch List' of the worst offending countries are published annually.⁴¹

In January 1992, following Section 301, a Memorandum of Understanding was signed between the US and China. China pledged to strengthen its principal IP laws including copyright laws, and improvements included the agreement to accede to the Berne Convention and to treat computer software as protected literary works.

While the scope of Chinese copyright law is narrower than the US would prefer, the real issue in the last five years has been the enforcement of the law. The US frustration with Chinese enforcement led the US Trade Representative (USTR) to place China on the Priority Foreign Country list again in 1994,⁴² because its practices in IP, which included copyright protection, were deemed to be especially onerous and egregious and alleged to have the greatest adverse impact on the US products.⁴³ After 6 months of investigation, the US threatened China with trade sanctions unless China agrees to undertake serious measure to combat piracy of the US products. Two months later, an agreement was signed on 26th February 1995, in which China agreed to the demands.⁴⁴

Governments, chiefly the US government, believe that stronger protection of their copyrights in China, and the subsequent decrease in copyright infringement, would serve the needs of their companies trying to break into the Chinese market. China has recognized the need to meet some international demands and has responded by developing a comprehensive copyright law system to enforce it. As pointed out by Lazar, it should be noted that while the modern Chinese copyright system meets China's needs, it does not completely satisfy the others, i.e. the eminent US business concerns. Nevertheless, the copyright system in China should be recognised by the US and other governments as a legitimate legal system that reflects the cultural and

⁴¹ Deng & Townsend etc, A guide to intellectual property rights in Southeast Asia and China (1996)

⁴² JC Lazar, Protecting ideas and ideals: Copyright Law in the People's Republic of China (1996)

⁴³ K Ho, A Study into the Problem of software Piracy in Hong Kong and China (1995)

⁴⁴ New York Times, 1995

social background of China while at the same time meeting the basic need of foreign businesses.⁴⁵

4.1.3 Japanese experiences

The developments of culture and the changes of custom in China and Japan have been linked in countless ways. In context of copyright, as motioned above, the first Chinese copyright law - the Authors' Rights in the Great Qing Empire – was essentially modelled after the Japanese law.⁴⁶

The copyright system in Japan was established and developed gradually after the Meiji Restoration. The Publishing Ordinance - the first legislation on copyright - was enacted in 1869. This Ordinance provided for both the protection of copyright and the regulation on publishers. In 1887, the copyright part of this Ordinance became independent as a newly established legislation called the Copyright Ordinance and it is treated as the first Japanese copyright legislation in substance.

Japan acceded to the Berne Convention in 1899 and the Copyright Ordinance was changed as a whole into the Copyright Law which is well known as “the old Copyright Law”. The old Copyright Law is referred to as the first modern copyright law in Japan and was revised and amended several times as follows in order to expand the range of copyright protection and to facilitate fair exploitations of works.⁴⁷ In 1971, the new Copyright Law was enacted, and the term of the copyright protection expanded to 50 years after the death of the author.⁴⁸ Furthermore, keeping up with the significant developments in relevant technologies, changes in socio-economic backgrounds and international movements, the new Copyright Law has been revised a number of times and the latest revision is 2002.⁴⁹

In Japan, the author's moral rights, including the right of making the work public, the right of determining the indication of the author's name, and the right of preserving the work's integrity, are protected, not only to safeguard the spiritual interests of the author, but also to maintain public interests by preserving the original state of works as the nation's cultural inheritance. Article 18 of the Japanese copyright law 2002 states that the author shall have the rights to offer to and to make available to the public his work which has not yet been made public (including a work which has been made public without his consent; the same shall apply in this Article), the author shall be presumed to have consented to the following acts:

1. where copyright in his work unpublished has been transferred: the offering to and the making available to the public of the work by exercising the copyright therein;
2. where the original of his artistic or photographic work unpublished has been transferred: the making available to the public of the work by exhibiting its original;

⁴⁵ JC Lazar, *Protecting ideas and ideals: Copyright Law in the People's Republic of China* (1996)

⁴⁶ note 14 above

⁴⁷ M Ishida, *Outline and Practices of the Japanese Copyright Law* (1999)

⁴⁸ T Doi, *Japan in Stewart* (1989)

⁴⁹ Japanese Copyright Research and Information Centre Website, <http://www.cric.or.jp>

3. where the ownership of copyright in his cinematographic work belongs to the maker in accordance with the provision of Article 29: the offering to and the making available to the public of the work by exercising the copyright therein;
4. where his work unpublished has been offered to government organisations: the offering to and the making available to the public of the work by the head of a government organisation in accordance with the provisions of the Government Organisations Information Disclosure Law;
5. where his work unpublished has been offered to independent administrative organs, etc.: the offering to and the making available to the public of the work by an independent administrative, etc. in accordance with the provisions of the Independent Administrative Organs, etc. Information Disclosure Law.

However, Japanese copyright law has never contained such a general fair use or public interest defence under either the statute or the case law, although the statute does contain a number of provisions that permit reproduction or exploitation of works in specific situations or for specific purposes.⁵⁰ Thus, the Japanese Copyright Law 2002 Articles 30 to 50 permit,

1. Reproduction for private use;
2. Reproduction in libraries, etc.;
3. Quotations; Reproduction in school textbooks (subject to paying a royalty in an amount fixed by the Agency for Cultural Affairs), etc.;
4. Broadcasting, etc. in school education programs;
5. Reproduction in schools and other educational institutions;
6. Reproduction in examination questions;
7. Reproduction in Braille, etc.;
8. Interactive transmission for the aurally handicapped;
9. Performance, etc. not for profit-making;
10. Reproduction, etc. of articles on current topics;
11. Exploitation of political speeches, etc.;
12. Reporting of current events; Reproduction for judicial proceedings, etc.;
13. Exploitation for Disclosure by the Government Organizations Information Disclosure Law, etc.;
14. Exploitation by means of translation, adaptation, etc.;
15. Ephemeral recordings by broadcasting organizations, etc.;
16. Exhibition of an artistic work, etc. by the owner of the original thereof;
17. Exploitation of an artistic work, etc. located in open places;
18. Reproduction required for an exhibition of artistic works, etc.;
19. Reproduction, etc. by the owner of a copy of a program work;

⁵⁰ M Ishida, *Outline and Practices of the Japanese Copyright Law* (1999)

20. Transfer of ownership of copies made in accordance with the provisions of limitations on reproduction right; Indication of sources;
21. Uses, etc. of copies for other purposes;
22. Relationship with moral rights of authors.

4.1.4 *International organisations and legislation*

The World Intellectual Property Organization (WIPO) was founded in 1970. The predecessor of WIPO was the United International Bureau for the Protection of Intellectual Property (best known by its French acronym BIRPI), which was set up in 1893. WIPO became a specialized agency of the United Nations system of organizations in 1974, with a mandate to administer intellectual property matters recognized by the member states of the UN. In 1898, BIRPI administered only four international treaties. By now, WIPO administers 23 treaties and has 180 member states. As shown in the following table, the Berne Convention is one of the earliest copyright treaties. It marks the copyright entered in the international arena with the Berne Convention for the Protection of Literary and Artistic Works created in 1886. The aim of this Convention was to help nationals of its member States obtain international protection of their right to control, and receive payment for, the use of their creative works such as: novels, plays, songs, sonatas, drawings, sculpture, etc. Besides the statutory Article of fair dealing⁵¹, Berne Convention recognises the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information.

Table 5. The international copyright treaties

Year	Action
1886	Berne Convention for the Protection of Literary and Artistic Works
1961	Rome Convention, for the Protection of Performers, Producers, of Phonograms and Broadcasting Organizations
1971	Geneva Convention, for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms
1974	Brussels Convention, Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite

⁵¹ Article 10 (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice. (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon.

1996	WIPO Copyright Treaty
1996	WIPO Performances and Phonograms Treaty

After the Statute of Anne, throughout almost three hundred years, worldwide copyright law has been revised to broaden the scope of what is covered by a copyright, to change the term of copyright, and to incorporate new technologies. Governments including Britain, America, Japan, Germany, China, have reformed the copyright law. At the same time, WIPO is addressing a number of proposals for changes to meet the global information infrastructure. In addition, the courts also continue to address copyright laws. Copyright has become an extremely important international issue especially since the late twentieth century.

Another remarkable treaty is WTO's Agreement on TRIPS. The WTO was founded in 1995 and is the successor to the General Agreement on Tariff and Trade (GATT), established in 1950. It is the only international organisation dealing with the rules of trade between nations and the goal is to help producers of goods and services, exporters, and importers conduct their business. It has 147 membership countries as of April 2004.

TRIPS deals with both copyright and neighbouring rights. It is in compliance with the provisions of the Berne Convention except for those on moral rights; it includes the protection of computer programmes and databases; introduction of the right of rental for computer programmes, cinematographic works and phonograms; protection of performers, phonogram producers and broadcasters. Furthermore, repeating the three-step test of the Berne Convention, it requires members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁵²

The three-step test may prove to be extremely important if any nations attempt to extend the exceptions of copyright, because unless the WTO decides that their modifications comply with the test, such states are likely to face trade sanctions.

Undoubtedly, TRIPS has become one of the most powerful IP treaties although scholars argue whether it should remain in the WTO. Picciotto considers for any "multilateral framework" for intellectual property rights, it is essential to concern if it enable the full scope of the protection of intellectual property right to be defined by public interest criteria. He appeals to "rescue the TRIPS and WTO from the damaging effects of their capture by private interests", and argues the possibility of an international public welfare standard. He further urges that developing countries should "adopt a common stand to resist bilateral pressures and insist that TRIPS be treated as maximum and not a minimum".⁵³

4.2 The influences of Chinese culture

As mentioned above, cultural difference is another significant factor which influences the development of copyright in China.

⁵² Article 13 of TRIPS

⁵³ S Picciotto, *Defending the Public Interest in TRIPS and the WTO* [2003] EIPR 229

In a characteristic value of the Western world, copyright protection reflects how individual freedom and benefits are often emphasised over societal benefits, i.e. either the author's right or the economic right is stressed.

By contrast, traditional Chinese culture believes that individuals are obliged to share their creations and developments with their community.⁵⁴ The individual pursuit of economic gain was seen as a threat to the state and was actively discouraged. Accordingly, on one hand, new ideas and technologies are considered public goods, and cultural esteem rather than material gain is the incentive for creativity. On the other hand, Eastern minds are separated from Western minds, by a deep philosophical line. For instance, there is a profound difference between Western and Eastern thinking on the nature of truth and discovery.⁵⁵ Furthermore, what is often not appreciated in the West is that intellectual theft is comparatively a new concept to many Chinese.⁵⁶

The copying of works of almost any kind has been regarded as honourable and necessary in traditional Chinese culture. The soul of the traditional Chinese culture – Confucianism – emphasises learning by copying applied to all aspects of life in China. It was closely applied to the essential virtues of filial piety and obedience to authority, of not presuming to question the opinions or decisions of one's elders or superiors. It was a powerful influence in all Chinese life, included the judges and magistrates in the traditional legal system before the adoption of 'the reform and opening-up policy' in 1979.⁵⁷

Moreover, historically, Chinese people's view of the law was very different compared with that in Western countries. It is one of the characteristics of the Chinese nation and it is a result of the traditional Chinese culture.

The traditional legal system of China was a mechanism for retaining imperial control over the populace. On one side, it was a political tool to control society which is strikingly different from the Western legal system; on the other side, it was disgusted by the common people. The great Confucian philosopher Lao-tzu remarked that the more laws and ordinances are promulgated, the more thieves and robbers there will be. What the public respected was *ren zhi* – rule of man - but not *fa zhi*- rule of law - with the emperor or governor and the officials possessing the absolute right to rule the people, who in turn had an absolute duty to obey. For centuries, the Chinese public treated lawsuits as bad-luck, even evil.

From 1949 until the end of the 1970s, Mao was the major influence in Chinese society. Early socialism as practiced under Mao's leadership viewed the law as a tool for oppression of a class of people. Under Mao's indication, the Chinese intelligentsia, which was named as 'chou lao jiu', was repressed not only by Chinese government but also the public. The unimaginable hostility towards the intelligentsia was expressed by a popular Chinese saying from the Cultural Revolution which is shown as following.⁵⁸

⁵⁴ P Altbach, *Economic Progress Brings Copyright to Asia* (1988)

⁵⁵ G Hofstede, *Cultures and Organisations* (1994)

⁵⁶ N Wingrove, *China traditions oppose war on IP piracy* (1995)

⁵⁷ Nair etc, *Strategic alliances in China: Negotiating the barriers* (1998)

⁵⁸ ChS Zheng, *The Future Chinese Copyright System and Its Context* (1984)

Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?

For the last five decades, people in China have been fed, educated, and supported by a system which does its best to enforce equality among all its members; no one, including intellectuals, is supposed to profit from the work.⁵⁹ Consequently, copyright legislation and enforcement have been slow in coming into China.

5. Concepts of copyright and the public interest

5.1 Copyright – the ramification of private property right

According to modern copyright legislation, copyright could be affirmed as “a form of protection provided by the law to the authors of original works of authorship” which includes literary, dramatic, musical, artistic, and certain other intellectual works, for example computer software.⁶⁰ This protection is available to both published and unpublished works. Therefore, the owner of copyright is generally given the exclusive right, and the right to authorise others, to reproduce and to create derivative works, to distribute copies or phonorecords of the work to the public, and to perform and display the copyright work publicly.⁶¹ As is well known, it is prohibited for anyone to violate any of the rights provided by copyright law to the owner of copyright. These rights, however, are not unlimited in scope. As stated in Article 4, chapter I of the Copyright Law of the People’s Republic of China (Copyright Law 2001), “copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests”.

The Chinese copyright law imposes two restrictions on the exercise of copyright by its owner, namely *fair use* and *statutory licence*. Consistent with the Copyright Law 2001, twelve kinds of fair uses have been identified:

1. use of a published work for the purposes of the user’s own private study, research or self-entertainment;
2. appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, author’s work, or demonstration of a point;
3. reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events;
4. reprinting by newspapers or periodicals, or rebroadcasting by radio stations, television stations, or any other media, of articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcast by other radio stations, television stations or any other media except

⁵⁹ H Wan & M Lu, *An Analysis of Chinese Laws Against Computer Crimes* (1997)

⁶⁰ WR Cornish, *Cases and Materials on Intellectual Property* (1999)

⁶¹ also WR Cornish *Cases and Materials on Intellectual Property* (1999)

where the author has declared that the reprinting and rebroadcasting is not permitted;

5. publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted;
6. translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed;
7. use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties;
8. reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work;
9. free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers;
10. copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place;
11. translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country;
12. transliteration of a published work into Braille and publication of the work so transliterated.

The statutory licence includes that where the copyright owner has not declared that the work concerned is forbidden to be exploited by others, a newspaper or periodical may reprint or print an abstract of the work which was published in another newspaper or periodical, and work published may also be exploited for public performance or for the production of a sound recording, video recording, radio program or television program; but subject to the payment of remuneration.

The public interest grants individuals the right to use copyrighted work without the owners' consent. It concerns information freedom, educational interests, and the spreading and availability of knowledge. The public interest, the interest or the right of the public to access or use of copyright protected works, "(it) is based upon a general principle of common law" and "it is a defence outside and independent of statutes".⁶²

Furthermore, Gillian Davies identifies the four interrelated principles that were part of original efforts in England to develop intellectual property law, and continue to inform the philosophy of private property. The first of these is the idea of natural law as it applies to the author. In this conception, the work is an extension of an author, an expression of personality and thus embodied in some higher principle that protects it. The second is the common notion that the author deserves just reward for creative

⁶² LH MacQueen, *Copyright and the Internet* (2000) 181-224

labour. The third is that without some law in place protecting the creations of individuals, there would be no stimulus to creativity. This notion argues that writers, painters, musicians and innovators would cease producing in the absence of a law guarding their works from piracy. The final principle is one of social requirement. This ideal argues that it is a social requirement in the public interest that authors and other right owners should be encouraged to publish their works so as to permit the widest possible dissemination of works to the public at large. It should be recognised here that these principles allow for the passing of authorial rights on to other owners.⁶³

It is notable that the roots of Anglo-American copyright are censorship and industrial privileges granted to loyal conscripts by a hegemonic state. It took almost 250 years for the first formal laws on copyright to come to life. The Statute of Anne of 1710 was the first formal copyright law. Copyright was conferred on the author of a work. However, the owner was almost always the bookseller. Although the Statute of Anne was enacted in 1709, it was 1774 before it finally reached the House of Lords for a definitive construction - the House of Lords supplanted the common law on printing in favour of the author.⁶⁴ The Anglo-American tradition emphasises the economic role of copyright.⁶⁵ On the other hand, authors' right is the concept of Continental copyright protection. It is rooted in the traditions of the French Revolution (18th century) and follows from *man's right to movement*.⁶⁶ In China, the legal term of *copyright* is *authors' right*. As MacQueen points out, the historical contrast between the two traditions is reflected in current laws as, in general, the commercial value of copyright is stressed more in the Anglo-American tradition, while its cultural value is stressed in the Continental counterpart.⁶⁷

5.2 The relevant concepts in China

Copyright has been often misunderstood as meaning publishing or publishing rights in China.⁶⁸ Historically, publishing and copyright did have a close link. Publishers of books were quick to realise that sustaining a viable publishing business was dependent upon a right to prevent copying. When the Statute of Anne was promulgated, the law was not merely a book publisher's registration law, what it protected was the copying of printed work. The copyright situation is closely linked to copying technology development – the easier to copy, the harder to protect copyright – and this is especially true in the information age. It might even be said that the current legal position depends on whether the supplier of the copying machine is able

⁶³ G Davies, *Copyright and the Public Interest* (2002)

⁶⁴ M Rose, *The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship* [1988] 23 *Representations* 51-85

⁶⁵ LH MacQueen, *Copyright and the Internet* (2000)

⁶⁶ M Rose, *Authors and owners: the invention of copyright* (1993)

⁶⁷ LH MacQueen, *Copyright and the Internet* (2000)

⁶⁸ ChS Zheng, *Copyright Law in China* (1991)

to control its operation.⁶⁹ Some scholars further regard technical devices as a solution to private copying.⁷⁰

The statutory Chinese term for Copyright is *zhu zuo quan* - *right(s) arising from or in relation to work(s)*. A work, which is named *zuo pin* in Chinese, is defined as “a fruit of intellectual creation, in literature, arts and sciences, which is original and capable of being reproduced in a tangible medium”.⁷¹

Nine types of works are listed for the subsistence of copyright in the Copyright Law 2001, which including

1. written works;
2. oral works;
3. musical, dramatic, quyi, choreographic and acrobatic works;
4. works of fine art and architecture;
5. photographic works;
6. cinematographic works and works created by virtue of an analogous method of film production;
7. drawings of engineering designs, and product designs; maps, sketches and other graphic works and model works;
8. computer software;
9. other works as provided for in laws and administrative regulations.

Among those works for the subsistence of copyright, *quyi work* is a typical Chinese product. According to Regulations for the Implementation of the Copyright Law (2002), *quyi works* are the traditional Chinese theatrical and talking-and-singing, including *xiang sheng* (cross talk), *kuai shu* (clapper talk), *da gu* (ballad singing with drum accompaniment) and *ping shu* (story-telling based on classical novels), which are all used for performance involving mainly recitation or singing, or both. Nevertheless, the Copyright Law 2001 leaves out some important categories, such as broadcasts, sound recordings, typographical arrangement, which the law provides for elsewhere. Moreover, (1) government documents, (2) reports of current events and (3) calendar, mathematical and general tables, and formulae, are three types of works excluded as non-copyright for the public interest. But it is quite hard to find a consensus view as to the nature, scope and justifications for these exclusions, especially (1) and (2). Besides, originality has not been defined, although in the main, Chinese researchers understand that *original* means the work must not be copied from another work – that it should originate from the author.

Copyright vests in the author, unless the law provides otherwise. The author is ordinarily the natural person who creates the work. A person undertaking organisational work, provision of advice or material means, or other forms of assistance for another’s creation, is not deemed to be creating, and therefore is not an author. The law presumes the author to be the individual or unit whose name is stated

⁶⁹ W Hayhurst, *Copyright and the Copying Machine* (1984)

⁷⁰ G Davies, *Copyright and the Public Interest* (2002)

⁷¹ ChS Zheng, *Copyright Law* (second edition) (1997)

on the work, unless proved to the contrary. And the main thrust of the Copyright Law service work lies in redefining the author's work affiliation with the organisation as (1) the author's work is based on an employment relationship, whatever its form; (2) the service work must be completed as an assigned task rather than the author's normal duty; (3) the work is for use within and closely related to the organisation's scope of business.

Traditionally, rights arising from creative works are of two kinds: moral (personal) and economic (property) rights. Moral rights are particularly useful to the author to control the use of author's work. Since the treatment of an author's works may easily affect the author's honour and reputation, right of reputation claims tend to pervade Chinese copyright disputes. Economic rights are rights to use copyright works and receive benefits therefrom. The rights owner may use and authorise others to use works in any of the statutorily stipulated forms, including reproduction, performance, broadcast, exhibition, issue, translation, annotation, compilation and adaptation for film, television and video production. Other rights such as performers, broadcasting organisations and audio-visual producers in their products rights are separately grouped as neighboring rights (related rights).

5.3 Internet in experiment

As mentioned above, the development of copyright has a close relationship with technology. The Internet, which was researched in the 1960s, developed in the 1980s and well used in the 1990s⁷² has been described as history's greatest photocopying machine and a wonderful common resource for users, bringing copyright unprecedented challenges.⁷³ Enormous differences between this digital medium and the traditional media in terms of copyright, which include the ease of replicating a work, transmitting it to multiple users and the convenience of representation. Moreover, the advent of faster technologies, such as cable modems, and the increase in storage space on the average PC, are only making this issue more obvious than ever. Copyright has become one of the essential Net debates and can be seen as divided into two camps. One is made up of those who promote the free redistribution of any and all material throughout global networks, and the other is composed of those who want to see the development of controls so that, authors, or owners of information can track their travels and be paid for usage.

According to the Finance Information Network, at the end of 2002, China had 59.1 million Internet users, while there were 20.8 million PCs Online. This rapid increase certainly has brought the law new trials. Two notable cases should be mentioned as following.⁷⁴

The first one is *Wang Meng etc v. Century Communication Ltd Company (Six Writers)*. The defendant was an information technology company in Beijing. On its Website, there were a series of literary work collections which users were free to download. Works of six famous Chinese writers - Wang Meng, Zhang Chenzhi, Zhang Kangkang, Bi Shumin, Zhang Jie and Liu Zhengyun's - were included, among

⁷² the Internet Society Website, <http://www.isoc.org>

⁷³ Davies G (2002) Copyright and the Public Interest

⁷⁴ Source from the China Judge Website, <http://www.china-judge.com>

others. In June 1999, those six writers appealed to Haidian (Beijing) Court for, firstly, the judgment for the action for infringement of copyright and the condign remuneration, secondly, the defendant compensate for the both economic and spiritual damages. *The Six Writers* is the first case in China refer to the Internet and copyright.

Although Copyright Law then had not extended to the Internet before it was amended in October 2001, the judgment concluded that digitising a work is not only a change of the format but a creation, namely a new work; authors have copyright of the digitised works and the monopoly to decide if their works could be distributed and in what format. Thus, the first part of the appeal was allowed but the other claim was dismissed. However, the court held that that judgment is concerned about, not only the copyright owners' and company's benefits, but also the public interest. The defendant then appealed to the Beijing First Intermediate Court, and the appeal was rejected in December 1999.

In the other case, *Chen Xingliang v. China Digital Library Ltd Company (Digital library)*, the defendant published Mr. Chen Xingliang's "New Perspective of Modern Criminal Law" as three works on the web without his authorisation. Users could download the full copies by paying a small sum of money online. On 1 April 2002, the plaintiff appealed to Haiding (Beijing) court that the digital library infringed his copyright and requested compensation. The defendant stated that the company was a non-commercial organisation and that to exploit virtual library, namely to upload works in digital format, was in the public interest. The judge held that, even if the digital library is on the demand of public along with the development of information technology, the Copyright Law 2001 affirmed clearly that "reproducing, distributing, performing, showing, broadcasting, compiling or communicating to the public on an information network a work created by another person, without the permission of the copyright owner" are unlawful. The judgment, therefore, was given that the defence of public interest failed and the appeal was permitted.

In this case, books were digitised and distributed online at the virtual library. Current laws in all countries state that book publication, circulation and usage involve intellectual property rights, and this applies to electronic books.

In 1996, the WIPO regarded storing products in digital form in the electronic media as 'copying'. Offering digitised works for others to skim, read, copy and print through networking also means 'copying'. People who download, copy or print others' works without the authors' permission violate copyright laws and are liable. E-media should get permission from copyright owners, and measures such as charging browsers and using codes and digital watermarks should be taken to prevent illegal downloading.

Nonetheless, questions arise: how will patrons read electronic books more cheaply than going to libraries; how can authors be compensated; how can digital libraries find a balance between the two groups' interests? If technical devices are the only methods to prevent unlawful copying, then collective contract may be an approach towards better online copyright protection.

Moreover, the Copyright Law 2001 asserts that "a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced" and library use is included. Does the law apply properly to digital library as well?

6. Discussions and Conclusion

From the western point of view, the doctrine of the public interest in terms of copyright is for the purpose of balancing the exclusive property rights of the copyright owners with the social benefit in the free dissemination of information. The public interest defence involves only a very limited expropriation of property and the owner remains free to exploit the work commercially. Furthermore, according to the literature review, the public interest defence has never been awarded to libraries and has really only been used by newspaper publishers in the UK.

Nonetheless, it should be accepted that the public interest defence can in exceptional circumstances give rise to a limited right of using copyrighted works, although the public interest should not override copyright in general. In addition, it is suggested that courts should offer various safeguards to provide comprehensible guidance as to the circumstances in which the public interest defence might succeed, on the one hand, and, on the other hand, to ensure that such a defence is not abused.

China carries out a double-track system in the field of copyright enforcement, i.e. the system of judicial protection and that of administrative management operate in parallel. The copyright administration departments, which are owned by different levels of government, strengthen the promotion and administrative management of copyright in accordance with the Copyright Law and related laws and regulations. When there is a serious acts of copyright infringement, which cause damage to society, the copyright administration departments impose relevant administrative punishments according to the seriousness of each case. The copyright administration departments also provide legal advice and mediate disputes over copyright infringement.

The Chinese copyright law was enacted “for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and rights related to copyright, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and flourishing of socialist culture and sciences”.⁷⁵ These purposes reflect two principles: first, protection of the legitimate rights of authors and disseminators of works so as to encourage them to undertake such endeavours and thereby promote the creation and wide dissemination of excellent works; and, second, coordination of the beneficial relationship among authors, disseminators and the general public so as to encourage the latter to take an active part in social and cultural activities with a view to enhancing the scientific and cultural quality of the whole nation and promoting the development and prosperity of socialist culture and sciences and the construction of socialist spiritual and material civilisation.

However, Chinese copyright in practice has its particular characteristics compared with western countries. First of all, China is still struggling to make both the idea and the system of private property rights harmonious with the socialist regime. Second, the notion of law which Chinese people have is undergoing variation and alteration. Third, people in China have a very deep-rooted and different concept of the public interest due to the influences of Chinese culture. As a well known Chinese says “*ren*

⁷⁵ Article 1

min de li yi gao yu yi qie" - the people's interest is the first - public interest in some certain sense is beyond any other private rights, which include property rights.

Unquestionably, the judicial system in China is now facing a dilemma. On the one hand, it has tried to address the needs of high international standards and, therefore, copyright protection is promoted diffusely and in depth among nations[again, I don't know what this sentence means]. On the other hand, the public interest is nevertheless emphasised much more than in other countries for the purpose of retaining and developing *socialist spiritual civilisation*. Nevertheless, public welfare and social value have been historically stressed in Chinese culture. The public interest doctrine is recognised not only within the copyright system, but also extensively in the society. As a ramification of private property rights, copyright and its enforcement in China are intensely challenged by tradition.

The Chinese court has demonstrated that it is a breach of copyright to disseminate others' works on the Internet without the author's permission, to sabotage technical means for transmission of works, or any action to tamper with the right of information administration. However, how to effectively obtain the author's authorisation, or to exercise the public interest doctrine without the author's permission for using literary works, pictures, music and video products online, and what copyright measures should be taken so as to ensure a protective mechanism for a sustainable and healthy development of the online information industry, have become not-so-new tests for the newly revised Chinese copyright law.

Based on common international standards, the copyright legislation differs between individual countries including the formulations of the statute law. In relation to fair dealing, the UK CDPA spends a rather long time specifying the uses made of a work in particular cases, which is modelled after many other countries, such as Japan and China,, while the US Section 107 simplifies it in general clauses, which gives judges more scope to implement the law consistent with the particular case in court.

The UK model may merit an easier understanding or adoption for court; however, it has considerable limitations. First, it is hard to cover various circumstances and cases in practice; and, second, rapid developments and changes in technology make the specific clauses more difficult to update.

While conferring with the general clause approach would allow lawmakers to simplify the UK legislation for the better. Having said that, UK lawmakers seem determined to make the legislation more detailed, satisfying the wishes of certain persons, which, remarkably, are included in even the latest Copyright and Related Rights Regulations.