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New Development in Digital Copyright Protection in China: The Landmark Case of Zheng Chengsi v Shusheng

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an expected adjunct of the exclusion of protection for features of a product that are solely dictated by that product's technical function.¹⁵ Where the freedom of the designer is considered to be almost limitless—as was held in the case of *Ljubojevic*—a considerably greater degree of dissimilarity will be required to establish individual character.¹⁶

Conclusion

These early decisions of the Invalidity Division are likely to be examined closely by those looking for guidance on the proper interpretation of the core provisions of the Regulation and Directive.

Some fairly clear themes helpfully emerge from the cases reviewed, although on the other hand it is difficult to draw any fixed indication of the threshold required to establish individual character. This probably reflects the fluid nature of the assessment, in which account is taken of various factors that influence the degree of design freedom in each case. However, the early indication is that the threshold is neither especially high nor obviously low, and this may reflect the reference in Recital 14 of the Regulation to the need for the overall impression of the RCD to “clearly” differ from the prior art.¹⁷ Once differences have been identified that enable the informed user to clearly distinguish one design from the other, the criteria may be met without anything further being required in the way of exceptional invention in the design. OHIM has reasoned in its monthly newsletter that the more specific knowledge possessed by the informed user may mean that “moderate elements of uniqueness . . . would be sufficient to produce on the user an impression of individual character”, and that, more generally, the threshold is likely to be lower than that required to establish distinctiveness in a trade mark.¹⁸

Given the influential role of the informed user in separating out features of relatively greater weight in the assessment of individual character, legal certainty going forward would be promoted by a fuller elaboration of the characteristics of the informed user in the particular design field as a more transparently rational basis to the conclusions he is presumed to draw (and of the support for this in the evidence submitted).¹⁹ This is lacking in the Regulation itself, and OHIM has acknowledged in its newsletter that there is an element of subjectivity in this aspect of the adjudication.²⁰

In the Commission's Explanatory Memorandum of March 14, 1996, it is explained in the context of the corresponding provisions in the Directive that:

“the informed user may be, but is not necessarily, the end consumer . . . A certain level of knowledge or design awareness is pre-supposed depending on the character of

the design. But the term ‘informed user’ should indicate also that the similarity is not to be assessed at the level of ‘design experts’.”²¹

It is submitted that these characteristics sit well with the term “informed user” itself, and there is nothing in the decisions reviewed to suggest that the approach of the Invalidity Division differs meaningfully on this point. In its newsletter of July 21, 2005, OHIM commented further that the informed user:

“is not necessarily an average consumer, but possibly someone with more specific knowledge of the relevant market (perhaps a retailer or another person trading with the relevant product)”.

It remains to be seen exactly how case law will develop in the Boards of Appeal and beyond.

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New Development in Digital Copyright Protection in China The Landmark Case of Zheng Chengsi v Shusheng

 [Keywords to follow]

Introduction

Zheng Chengsi v Shusheng Digital Technology Co Ltd (the “*Shusheng case*”)¹ is fated to become a landmark case in the copyright history of the People's Republic of China (“PRC” or “China”). Even when the *Shusheng case* was just decided by the court of first instance and still

¹⁵ Regulation, Art.8(1).

¹⁶ *Ljubojevic*, fn.1 above, at [21]; cf. *Grupo Promer Mon-Graphic SA v Pepsico Inc* (RCD 74463-0001), at [24] and [25].

¹⁷ cf. Directive, Recital 13.

¹⁸ *OHIM European Trade Marks and Designs Newsletter*, July 21, 2005. See, e.g. *Henkel* (bottle shape) C-218/01.

¹⁹ Legal certainty in the registration process is itself an aspiration of the Regulation (Recital 16).

²⁰ *OHIM European Trade Marks and Designs Newsletter*, January 1, 2005.

²¹ cf. *Sunstar Suisse, SA v Dentaid, SL* (RCD 85311-0001), at [19].

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¹ See *Zheng Chengsi v Shusheng Digital Technology Co Ltd*, Beijing Municipal People's Court of Haidian District (Hai Ming Chu Zi No.12509, 2004), affirmed by Beijing Municipal No.1 Intermediate People's Court (Yi Zhong Ming Zhong Zi No.3463, 2005).

pending appeal, it was elected by media as one of the top 10 IP cases of 2004 in the PRC.²

One may think that it was because the participants of this case virtually constitute a “dream team” in PRC IP circles. For example, one of the presiding judges was the “model judge” Song Yushui, who has long been well known throughout the PRC for her integrity and professionalism.³ More interestingly, the seven plaintiffs were all highly respected IP scholars in the PRC, headed by Professor Zheng Chengsi. As many readers are aware, Zheng Chengsi is commonly regarded as the ultimate authority of intellectual property law in the PRC and was recently elected by an English journal *Managing Intellectual Property* as one of 50 IP’s most important figures in the world.⁴

Notwithstanding the above, the importance of the *Shusheng* case apparently lies more in the various policy implications that it brings forward to the Chinese public, e.g. whether copyright law has become obsolete in the digital age, whether the exclusive rights of authors should be compromised to provide for the free flow of content through the internet, and what it takes to achieve the delicate balance between the legitimate interests of authors, distributors and end-users. As an attempt to answer those questions, this comment argues that the key to fostering the development of information industries, especially online publishing, is to reinforce copyright protection in cyberspace and in doing so preserve the ultimate source of creative and useful content for the public.

The next two sections of this comment begin with an introduction of the facts and holdings of the *Shusheng* case. The fourth to seventh sections briefly discuss the major policy controversies arising from the *Shusheng* case, including the legal nature of a digital library, the transactional costs of copyright law, the practicality of the “authorization offer” and the appropriate level of copyright protection in China. The final section summarises the main points of this comment and presents several overall recommendations.

Facts

In March 2003, the plaintiffs accidentally discovered a website, the Shusheng Digital Library,⁵ which uploaded a large number of books authored by the plaintiffs. Taking Zheng Chengsi, for example, his works alone found therein included at least eight books consisting of 2.5 million words in total. Any end-user might read and download the full text of such books by using the special browser provided by Shusheng’s website.

Although this website asserted that it had obtained “dual authorisation”, i.e. authorisation both from publishers and from authors, Zheng Chengsi and other plaintiffs in the *Shusheng* case never gave any consent to Shusheng for any use of their books.

² See www.sipo.gov.cn. The appellate decision was later elected as one of the top 10 IP cases of 2005 by the Beijing Higher Court.

³ See www.chinacourt.org.

⁴ See *Managing Intellectual Property*, July/August issue—Features.

⁵ The Shusheng Digital Library was situated at www.21dmedia.com.

The plaintiffs lodged a civil action against Shusheng in June 2004 claiming that the above use of their copyrighted works constituted copyright infringements and should be subject to legal penalties including permanent injunction, public apology, damages and recovery of reasonable investigation and legal costs.

Correspondingly, Shusheng argued that its uses of copyrighted works on the website should be qualified for the fair use defence, for the following two reasons:

First of all, Shusheng’s major line of business is to provide digital library infrastructures to various Chinese libraries, partly by digitalising and restoring books in Shusheng’s own database. The book contents in its website were never open to the general public, but only accessible to a limited number of library users who were allocated with user names and passwords.

Secondly, Shusheng’s business model and reading experience were completely analogous to those of a traditional library, given various restrictions imposed by Shusheng. For example, Shusheng’s website implemented a special technical measure so that a single book could only be viewed by up to three users simultaneously. Also, the website adopted a copy protection to prevent viewers from copying any contents of the books unless by using the “screen shot” function.

Holdings

The court of first instance held that Shusheng, without due authorisation, made the plaintiffs’ copyrighted works available to the general public on the internet and as such infringed the plaintiffs’ network communication rights protected by the PRC Copyright Law.⁶ The court therefore upheld the plaintiffs’ claims for injunction, public apology, damages and recovery of legal costs.

The court apparently allocated little weight to Shusheng’s fair use defence based on its restrictive methods and business model. First, although Shusheng claimed that its website was never open to the general public, evidence showed that Shusheng had posted detailed instructions including user name and password⁷ on the open pages of the website. Secondly, while Shusheng intended to establish that it had adopted necessary restrictions on the scope and manner of using copyright works, the court opined that such restrictions neither substantially lower the risk of the copyrighted works being abused online nor change the unauthorised and infringing nature of such uses. Thirdly, the court appeared to disagree with Shusheng’s analogy of its “digital library” to a traditional library. The impact of a traditional library to copyright owners is very limited because its physical and material conditions have many constraints and its usage rules are relatively reliable. Besides, traditional libraries are generally non-commercial in nature and intended to serve the public interest. By contrast, the so-called “digital library” in question was totally different from a traditional library in business nature, business model, business purpose and potential impact to copyright owners.

⁶ For the legal provision of network communication right, please see Art.10 of the PRC Copyright Law.

⁷ User name and password were both “guest” for each user.

The court also pinpointed probably as dicta that the internet provided more convenience or freedom for the use and distribution of works of authorship; however, such convenience or freedom was not without boundaries: it needed to be exercised with due respect for the law and others' legitimate rights.

Eventually, the court of appeals rejected Shusheng's appeal and affirmed the decision of the lower court.

On the face of the facts, the *Shusheng* case appears to be a relatively straightforward internet piracy case. Yet considerable controversies arose outside of the courtroom owing to Shusheng's extensive media campaign attempting to add political pressure on the courts and disguise this copyright infringement case as an academic debate between different schools of policy thinking.⁸ By hosting press conferences and sending bulky emails to newspapers, Shusheng intended to amplify its opinion that copyright law has become archaic with the advent of digital technologies, becoming an unsurpassable impediment to the growth of digital libraries and other new forms of information industries. Given that, the following sections of this comment will examine most of Shusheng's "policy arguments" and will support the continuing vitality of copyright law in the digital age.

Legal nature of a digital library

In the *Shusheng* case, Shusheng heavily relied on an analogy to the traditional library in order to justify and defend the Shusheng Digital Library. This argument did have certain appeal at first glance in that a traditional library normally enjoys certain exemptions under copyright law, owing to various public policy concerns.

For example, in accordance with the US Copyright Act of 1976, a library may freely lend books in its collection to the public without authorisation from copyright owners. This exemption is based on the first sale doctrine,⁹ whereby the owner of a legitimate copy may sell, rent, lend or otherwise dispose of the same without further authorisation. The first sale doctrine restricts the copyright owner's control over copies of the work to their first sale or transfer, upon which the distribution right in respect of such copies is exhausted.¹⁰

In Europe, exceptions for libraries appear to be a bit narrower. The EC Directive on Rental, Lending and Related Rights¹¹ accords to authors a public lending right, i.e. the exclusive right to authorise or prohibit public lending of copies of copyrighted works. Nevertheless, this Directive also allows Member States to derogate from the public lending right, e.g. by endorsing the first sale doctrine, provided that authors are able to obtain equitable remuneration for such lending.¹²

⁸ See <http://tech.sina.com.cn>.

⁹ The first sale doctrine is also called "exhaustion of rights" in Europe. See Cornish and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (2003), pp.1-49.

¹⁰ See 17 U.S.C. §109(a).

¹¹ See Council Directive 92/100 of November 19, 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

¹² In reality, at least the United Kingdom and Germany adopted the first sale doctrine in relation to public lending. See Cornish and Llewelyn, fn.9 above.

The PRC Copyright Law does not explicitly provide for the first sale doctrine. However, PRC libraries appear to be entitled to the privilege of public lending no less than their US counterparts. Under the PRC Copyright Law, the distribution right only covers distribution of copies in the form of sales or gift and therefore excludes rental or lending. It separately provides for the rental right in respect of cinematographic works and computer software, but does not address the public lending right at all.¹³ This silence seemingly implies that PRC copyright owners were never entitled to the public lending right in the first place.

That said, the above exceptions may not be applicable to the digital library in the *Shusheng* case, which was substantially distinguishable from a traditional library in several key aspects.

First of all, unlike a traditional library, Shusheng does not purchase and keep book collections by itself. All copies in its digital library were made from the collections of other libraries without authorisation from copyright owners. Such digitalisation unavoidably involves the right of reproduction. In addition, while a traditional library lends physical copies to the public, Shusheng actually disseminates digital copies of books to the public via the internet, which concerns the right of communication. As a result, Shusheng was obviously disqualified for the application of the first sale doctrine, which is merely in association with the distribution right.

In actual, the difference between Shusheng and traditional libraries goes far beyond legal metaphors as discussed above, and implicates many practical concerns.¹⁴ For example, when a traditional library lends a book to the public, it is physically difficult for more than a couple of users to view such a book simultaneously even at the same location. In contrast, the Shusheng Digital Library, by distributing books online, enables multiple users to view the same books simultaneously even in different corners of the world. Secondly, in a traditional library, it would hardly be cost-effective for users to make copies of library collections in a large scale. However, in Shusheng's digital library, users may duplicate and further distribute a vast number of books as easily as by several strokes on the keyboard. Thirdly, a traditional library is normally of a non-commercial nature and open to the general public. On the contrary, Shusheng created the digital library mostly for financial gains and only provided access to customers that had paid for the same.

In short, Shusheng's digital library poses a much more meaningful threat to copyright owners' legitimate interests by drastically exceeding the physical limitations of traditional libraries. If such a digital library were allowed to be widespread without due authorisation, it would basically shut the door for copyright owners to exploit their own markets in cyberspace.

Though calling itself a "digital library", Shusheng was as a matter of fact more like commercial electronic database providers, e.g. Westlaw and Lexis-Nexis.

¹³ See Art.10 of the PRC Copyright Law. "Rental" is defined by the PRC Copyright Law as "making available for a limited period of time for profit". Accordingly, it did not contain public lending, which should exclusively for non-commercial purposes.

¹⁴ See Zhu Lin, "Combating Internet Piracy and Protection the Integrity of Law", available at www.iolaw.org.cn.

In reality, such commercial database providers never enjoy the status of a public library and have to seek authorisation from each copyright owner for including their copyrighted works in the databases.

As another interesting comparison, the search engine giant Google was recently accused of massive copyright infringement because of its Print Library Project.¹⁵ Google thereby digitalised book collections in several university libraries to make their full texts searchable on the internet. The Print Library Project is, however, much less aggressive than what Shusheng did. Google only makes available full texts of books already in the public domain. For copyrighted books, the search results would be limited to bibliographic information and a couple of pages of excerpts, much like the distilled information contained on a library file card. Users who are interested in copyrighted books would likely be directed to bookstores or libraries. Notwithstanding the above restrictions, Google was still sued for copyright infringement in the United States. This case indicates how intolerable Shusheng would be considered by international standards, as it actually distributed full texts of copyrighted books online.¹⁶

Copyright and transactional costs

During the period of legal proceedings, Shusheng repeatedly claimed to various media that digital technologies have outgrown the traditional copyright regime. According to Shusheng, existing copyright law, which generally requires authorisation from each copyright owner for uses of copyrighted works, increases transactional costs and perpetuates a bottleneck for the development of internet-related industries. In order to illustrate its argument, Shusheng presented this calculation¹⁷: in the PRC, there are more than 100,000 books, 10,000 journals and 2,000 newspapers published annually. Even if only part of PRC websites wished to use the above publications online, the transactional costs spent on negotiation with copyright owners would be prohibitively expensive, say over RMB 100 billion (approximately US\$ 12 billion).

Ironically, Shusheng seemed to forget the fact that those hundreds of thousands of books were in the first place published mostly with authorisation from copyright owners. It does not make much sense to argue

¹⁵ See www.chicagotribune.com.

¹⁶ During the trial, Shusheng alleged that its digital library, by restricting the number of simultaneous readers to three, complied with the safe harbour provided by the US Digital Millennium Copyright Act of 1998 ("DMCA"). This argument was totally irrelevant, as PRC courts obviously would not be governed by US law. Furthermore, it was also fallacious. The DMCA did allow libraries to make up to three digital copies of copyrighted works, but subject to many conditions precedent, e.g.: (1) the reproduction or distribution is not for any direct or indirect commercial advantage; (2) the collections of the libraries are open to the public or open to any researcher in a specialised field; (3) the reproduction or distribution includes a copyright notice; (4) the copies are made solely for the purpose of preservation, security, replacement of a damaged copy or obsolete format; and (5) the copies are not made available to the public outside the premises of the library. See 17 U.S.C. §108. Obviously, Shusheng could not satisfy most of the above conditions.

¹⁷ See <http://news3.xinhuanet.com>.

that what traditional publishers can achieve can hardly be achieved by online publishers.

Moreover, contrary to Shusheng's seemingly striking argument, digital technologies actually provide more efficient methods for intermediaries to seek copyright authorisation than traditional analogue technologies do. In the analogue age, if an intermediary wishes to identify an unknown author and subsequently negotiate a publication deal, it would have to either pay visits in personal or communicate via the post, telephone and/or facsimile. As a result, traditional publishing would unavoidably incur significant costs in travelling and communications. By contrast, with the advent of digital technologies, intermediaries can utilise online search engines to locate authors' contact details, only spending a few minutes before the computer. Also, a major part of negotiations and communications can be carried out through a chain of emails or even instant messages. Even conclusion of publication contract has been much simplified on the internet, e.g. taking the form of click-wrap agreements. In addition, given that digital technologies significantly reduce the costs for accessing, restoring and disseminating contents, they will avail intermediaries of more financial resources to seek authorisation from copyright owners.

The fallaciousness of Shusheng's statement is further demonstrated by the fact that many digital libraries have excelled by faithfully complying with copyright law.¹⁸ For example, a small-scale Chinese company, Superstar Digital Library, has obtained authorisations from 210,000 authors and grown into the largest online database of Chinese books, only after three years' efforts in approaching authors one by one. Other successful examples of course include the famous Westlaw and Lexis-Nexis, as mentioned above. As many readers are aware, these databases almost include all the legal journals ever published in the United States and in a few other countries. Yet their business operations still take the form of seeking authorisation from each copyright owner concerned. These examples reveal that the traditional authorisation model is not only legitimate but also practical in the digital environment.

In a nutshell, while digital technologies are drastically decreasing transitional costs in association with copyright authorisation, it is groundless and disingenuous to claim that copyright law creates excessive costs and obstacles for online businesses. It appears that the real driving force behind such a false statement can only be greed, i.e. the desire to further enlarge profit margins by avoiding remunerations to authors after digital technologies have already eliminated many of the business costs for accessing, restoring and disseminating contents.

Practicability of authorisation offer

As a litigation strategy, the defendant also asserted outside of the courtroom that it had resolved the so-called "copyright dilemma" in cyberspace by inventing an authorisation offer scheme to replace the current copyright regime.¹⁹ Basically, Shusheng proposed that, in order to streamline the growth of online publishing

¹⁸ See www.ssreader.com.

¹⁹ See <http://news3.xinhuanet.com>.

businesses, all authors should waive their exclusive rights to authorise exploitations of copyrighted works by means of the authorisation offer. Such a document would extend an offer to each member of the general public that anyone may reproduce, distribute or otherwise exploit the copyrighted works subject to certain conditions regarding royalty rate and attribution, etc. Shusheng boasted that this authorisation offer scheme could eliminate all transactional costs and bypass the “bottleneck” of copyright authorisation.

The above proposal from Shusheng, viewed in context, is quite paradoxical: once an infringer was caught infringing others’ legal rights, instead of repenting her wrongdoing, she urged the victims to be good citizens by giving up their rights and claims. It appears to argue that what is more immoral than an infringement is to combat the infringement.

No matter how fanciful the authorisation offer scheme sounds, it would be realised inevitably at the cost of the authors’ legitimate interests. Assuming all authors waive their rights to authorise (or not authorise) in accordance with the authorisation offer scheme, the bundle of exclusive rights provided by copyright law would virtually be reduced to a mere contractual right to demand remuneration. Consequently, authors would be deprived of all remedies available in infringement cases but not in contract or debt disputes, such as preliminary injunction and statutory damages.²⁰ In today’s China, where pirates are still rampant and undeterred by constantly increased penalties to copyright infringement, one can imagine how difficult it would be to fully protect authors’ legitimate interests merely based on limited contractual or debt claims.

What is more, the authorisation offer scheme actually makes copyright infringement more cost-free: if the unauthorised uses are not caught, they would of course incur no costs in relation to compensation to authors. Even if the unauthorised uses are eventually caught, the infringer would just be required to pay the royalties provided in the authorisation offer. In other words, the highest costs possible for infringement would be no more than what law-abiders need to spend in compliance with copyright law. In this sense, the authorisation offer scheme is more like an encouragement to infringement.

Finally, the authorisation offer scheme might not even be applauded by most intermediaries. When an intermediary decides to publish a book, it needs to invest substantially in editing and advertisements. In order to prevent free-riding by competitors and secure its vested interests, the intermediary normally requests to either buy out the copyright or obtain an exclusive publishing contract from the author. However, the authorisation offer would preclude any exclusivity by allowing anyone to exploit the works without seeking authorisation. Therefore it would eventually encourage free-riding between intermediaries.

Overprotection or underprotection

In the wake of China’s entry into WTO, an increasing number of foreign right holders came to China, succeeding in their intellectual property actions pursuant

²⁰ For legal provisions of preliminary injunction and statutory damages, please see Arts 48 and 49 of the PRC Copyright Law.

to the TRIPs Agreement and extracting a vast amount of royalties and compensations from Chinese entities. Witnessing this overwhelming trend, some Chinese commentators are wary that overprotecting intellectual property rights may hinder the growth of technology and commerce in the PRC.²¹ Shusheng, convicted of copyright infringement, also held itself out as the latest one in a long line of victims of intellectual property overprotection in China.

It is always a legitimate concern that copyright law should strike a balance between competing interests of retaining incentives to intellectual creation in works of authorship and enhancing technology innovation in other areas of commerce.²² However, contrary to Shusheng’s self-portrait, the *Shusheng* case in fact demonstrated that intellectual property protection in China still has a long way to go before reaching an appropriate level. Once Zheng Chengsi as well as other copyright owners initiated the civil action against Shusheng, he was immediately faced with enormous pressure from varied sources.²³ Some criticised their action as blocking the wheel of technology developments; some others even accused those scholars of simply being greedy for compensation. In contrast, the copyright infringer Shusheng blatantly sought public sympathy through the mass media by declaring how copyright law was out of-date and how their infringing acts actually resolved the “copyright dilemma”. Such abnormal phenomena indicated that the overall level of ignorance and misunderstanding with regard to intellectual property is still very high among Chinese people. While social environments have made intellectual property enforcement so challenging even for intellectual property experts, one can imagine how difficult it would be for average authors to stand up for their legitimate interests. In reality, many Chinese authors unsurprisingly chose to be silent in the face of intellectual property infringements.

Some Chinese commentators hold the point of view that Chinese intellectual property legislation resulted purely from international pressure; as long as the thresholds of international treaties are satisfied, the lower the level of intellectual property protection is, the more Chinese companies would benefit.²⁴ The *Shusheng* case revealed how much such an opinion misses the point. As far as foreign right holders are concerned, if they could not effectively enforce their intellectual property rights in the PRC, the worst scenario for them would be to retreat from the Chinese marketplace and suffer certain opportunity costs.²⁵ However, as to Chinese authors and innovators, if they were unable to secure their intellectual property rights in the PRC, their sources of living would likely be destroyed in total. There have been a number of sad stories in this regard. For

²¹ See <http://news.ccidnet.com>.

²² See *Sony Corp of America v Universal City Studios, Inc* 464 U.S. 417, 442 (1984).

²³ See Zheng Chengsi, “Pirates’ New Excuses for Infringement”, available at www.iolaw.org.cn.

²⁴ See, e.g. Mao Jifu, “Software Copyright Protection and National Interest”, available at www.netlawcn.com/.

²⁵ This would of course diminish China’s ability to attract foreign investment and technology, which is not necessarily a good thing for China as a whole.

example, devastated by software piracy, many domestic software companies had to give up their own R&D and became OEM factories of foreign software developers. Faced with music piracy, many talented musicians collected nominal royalties from record selling and were forced to give endless live performances to earn a living. Those painful stories keep on reminding us that perfection of the intellectual property regime in China means a lot more to domestic authors and innovators than to foreign multinationals.

Arguably, the arrival of digital technologies further upsets the copyright balance towards end-users rather than towards authors. Digital technologies empower average users to store all kinds of information, including text, sound, and graphics, etc. in a unitary digital format (i.e. translated into a sequence of binary digits) and with several clicks on the mouse disseminate the same globally with almost no quality degeneration. Such technological advances on the one hand increase the ease and variety of information dissemination for consumers, and on the other hand escalate the risk and consequence of copyright infringement. For instance, just one unauthorised uploading of a work on an electronic bulletin board, unlike most single reproductions in the analogue environment, could have devastating effects on the market for the work.²⁶ Therefore, without sufficient copyright protection on the internet, authors may be hesitant or unwilling to put their works online; in the worst-case scenario, uncontrolled online piracy may destroy the creativity and vitality of the whole copyright industry. Ultimately, the general public will also suffer from lack of copyright protection, deprived of the benefits made possible by digital technologies to enjoy a wide variety of cultural and entertainment works.

Therefore it is unsurprising that, faced with the challenges by digital technologies, many countries in the world chose to reinforce copyright protection, e.g. by adding technological protection measures, right management information and intermediary liability into their copyright law, in order to redress the delicate balance between providing incentives to intellectual creation and securing the public interest in maximum access to information.²⁷

Conclusion

Copyright law history has seen the emergence of an endless line of technologies that have facilitated more efficient reproduction, manipulation and dissemination of copyrighted works of authorship. In the past, piano rolls, cable television, photocopiers and VTRs all sparked much debate on their formidable threats to meaningful copyright protection. In each instance, copyright law managed over time, however, to accommodate the new technology into the existing legal frame, often

26 See Ronald H. Brown and Bruce A. Lehman, *Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure* (1995), pp.114, 124.

27 See Digital Millennium Copyright Act of 1998, Pub. L. No.105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C.); Directive 2001/29 of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

creating a new avenue of benefits for both copyright holders and the general public.²⁸ The recent *Shusheng* case once again teaches us that, in confrontation with the advent of new technologies, instead of crying doom for copyright law, we need to preserve the inherent balance in copyright law between authors' interests in control and exploitation of their intellectual creations, unfettered technology innovations in means of dissemination and the ultimate public interest in the free flow of information. Diminishing copyright protection in cyberspace would end up only enriching a limited number of entrepreneurial intermediaries, but at the cost of authors and the general public as a whole.

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Lucy Harrold

Beyond the Well-trodden Paths of Passing Off The High Court Decision in *L'Oreal v Bellure*

 [Keywords to follow]

*L'Oreal SA v Bellure NV*¹ is the latest English High Court case in which an extension of the law of passing off to encompass a broader concept of unfair competition has been proposed. In an interim decision handed down on January 25, 2005, Hart J. permitted a claim of passing off regardless of deception or confusion to go forward to trial despite House of Lords authority to the contrary. In support of its call for this development in the law, the claimant argued that passing off should be developed along similar lines to the European case law under Art.5(2) of Council Directive 89/104 (the equivalent of s.10(3) of the Trade Marks Act 1994), i.e. so that it protects against the diluting or tarnishing of brands.

Introduction

"It remains too easy for the unscrupulous competitor to free ride on the hard-won reputation of the brand, deceiving consumers into thinking that a competitive product has the qualities of the well-known brand when it does not. Such deceptions take the form of common knock-offs of familiar packaging or misleading claims on packs that suggest the product performs as well as the brand. This deficiency in UK legislation has persisted for too long".²

The English law of passing off dates back to the reign of Elizabeth I. The essence of the law is that no man has the right to represent his goods as the goods of

28 See Arthur R. Miller, "Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?" (1993) 106 Harv. L. Rev. 977 at p.982.

1 January 25, 2005 (unreported).

2 Andrew Redpath, chairman, British Brands Group, *Newsletter of the British Brands Group*, Issue 21, Spring 2005.