

# Choice-of-law Rules in Cross-border Copyright Disputes

- a comparison of Chinese law and European  
 Union law

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# Overview

- the Chinese legal system
- sources of choice-of-law in copyright disputes
- choice-of-law rules and judicial practice
- current problems and their causes
- legislative trends
- comparing with European Union law

# The Chinese Legal System

- 1949 establishment of the P.R.China
- 1979 adoption of “open door” policy
  - 1990 Chinese Copyright Law
  - 2001 Chinese Copyright Law amended
  - 2010 Chinese Copyright Law revised
- a civil law system
  - function of the Supreme People’s Court (SPC)

# Sources of Choice-of-law Rules in Copyright Disputes

- the General Principles of Civil Law
- opinions of the *SPC* on the Implementation of the General Principles of Civil Law
- international treaties
- answers of the *Beijing High People's Court* on choice-of-law in intellectual property cases

# The Role of International Treaties (1)

- there are no specific provisions in Chinese national law on their legal status
- they do not automatically become part of national law, do not automatically have domestic effect
- they do have binding force in domestic law in certain situation, except for those provisions to which China has made reservations.

# The Role of International Treaties (2)

- bilateral treaties
- Berne Convention
- Universal Copyright Convention
- TRIPs Agreement

# The Role of International Treaties (3)

- Tsuburaya (Japan) v. Guangzhou Lianhe Electronic Clock Factory (Guang Dong Province High Court, 2002)

dispute over Ultraman Image and Ultraman Clock



# The Role of International Treaties (4)

essence of the case: does a three-dimensional work (Ultraman clock) constitute reproduction of a two-dimensional image (Ultraman)?

- 1990 Chinese Copyright Law: no!
- both courts were guided by the Berne Convention and held that the defendant's acts infringed the plaintiff's reproduction right



# The Role of International Treaties (5)

- Goldlok Toys (HongKong) v. Qingdao Yufeng Trading Company (Qingdao Intermediary Court, 2003)

essence of the case: would foreign applied arts (made in Hong Kong) be protected in China?

# The Role of International Treaties (6)

- works of applied arts are not protected under Chinese Copyright Law
- the court
  - referred to the Berne Convention
  - referred to the Regulation for the implementation of international treaties 1992
  - granted copyright protection to a work of applied arts made abroad

# Applicable Law (1)

- no specific choice-of-law rules for IP disputes
- infringement may be covered by the choice-of-law rules for tort claims
  - *lex loci delicti*
  - common home state exception

# Applicable Law (2)

the SPC explains *lex loci delicti* as:

cumulation of “*the law of the place where the event giving rise to the damage occurred, and the law of the place where the damage occurs.*”

*If the two laws contradict each other, the court may determine which law should apply.”*

# Applicable Law (3)

the Answers (question10)

*“If a foreigner claims copyright protection for his work in China, Chinese copyright law shall apply to determine the existence, contents and ownership of copyright.”*

- *lex loci protectionis*

# Applicable Law (4)

the Answers (question 18)

*“As to copyright infringement committed outside China, if both claimant and defendant are Chinese or domicile in China, Chinese copyright law may apply.”*

- common home state exception

# Applicable law (5)

as a result:

- only Chinese Law, or
- some provisions found in the international treaties

and

**no** foreign laws will be applied to cross-border copyright disputes

# Cases (1)

judicial practice proves that:

**all** cross-border copyright disputes are adjudicated according to Chinese law, including the issues of initial ownership, existence, content and infringement of copyright



# Cases (2)

which choice-of-law rule was applied?

only in 5% of cases, some courts referred to choice-of-law rules

those courts applied:

- *lex loci delicti*
- *lex loci protectionis*, or
- the closest connection rule

# Cases (3)

## - *lex loci protectionis*

- Gorden Dryden (New Zealand) v. Li Hua Education and others (Beijing High Court, 2000)

dispute over the publication of the Chinese version of  
*The Learning Revolution*

held: since the place where  
the plaintiff claimed copyright  
protection is in China, Chinese  
law determine the authorship,  
content, scope and infringement  
of the alleged copyright



# Cases (4)

## - *lex loci delicti*

- Warner Music Hong Kong Ltd v. Kun Ming Haoledi Entertainment Ltd (Yun Nan Province High Court)

Dispute over showing plaintiff's MTV in a way of karaoke

held: since the place of infringement (showing the MTV) was in China, Chinese law applies to the issues of initial ownership, existence, content, infringement and remedies

# Cases (5)

95% of the cases did not mention choice-of-law problem. They demonstrate that there are two main approaches leading to the application of Chinese law:

1. direct application of Chinese law, or
2. *via* references to the Berne Convention or the TRIPS Agreement

# Applicable Law

summing up,

**only** Chinese law is applied,

occasionally, by reference to some provisions of the Berne Convention

Chinese law is applied as:

- *lex loci delicti*
- *lex loci protectionis*
- the closest connection rule, or
- by reference to international treaties

# Current Problems

- no choice-of-law analysis
- no clear and consistent choice-of-law rules
- no application of foreign laws
- no clarity how to deal with multi-states infringement

# Why is there no choice-of-law analysis?

1. lack of awareness of choice-of-law issues
2. misunderstanding of national treatment as a choice-of-law rule
3. strict understanding of “territoriality”

# Why is foreign law never applied?

1. no necessity of applying foreign laws
2. China is the place of infringement
3. China is the place for which the protection is claimed
4. the judiciary's natural preference for forum law



# Legislative Trends (1)

Chapter 9 of the draft Civil Book  
and

the 1<sup>st</sup> draft *Statute on the Application of Law for Civil Relationships Involving Foreign Elements*:

*“The national law of an author shall govern the issues of ownership, content and validity of the copyright.”*

# Legislative Trends (2)

the infringement of copyright: referring to  
choice-of-law rules in general tort claims

1. *lex loci delicti* (pro victim)
2. the closest connection rule
3. the common home state exception
4. party autonomy, but only *lex fori*

# Legislative Trends (3)

the 2<sup>nd</sup> draft:

1. intellectual property right :

*lex loci protectionis* or *lex originis*

2. assignment or licensing:

party autonomy; in the absence of the choice:  
choice-of-law rules for contracts

3. infringement: *lex loci protectionis* or party  
autonomy, but only *lex fori*.

# European Union Law (1)

infringement of copyright:

Art.8 Rome II Regulation

- *lex loci protectionis*: Art.8(1)
- *no party autonomy*: Art.3(3)

# European Union Law (2)

assignment or licensing of copyright:

## Rome I Regulation

- *party autonomy: Art.3*
- *the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence: Art.4(2)*

# European Union Law (3)

initial ownership of copyright:

- not dealt with in European Regulations

# Comparison

	Chinese: 2 <sup>nd</sup> draft statute	European Rules
initial ownership	<i>lex loci protectionis</i> <b>or</b> <i>lex originis</i>	national choice-of-law rule
infringement	<i>lex loci protectionis</i> <b>or</b> party autonomy ( <i>lex fori</i> )	<i>lex loci protectionis</i>
assignment or licensing	party autonomy, else: choice-of-law rules for contract in general i.e. the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence, <b>or</b> the law of the place where the contract is performed	party autonomy, else: the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence