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RESEARCH ARTICLE

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Analysis on the Legal Protection of Merchandising Rights in Characters

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Abstract The case of cartoon character "San Mao" triggers broad debates on merchandising right in fictional characters within the academic circle of intellectual property law. For lack of explicit legal provisions and theoretical supports, the final judgments of such cases may be unfair or inconsistent. By introduction to the origin of the merchandising right in fictional characters and the practice of its protection in the US, this paper holds that China shall learn from the US comprehensive protection mode in practice, give consideration to its protection standard formed in its case law, research typical cases and, if necessary, establish the standard on protection of the merchandising right in fictional characters by judicial interpretations.

Keywords merchandising right, fictional character, protection mode, protection standard

1 Merchandising Right in Fictional Characters: Review of the Case of Cartoon Character "San Mao"

1.1 Introduction to the Case: Conflicts between Copyright and Trademark Right

The plaintiff Chuyin Feng (wife of Leping Zhang, the deceased) et al.

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stated:[1] The famous cartoonist Leping Zhang had created the widely known cartoon character "San Mao", a little boy featured by a big head, a chubby nose and three hairs in his head. She owned the copyright thereof, which was registered at the Copyright Department of Shanghai. (Zuo Deng Zi 09-96-F-002) The plaintiff, as the legal successor of Leping Zhang, had the rights to use such works and obtain remunerations from such works in the copyright protection period. However, the defendant applied to register the cartoon character "San Mao" created by Leping Zhang as its trademark without authorization and began to use it broadly including outdoor advertisements, business cards of its employees, newspapers and internal nameplates of the company as its enterprise image. This was an infringement the copyright of the plaintiff.

The defendant (Jiangsu Sanmao Group) argued: The "San Mao" trademarks use was verified and approved by the Trademark Office of the State Administration for Industry & Commerce. It was entitled to the trademark right, and thus, the use of the registered trademark according to law should not constitute any infringement on the plaintiff. It also indicated in hearing of second instance that the cartoon character "San Mao" was not originally created by Leping Zhang. The original "San Mao", also with the features of a big head, a chubby nose and three hairs, was created by the world renowned Swedish cartoonist Oscar Jacobsson and had been introduced to China before Zhang's creation. Therefore, there was no relationship between the trademark registered and used by the defendant and the cartoon character "San Mao" of the plaintiff.

There were two issues in the case: Firstly, whether the plaintiff was entitled to the copyright of the cartoon character "San Mao", and secondly, whether the defendant's use of "San Mao" trademark infringed the copyright of the plaintiff. Based on the trail, the court held: (1) As to the plea of the defendant that the cartoon character "San Mao" was not the original creation of Leping Zhang, through comparison and analysis of the characters created by Zhang and Jacobsson, the court found that the two characters were different in age, face, facial features, posture and national style. They held that the cartoon character "San Mao" of Zhang was his original creation. Hence Zhang owned it's copyright. The plaintiff, as the successor, had the rights to use the work and obtain remunerations from it in the copyright protection period. (2) Although the defendant registered the graphic trademark of "San Mao" and obtained the right to the exclusive use of the trademark, according to the *Trademark Law of the PRC* and its *Detailed Implementing Rules*, such registration damaged others' prior right—copyright. Hence such registration should be canceled. As a result,

[1] Feng Chuyin et al. v. Jiangsu Sanmao Group, where the latter slightly revised the cartoon character "San Mao" created by a deceased cartoonist and inherited by the former as its registered trademark. http://www.lawtime.cn/lawcase/zscqal/200403116585.html, 2007-8-15.

the plea of the defendant was denied. The court of first instance decided that the defendant should stop its use of the cartoon character "San Mao" on its products and enterprise image and make a compensation of RMB100, 000 for the plaintiff, and that the litigation costs should be borne by both parties proportionally. The court of second instance affirmed the ruling of first instance.

1.2 Reconsideration: Whether the Merchandising Right in Fictional Characters Was Infringed

The Court determined that the nature of this case was that of conflicting rights under the copyright and trademark regimes. It held that a registered trademark could not be used to infringe others' prior rights. Intellectual property academic circles debate whether the defendant also infringed the plaintiff's merchandising right in the cartoon character "San Mao".

The merchandising right is a new right currently emerging in modern society. Cases, as well as research, based on this right began to occur during the 1930s through 1960s within the US and Japan. Due to further development of market economy, disputes over merchandising right have appeared in China. The research on the issues concerning merchandising right has been increasingly noticed by scholars. Debates on this new category of right are far from mature and there is still no consensus in many aspects. Firstly, this right is manifested by many different names such as "right of image" (Zheng, 2004), "right of publicity" (Wang, Yang, 1995), "right of public image" (Xue, 1996), "advertisement and publicity right of name and portrait" (Marks, 1989) and "merchandising right". (Yang, Du, 1998) The authors support the proposal of "merchandising right" in its most broad form. The authors hold that the merchandizing right is a right generated from commercial use of the images of real figures, fictional characters and other factors with a view to drawing attention of the public so as to reach the objective of business promotion. Secondly, there is disagreement on the nature of the merchandizing right, generally, there are several doctrines; "doctrine of new personal right", "doctrine of new intellectual property right" and "doctrine of intangible property". (Wu, 2004) With further prosperity and development of commodity economy, more and more substances can be merchandised, while the merchandizing right as a new right has not yet have its stable coverage. The merchandising right is on the fringe between personal rights and intellectual property rights. It is a marginal right, whose coverage depends on the determination of other relevant rights that can be changeable.

No matter how one defines the merchandising right, the purpose is to better the protection of the interests of the owners of rights, the design of any legal system is only a technical means. If a right or a legal relation involves multiple aspects,

it shall be regulated by use of multiple systems. The merchandising right is no exception to this general rule. (Yu, 2005) Thus, the debates in the academic circle does not hinder search for solutions to the disputes concerning merchandising right in the current legal system even though the right itself has yet to mature. In the case of cartoon character "San Mao", it is acceptable that the courts determined the nature of the case as the conflict between copyright and trademark right and then found the practice of the defendant infringed the copyright of the plaintiff based on the provision in the trademark law that any registered trademark shall not infringe the legitimate prior right of others. After all, the final judgment safeguarded for the most part the rights and interests of the owner of the merchandising right.

2 Consideration of the Current Situation of Protection of Merchandising Right in Fictional Characters in the US

Since the merchandising right is not sufficiently developed in China because theoretical research has only been done at a low level, it is important to consider how other states implement this right. The Chinese legal system can draw from the US' implementation of this right for fictional characters.

2.1 Merchandising Right in Fictional Characters in the US: From Accessory to Independent

The merchandising right in fictional characters is part of the theoretical system of the merchandising right. This right has developed from an accessory to the privacy right to independent right

The Haelen Laboratories Inc. v. Topps Chewing Gum in 1953 was a milestone case in the history of the development of the merchandising right. In this case, Judge Frank clearly put forth the concept of the "merchandising right"[2] for the first time. He stated: "We think that, in addition to and independent of that right of privacy, a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture…This right might be called a 'merchandizing right'. For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses,

[2] Since some scholars in China translate it as "merchandising right" and some as "right of image", it is not translated here for avoidance of doubt and respect of the original meaning. The author supports the translation as "merchandising rights".

trains and subways." [3] (Li, 2003) Here, Judge Frank distinguished the "merchandising right" from the right of privacy, no longer confining use of others' image for business purpose to the right of privacy. The "merchandising right" was defined as an intangible property right, irrelevant to the personal right, which may be transferred freely. The next year, Prof. Melville Bernard Nimmer, US celebrated scholar in intellectual property right, published his paper entitled The Right of Publicity. This paper held that what celebrities need is protection of the business value of their identity and the right to control the business value of their identity, rather than their privacy. With joint efforts of Judge Frank and Prof. Nimmer, the concept of the "merchandising right" had been established and defined as a property right. Since then, the "merchandising right" had been derived and independent from the conventional right of privacy.

According to the objectives which were frequently applied in the business field at that time, the US academic circle divided the "merchandising right" into the "right of publicity" and the "right in characters".[4] Characters were protected as real figures (e.g. historical figures in films or persons still alive in reality) and fictional characters (e.g. Mickey Mouse) accordingly and the relevant right listed in the "right of publicity" and the "right in characters". The Right in Characters was further divided into the merchandising right in literary characters and the merchandising right in cartoon characters. As for the characters portrayed by real persons in films (e.g. the Superman acted by Christopher Reeve), they would be protected by the right of publicity or the right in characters, as the case may be.

2.2 Protection Mode and Standards of Merchandising Right in Fictional Characters in the US

The US has adopted a comprehensive mode combining copyright, trademark rights and the anti-unfair competition laws to protect the merchandising right in fictional characters. This formed a rather distinctive protection standard in judicial practice.

2.2.1 Protection by the Copyright Law

2.2.1.1 Standard for Protection of Literary Characters

Literary characters refer to the fictional characters that mainly appear in novels

[3] See Haelan Laboratories, Inc. v. Topps Chewing Gun, Inc. 202 F. 2d866 (2d Cir, 1953). For details, see Li Mingde (2003).

[4] Some scholars translate "Right of Publicity" as "Gongkai Quan" and some scholars translate the Right in Characters as "Juese Quan".

which are completely created by description. There are two influential standards formed in the judicial practice in the US, namely the "Nichols" standard and the "Sam Spade" standard. (Lin, Song, 2005)

The "Nichols" standard was formed in Nichols v. Universal Picture Corp. Judge Learned Hand pointed out, in analysis of the case, the protection of copyright should not be limited to the text of the works in itself, but be extended to characters. The more sufficiently a character was described, this is the more distinctive features the character had, the easier for the creator of such character to be protected by copyright law. Two conditions should be satisfied in deciding infringement: Firstly, the character infringed should be original with sufficient description. Secondly, the infringing character should be very similar to the character infringed. This can be shown by what was copied was the unique expression formed at description of the character in the original works, rather than of an extensively abstract character type.

The "Sam Spade" standard was established in Warner Brothers Pictures v. Columbia Broadcasting System. This case was tried by the 9th Circuit Court of Appeals in 1954. According to this standard, it is conceivable that the character constitutes the story being told. If the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright. Only those fictional characters that constitute the entire contents of a works will be protected by copyright law. The "Sam Spade" standard narrows the coverage of protection of literary characters when compared with the "Nichols" standard.

Since the "Sam Spade" standard was excessively abstract and rigor as to the works meeting such standard should be completely or substantially constituted by description of characters without any plot, almost no character in literature meets this standard. Hence some courts refuse to adopt it but instead choose to apply the "Nichols" standard. However, the latter is excessively flexible. Therefore some US scholars proposed a two-step method to find infringement: Firstly, the characters must be analyzed to decide whether the appearance of similarity exceeds the level of similarity one would expect to find in that specific type of character. Secondly, if the similarity between the characters is not merely due to the two being of the same type, substantial sufficient similarity should be found to constitute infringement. Additionally, the subtlest similarities between the two characters shall be analyzed to find whether the suspected infringer copied the expressions that constitute the unique style of the original character. (Ye, 1998)

2.2.1.2 Standard for Protection of Cartoon Characters

The standards for protection of cartoon characters are not as strict as those for

literary characters. Based on a large number of cases within the US, it is clear that cartoon characters, as a unique expression, enjoy independent copyright protection. The appearance of cartoon characters is the basis for finding both copyright protection and infringement. If others use the appearance of a cartoon character, without authorization and regardless whether the plot is copied, even if it personality is different, mere similarity in appearance is enough to constitute infringement.

The typical case in this regard is Walt Disney Productions v. Air Privates. (Li, 2004) In this case, the defendant copied the graphic depictions of Disney's 17 cartoon characters for its cartoon magazine "Counter Orthodox Culture" marketed to adults. The defendant went as far as copying the names of the plaintiffs' characters. In the defendant's cartoon magazines, such characters as Mickey Mouse and Donald Duck became a group of trouble makers. They were free thinking, promiscuous and drug eating; totally losing their original innocent, delightful and lovely images. The plaintiff claimed that the defendant infringed Disney copyrights by copying its cartoon characters. The defendant stated that its use of the characters was not copy of original works, and fictional characters were not independent objects protected by copyright law. The court held that Mickey Mouse and other well-known Disney's characters could be completely separated from their underlying stories and protected by copyright law independently. Although the cartoon characters could not reflect the structure of original works, because they were an extremely important part of its works and of intuitively and fixedly specific image containing certain unique expression, the coping of the appearance of a cartoon character was enough to constitute infringement of copyrights.

2.2.1.3 Standards for Protection of Characters in Motion Pictures and TV Programs

Characters in motion pictures and TV programs hereby only refer to the fictional characters in literature and cartoon works portrayed by real persons in motion pictures and TV programs. For example, Superman was portrayed by Christopher Reeve and Lara in *Tomb Raider* by Angelina Jolie.[5] When characters are portrayed by real people it creates a peculiarity. These people contain features of literary characters, playing a role determined by a script on the one hand but visually maintain a real image. In the US judicial practice, some courts treated such characters as literary characters. Whereas others emphasize their appearance

[5] Since the characters in motion pictures and TV programs relating to real persons (such as historical figures) are protected by the rights of image, they are not irrelevant to the merchandizing of the fictional characters.

visually described and adopt the standard for protection of cartoon characters and some adopt both protection standards. Thus, there is no unified standard for the protection of the copyrights of audio-visual characters. (Jiang, 2006)

2.2.2 Protection by Trademark Law and Anti-unfair Competition Laws

US scholars hold that the protection of the right in characters by the anti-unfair competition law and the trademark law are similar. The Main difference being that the coverage of anti-unfair competition law is more extensive. Some characters of labeling functions for the sources of services and commodities that have not become trademarks in a strict sense naturally cannot be protected by trademark law, but the protection by the anti-unfair competition law is available for avoiding public confusion. (Helfand, 1992)

2.2.2.1 Fictional Characters Shall Have a "Secondary Meaning"

The US trademark law allows for a "secondary meaning" to develop in characters. This is a single and fixed mapping relationship has been formed between a character and commodities and services so that the commodities and services represented by the character become another meaning of the character. (Wu, Hu, 2001) The trademark law and the anti-unfair competition law protect the capacity of the public to distinguish the sources of commodities and services by reliance of special marks. Thus, only the fictional character that matches the source of certain specific commodities or services can become a mark for the public to distinguish the source. If a character may relate to several sources, it may not be protected by the trademark law and the anti-unfair competition law.

In Universal City Studios v. Nintendo, a series of subjects shared the right in the character King Kong. RKO Company was entitled to the copyright based on the film King Kong released in 1933. DDL Company was also entitled to the right in the character as it reproduced the film King Kong in 1976. Richard Cooper as the successor of the scripts of the film was entitled to the copyright of the novel and the magazine King Kong. The plaintiff Universal Company accepted the copyright of the novel and the magazine King Kong from Richard Cooper. Through a trial, the court rejected giving protection according to the anti-unfair competition law since King Kong was related to many right holders. Thus the character lacked "secondary meaning" and unable to serve as a mark for a single source.

2.2.2.2 Use of Fictional Character Leading to Confusion of Sources to the Public

Unauthorized use of characters of others' works may fall into two types of unfair

competition, the first being confusion of the source of commodities or services or unreasonable use of others' results that has been recognized by consumers. In the US judicial practice, "action of passing off" and "action of misappropriation" may be filed for the aforementioned two practices. (Sun, Gong, 2003) In an "action of passing off", the plaintiff may win the action by proving the use of the character by the defendant will confuse the public about the source of commodities or services. The "action of misappropriation" comes from the axiom in equity. It holds that "One may not reap where another has sown", where the use by the defendant uses of the plaintiff labor results from a lot of efforts and financial input of the plaintiff without authorization constitutes infringement of others' business interests.

The "action of passing off" is based on the existence of false statement. Hence if the producers of the goods have adopted adequate measures to prevent consumer confusion as to the source of origin, for example, issuing "declaration"—announcing on the products that used others' characters that there is no relationship between it/him and the related right owner of the character—unfair competition may not be constituted. In this regard, it shall be pointed out that it does not mean a producer of goods may freely use the market or trend created by others' characters only by adding a "declaration" on his products, as the related right owner may still seek for protection of its/his merchandizing right in characters by reliance on the relevant standards of the copyright law. Although it/he may not win the "action of passing off" as the infringer's practice does not confuse the public.

3 Implications of the US Practice for China

3.1 Cartoon Characters May Be Protected by Copyright Law as Independent Subject: Reviewing the Case of Cartoon Character "San Mao"

"San Mao" created by Zhang Leping is intuitive, a visual image depicted with lines and colors by hand and a specific image formed by combined use of lines, outline and colors. It is neither an abstract concept nor an abstract idea. This shows that "San Mao" is a unique expression in itself and may be protected by copyright law as independent object. "San Mao" has become one of the cartoon characters of the highest influence and most welcomed in China. If such influence of "San Mao" is used in the business field, the good will of the figure by the public may pass to the products carrying it. The defendant further developed the cartoon character "San Mao", registered it as its trademark and used it for publicity of its enterprise image on outdoor advertisement, business cards of its employees, newspapers and internal nameplates of the company. This

was actually a business use of the character "San Mao" for the purpose of strengthening its business competitiveness, promoting its products and hence obtaining profits. Such practice infringes not only the plaintiff's prior lawful right—copyright, but also the merchandising right in the fictional character of cartoon character "San Mao" of the copyright owner.

3.2 A Comprehensive Mode for Protection of the Merchandising Right in Characters is Appropriate

There are two theoretical modes of protection of merchandising rights in China. One upholds the independent protection mode, whereby an independent merchandising right shall be established and the legitimate status of the merchandising right shall be legislatively established, thus, no longer letting a shadow of such civil rights as personal right, copyright and trademark right. The other is the comprehensive protection mode. However, some domestic scholars hold the comprehensive mode will excessively protect fictional characters and restrict the recreation of works.[6]

Regardless of which mode is more effective, in theory, the merchandising right as such is a kind of comprehensive rights. In the current environment the independent protection mode is infeasible. Firstly, the discussion on the merchandising right is thus far only an introspection on practice based on academic theories. Any primary thinking and specific legislation shall be based on further analysis on the issue and the relevant cases. Secondly, the establishment of a relatively mature system necessary to adopt an independent legislation requires a long time of preparation. As US Judge Holmes put it: Unless obvious interests may be acquired from adjustment of the present situation, legislation, as a bulky and expensive machine, shall not be started. (Liang, 1990) Thirdly, the merchandising right is only a theoretical discussion and though it is supported by judicial precedents in the US, there is no country that has established a special law to protect it. As for China, whose market economy needs to be improved and developed, more prudence is required. Consequently, the authors hold it is more appropriate to adopt the comprehensive protection mode, whereby the protection of the merchandising right in fictional characters may be incorporated in the current intellectual property law system

[6] Such scholars hold that such legislative mode embodies the expansion of the anti-unfair competition law to the field of copyright law. Since in the anti-unfair competition law the protection means are relatively flexible, the protection conditions are relatively low and the protection period is relatively long, there occurs the issue of excessive protection of fictional characters. For details, refer to Lin Yana and Song Jing: "Legal Mode and Experiences of the US Protection of Fictional Characters", Journal of Guangxi Administrative Institute of Politics and Law, Issue 9, 2005.

and the comprehensive protection mode by combining the copyright, trademark and anti-unfair competition laws.

3.3 Objectively Treat the Standards for Protection of the Merchandising Right in Fictional Characters Formed in US Case Law

The US has distinguished literary characters, cartoon characters in motion pictures and TV programs through interpretation of precedents by judges when forming the standards for protection of the merchandising right in fictional characters. However, it is impossible for China to form new protection standards in judgment of cases like US judges. We may attempt to establish the standards for protection of the merchandising right in fictional characters by judicial interpretations, if mature, based on introduction and research of typical cases.

In the judicial practice of China, disputes concerning the merchandising right in fictional characters have begun emerged, but there was no unity of justice in practice due to absence of specific underlying provisions. Though China does not normally implement case law, the cases discussed in courts and publicized actually play a role of guiding trial and unifying justice. Courts may publish judgments of typical cases concerning the merchandising right in fictional characters at proper time. In those judgments, reasoning shall be accurate and thorough. Demonstrations shall be clear and sufficient, without simple list of legal provisions. In content, analysis and demonstration shall be improved with more persuasive grounds and more rigorous reasoning. This will highlight the standing for protection of the merchandising right in fictional characters established in such judgments and improve the logistics and authority of protection methods and standards. The Supreme People's Court may collect and publish judgments of typical cases in a timely manner. If there is any similar case in the future, judges may refer to the relevant cases on application of laws and discretion. With this, the protection standards for protection of fictional characters existing in precedents will imperceptibly enlighten judges and serve as a guidance function. This will consequently be extensively applied and tested and may be improved in practice. Finally, if mature in time, the Supreme People's Court may form the standards for protection of the merchandising right in fictional characters of binding force and general application through judicial interpretation.

The US standard of protection for merchandising rights were formed from case law, for the same objective China should learn from this standard. Firstly, the practice of distinguishing literary characters, cartoon characters, characters in motion pictures and TV programs and adopting different protection standards accordingly is worth learning. Literary characters are described by linguistic signs and their images only exist in the imagination of readers without direct action on the organs of feeling of people. According to linguistic description of

authors, readers recover such characters through imagination by combining their personal experience and way of thinking. However, cartoon characters are created by use of lines, outline and colors, which are more intuitive than literary characters that are no longer abstract concept or idea, but specific and fixed visual images. Since literary characters are of no specific images, they are rarely used in business activities. While the distinctive personalities of cartoon characters are good materials for commercial use. Different protection standards are necessary due to the differences between literary characters and cartoon characters. Secondly, China may adopt the US's practice of protection of cartoon characters by copyright law as independent objects. The reason why cartoon characters can be protected by copyright law is that such characters are of independence standing. The restriction on the independent protection of characters by copyright law mainly comes from the principle of "dichotomy of idea and expression", the core of which was that what is protected by copyright law is not the idea itself but the form of expression of that idea. According to this principle, when and only when a character has formed a unique expression may it be protected by copyright law; while if it remains at the level of the abstract type of characters without sufficient depiction, it will not be protected by copyright law. Since cartoon characters are visual pictures formed with lines and colors drawn by hand or computer in cartoons and cartoon films and TV programs and specific and fixed images created by combined use of lines, outline and colors, they are more intuitive than literary characters. Rather than remaining as abstract concept or thinking, it may be said that cartoon characters are a unique expression. Thus protect them by copyright law as independent object does not go against the principle of "dichotomy of idea and expression".

Judges' discretion will play an important role while learning from other countries the standards of protection and creating one for China. Judges may not refuse to make decisions due to lack of statutory laws, and the relative stability of laws and social changes will certainly cause some vacancies in law. When there is no explicit provision on the merchandising right in fictional characters, it is proper for judges to reasonably extend the connotations of the current intellectual property law. The use of a correct and thorough understanding as well as comprehensive analysis on the principles and objectives of intellectual property is to incorporate the merchandising right into the law.

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