

*“China is another world, one that has been created independent of our thought categories and our reference, a world that questions what we have always taken to be universal”.*

François Jullien

#### **A cultural environment favourable to the copy**

In Confucian theory, the copy is not seen as something negative. Indeed, to reproduce something stroke by stroke, to basely imitate a work, is to reproduce the original work of the master. The copy that is a faithful execution of the original work is in no way perceived as a fraud. Thus, regarding the first classic period of Chinese pictorial art (The Tang Dynasty) François Cheng notes that Chinese pictorial art has always made room for copying with the freedom to “re-interpret” an original work: “the long history of Chinese art constantly brings together, values of continuity and renewal that are apparently totally opposed, in a way that is complementary and joined”<sup>1</sup>. This tradition of the copy that comes up naturally about China is not confined to the Far East. The copying tradition was born in Italy and was very widespread. The grand masters such as Raphael or Le Guerchin<sup>2</sup> can be used as an example of this type of speculation as they had their students copy their paintings, would add a few final touches and then sell

the painting as their own. There were even workshops, veritable organisations of disciple copiers under the aegis of the master. This practice became so common that copies became the norm. The copy was aimed at art lovers who could not own the originals and called on the copiers to paint them perfect imitations of the grand masters<sup>3</sup>. In painting, all the more so for the development of reproduction techniques like printing and engraving, the copy industry spread and continued its development throughout France, Germany, Russia and later in America. A number of works were carried out ‘d’après’ or in the manner of one master or another without the pieces being considered counterfeit. The only area in which the notion of the copy is limited is sculpture. The high cost of materials and the complexity of the work, the absence of reproduction techniques inhibited the production of copies, with the exception of antique copies<sup>4</sup>. We must also admit that the notions of imitation, found both in the East and the West, largely contributed to the development of fine art. Didn’t Jean-Jacques Rousseau say that “the spirit of imitation produced the beaux arts”.

On a more global level, Chinese writing as it is made up of characters and drawings reflects a representation of reality. The character represents the object in question in a stylised manner (table, house, etc.). Each word corresponds to the character drawn. The mentalities are more structured due to the relationship to the copy, with an imitative representation between the sign and the referent, between linguistic expression and reality. As Muriel Detrie says “Chinese writing thus presents an advantage over alphabetical writing, it shows the world directly, without using sound as an intermediary and using arbitrary symbols”<sup>5</sup>.

Closer to home, Paul Claudel, took a great interest in Chinese writing. In “Religion du Signe”, in 1896, he wrote about China that “the writing is mysterious as it speaks” without passing through the intermediary of sound. In order to escape the linear reading

of the French language, at least at first, Paul Claudel made an attempt to insert Chinese ideograms in at least two of his poems: *Cent phrases pour éventail* (One hundred phrases for the fan) (1927) and *Idéogrammes occidentaux* (Western ideograms)(1944). He tried to adopt a hand-written form of writing, that through the shape and position of the letters, would offer “a certain representation of the objects it signifies”.

### **The construction of intellectual property rights in China**

Besides the links between East and West, if we return to the subject of China, it is certain that personal creativity was not permitted in China for many years. Let's not forget that the political system between the fifties and the seventies left no place for creativity, and especially in clothes. People wore Mao jackets or shirts in grey or black, the only opportunity for variation was the number of pockets. Design was not even conceivable. So there was no fashion and design school in the seventies and eighties. For many years the only design allowed came from abroad, imported or fake.

In addition to a Chinese cultural context that was favourable to copies, in particular in the aesthetic domain, the economic situation must be taken into account. Fakes are part of the economic reality in China and provide a living for two millions Chinese people in mainly rural areas. Entire regions, among them the regions of the south west, work on manufacturing these products with a low level of added value and the question of fakes has a social dimension. The level of growth in China for the past 20 years has been such that it is no longer possible, on an economic level, to accept this unprecedented increase in fakes and copies in all areas<sup>6</sup>. The fight against world-wide copyright infringement and intellectual property rights has become a major issue for international organisations and governments. The phenomenon of fakes in China is less and less acceptable.

The protection, defence and valorisation of property rights has for a long time been monopolised by a few Western countries, in particular in France where a legal system for the protection of author's rights has existed for years, but is now becoming a part of the development of all states. As part of the Gatt negotiations in the Uruguay Round (1986-1994), the fight against copyright infringement on a world-wide basis was outlined as a priority, and marked the start of a protection and valorisation process for intellectual property rights within each of the states who signed the agreement in favour of international harmonisation. China can no longer ignore the problem of copies, as it now represents between 15% and 20% of Chinese industrial production and 70% of all fakes world-wide. Recognition of intellectual property rights was even one of the conditions of China's joining the WTO. Since it joined the WTO in 2001<sup>7</sup>, China has made a commitment to establish a system of protection of intellectual property rights and has signed the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights).

The simple notion of the protection of intellectual property rights came to light in China in 1979. Until then the very notion didn't even exist in as much as it referred back to the notion of a “property” that was collectively owned by the state. It took 20 years for China to meet international trade demands, for the concept of property to be then recognized and for the establishment of a national office for intellectual property (SIPO). From that point on, China now had a legal framework and established structures in order to protect, defend and valorise property. To this effect there is a brand office (TMO) that registers well-known brands. This office functions well and is a testimony to the extreme vitality of Chinese society. In 2005, over 588 000 brands were registered! This placed China in first place in terms of patent registration, in front of the U.S. Out of the 588 000 brands, the proportion of foreign brands patented in China is minimal, (5% to 10%)<sup>8</sup>.

The Chinese are becoming progressively aware of the issue of patenting. They have begun to register all names, Chinese and Western, even if it means selling them on at a profit to those interested in the brand. Products and service brands can be registered with the exception of sounds and smells. The main criteria for any registration remains notoriety. Obviously the main difficulties occur more in the way in which a "well-known brand" is defined than in the actual registration procedure which is quite straightforward. What is a well-known brand? This is a complex question as many brands are unknown to the general public. In this case, the registration procedure may be held up and take over three years as opposed to under one. This can be a drawback for Western brands, especially for smaller businesses who have never traded in China before and are relatively unknown, unlike the big corporations whose level of renown is easily established.

The registration procedure gives protection on a national and export level. There is a voluntary registration procedure through customs that is quite easy and that extends the protection to all of the customs in the country for three years. Customs seizures are on the increase. The non-authorized use of a registered brand constitutes an infringement of the penal code and the guilty party can be liable for a fine or a prison sentence of up to seven years. In the area of *designs and models*, the situation is more complex and the WTO didn't manage to impose a clarification of the system. In France or in Germany, the protection of designs and models is governed by a particular law that applies the theory of the unity of art. In China, the protection mechanisms for designs and models are vague and bring together copyright legislation and author's rights legislation. The protection of design and models can be cumulative with that outlined for the protection of author's rights, on condition that the design or model is perceived to be an artistic work, according to the author's rights law. A procedure for the registration of designs and models does

exist but it is long-winded and complex. It entails a very in-depth analysis of the notion of originality of the design or model with a six-month waiting period, even though for most design products this waiting period makes no sense.

What are the guarantees supplied by this legislation? From a *jurisdiction* point of view, two systems have been established: on the one hand, an *administrative* system that enables administrative agents to put a stop to acts of copying immediately. However, this system is not very dissuasive as, unlike the French system, the fine is linked to the faked product and not the authentic product. The actual owner of the rights receives no damages, the damages and interest go straight to the government. In addition, foreign companies are at the mercy of local administrations. On the other hand, the *judicial* system is built around a civil jurisdiction and a penal jurisdiction. The strength and the wealth of the system comes from its specialisation, on the first level the specialised chambers in property and then specialised courts for patents, brands and designs. The jurisdictions are based around the 31 administrative regions on three levels: local, municipal and provincial. Despite a very solid organisation, the Chinese legal jurisdiction system can be faulted on many levels. The magistrates are not really independent. Their power is variable as they have to put up with political and administrative pressure. In addition to this, with the exception of cities like Beijing or Shanghai, the training levels for magistrates in intellectual property rights is not adequate. The law is not well known. And there is a real gap between the judicial norm that outlines property rights and its application. In practice, seizures are hard to carry out, the dealers are often tipped off about the raids, it is rare that the material and merchandise is seized. The dissuasive effect remains limited and the court judgements are not publicised on Chinese territory and can be appealed. In general, judicial practice shows that favourable judgements are more likely to happen for the home side rather than the

foreign party. So, in the affair that brought *Microsoft Corporation against Shenzhen Reflective Materials Institute* in 1992, the Microsoft copier that had produced 650 000 CD ROM holograms was made to pay up \$252! More recently, in September 2005 in China, five foreign groups, Burberry, Chanel, Gucci, Prada and Vuitton made a common claim for \$300 000 damages against the owners of a Beijing silk market. The claim has just been validated by the civil court who forced the faker to pay \$13 000 in damages<sup>9</sup>. However, in a more general manner, there is a real will in China to control and prevent copying and fakes.

At a central government level, the issue is dealt with by Madame Han YU, the deputy Prime Minister who dealt with the outbreak of SARS in 2003. The idea is to change the attitudes and approach to copying and fakes in China, to encourage exchange on an international level so as to set up an effective protective system. For the past two years, the Chinese authorities have shown their willingness to co-operate with the large foreign multinationals (Philips, L'Oréal, etc.). Awareness campaigns about copying have even involved television advertisements aimed at raising the level of awareness among Chinese consumers. Unlike other large countries in Asia, such as Thailand<sup>10</sup> where there is no political will, or Vietnam<sup>11</sup>, where the situation is very unstable, China is going forward with creating the legal framework to deal with fakes and is trying to have it enforced. This entails a progressive awareness building among consumers and companies. Up until now, there have been mainly "one-off" operations carried out to make the Chinese population and tourists aware of the dangers of copies and fakes. In December 2005, seizure operations were carried out at production sites in coastal towns but also in certain provinces.

### **An economic environment that in the long term will encourage the creation of wealth**

The concept of copying must not be limited to the idea of copying an identical product.

The problem must be approached from a broader point of view of the "copying of an industrial strategy": copying a process, mastering a method, copying materials, products, marketing strategies and distribution networks. We are now going to review the different "eras" of a counterfeiting country.

#### *1. The basic copy*

Like in most developing countries, China produced copies of mediocre quality for a very long time. With access to mass production, Chinese entrepreneurs tended to produce rough copies with varying degrees of success in all areas: luxury goods, food, medicines, automobile equipment etc. In this case, the products were aimed at two different markets. On the one hand the domestic market: the consumer is unaware of these questions and is interested in finding a product at a low price, around 10% to 30% of the price of the original product. Copies are sold in the street or at the local markets (the Xiang Yan Lu market in Shanghai, the silk market in Beijing...) by small mobile traders. The main buyers are Chinese people with little or no awareness of questions of copying or Western tourists. The brand names are even often slightly altered: "Yves Saint Florent or Léon Vuitton", and the logos are badly reproduced like a Lacoste crocodile standing in front of a Disney-like castle. The other market for these products is international: it involves illegal and illicit trading through precise channels like the Middle East, which acts as a stop-off point before moving on to Africa and Europe. The lack of awareness among the general public and companies on questions of copying enabled the industry to flourish for a long time.

#### *2. The perfect copy*

In the second stage of a country's industrial development, we see a perfectly mastered production process and a copy that is as good if not sometimes better than the original. We see an increase in quality on both a

product and packaging level. The example of perfumes illustrates this perfectly. The fake products use “jus” (the basis for a perfume) of excellent quality, this was not the case 5 or 10 years ago, and the packaging has reached a high level of quality (excellent cardboard, packing, correct use of colours, tones, font). These type of copies that at first were concerned with luxury or sports goods spread very quickly to other, more complex sectors (toys, cosmetics, pharmacy, children’s milk formula, medical equipment, car parts), to sectors that directly involve people’s health and safety. They are generally sold for 20% to 30% less than the original product. In certain cases, it is very difficult to spot the fake, it is often of equal if not better quality. The Chinese manufacturer has the same equipment at his disposal that is used by the Western client and does not hesitate to use it illegally outside official orders. They then propose the same product, from the same production line with or without the brand. In 2003, hundreds of children died from fake formula milk that was rich in starch but had no protein.

High-quality fakes are aimed partly at the domestic market. In fact, with the current commercial and economic boom, the demand for good quality fakes has risen, with a clear preference for foreign products, especially accessories. The price of a fake Prada bag is about 8 euros, a Chanel watch goes for 8 to 50 euros depending on the range. These fakes, that once only touched the coastal cities are now heading inland to the smaller urban areas (Chengdu, Dalian, Shenzhen, Wuhan...). A Chinese woman with a high standard of living consumes fake luxury products as well as genuine ones. She will often own an original and several copies in different shapes and colours. There is no competition between the fake and the real, more a complementary relationship: the conjugation of two purchases from two different supply sources. We could almost see it as an ecosystem between manufacturers and fakers. In addition, the distribution has become more sophisticated. It is no longer limited to retail outdoor markets. Wholesale

markets have developed in a considerable manner in the main zones in China the north, the centre (Yiwu market, Zhe Jiang Province), and the south (Yi fa market, Canton province) and are segmented according to product type (cosmetics, car parts...). In addition, shopping centres given over entirely to counterfeit goods exist especially in the south and enable consumers to buy all types of imitation products.

As for the international market, the high quality copies are principally manufactured with the Middle Eastern market (Dubai...) and Russia in mind. This illicit trade relies on local and provincial corruption and bribery. The profits, which are obviously huge, finance criminal and Mafia networks. We have also seen the development in recent years of fake boutiques on the Chinese market. This is a relatively recent phenomenon. It is linked to the development of brand policy and the wish to stand out at the point of sale. The most striking examples have been Vuitton and Burberry where fake shops which reproduce all of the identifying marks of the brand have been reconstituted, from the architectural concept to the window displays even to the shop assistants who wear the same clothes.

As we noted above in the area of brand registration, there are Western brands that have not been registered and whose identity is copied to perfection by Chinese fakers. In this case, the Chinese party is taking full advantage of this legal loophole to copy both the concept and the images. This is the case most notably with brands with a strong identity that is taken up under another name. We can give the example of the brand-shop *Caminae*, an identical copy of the “provençal” concept of the brand l’Occitane or the brand Xing Bake, an identical copy of Starbucks. In these cases, we are dealing with almost perfect copies that showcase the savoir-faire of the Chinese copier in terms of production but also in terms of marketing. This complete control of the manufacturing and distribution process is reminiscent of Japan in the eighties. In the

industrial domain, the question of copies becomes even more complex as Chinese strength relies on Europe-China joint ventures that plan transfers of knowledge in the long term. For example the Airbus sales in 2005 show how crucial the question has become. At what stage will we see a transfer of technology that will give the Chinese total control over the know-how?

### *3. Creating the value of a product and the development of intellectual property rights.*

The final stage in the mastering of intellectual property will have happened when China is capable, in addition to its capacities for production and marketing, to develop the creation of value for its own products (design/innovation/research) and to appear with a new, totally original marketing approach. The example of Japan shows that a high level of technological and scientific accomplishment is needed in order to copy the original product well and add to its value. Today, China has the highest trade surplus without any high profile Chinese brand, but this will not last. In the universe of fashion and luxury goods the situation changes rapidly. Chinese designers want to design, not copy. Personal design has begun not only to be allowed but to be encouraged. A certain number of purely Chinese brands are emerging (LiMing for sport, Ports or Yi Fe in women's fashion, Chin Fe for cosmetics...). These brands represent true Chinese artistic creation. When this approach spreads and the products are not just for the domestic market but also for export, the protection of design and creation will become essential and an accelerator for the protection mechanisms will be inevitable. It is true that it would be difficult for China to put mechanisms for the protection and valorisation of property into place that are operational immediately. It will happen through education which must happen within companies (both Chinese and foreign) and an increase in consumer awareness. The advances that have been made in this area by the Chinese authorities will be even more determinant in that they

will have a knock-on effect for the development of property rights all over Asia, today a zone of unregulated production and a breeding ground for fakes and copies.

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1. François Cheng, *L'espace du Rêve, 100 ans de peinture chinoise*, Phébus, 1981.
2. Le Guerchin was expertly copied by his brother-in-law Ercole Gennari and his nephews Benedetto and Cesari Gennari.
3. Simon Vouet was pastiched by Claude Goyard, Poussin by Angelica Kauffman, Claude Lorrain by Borzone, Watteau by Deshayes, Greuze by his daughters.
4. Antiques manufactures in Rome, Naples or Florence.
5. Muriel Detrie, *France-Cbine. Quand deux mondes se rencontrent*, Paris, Découverte, 2004.
6. Chinese economic growth was 9,6 % between 1979 and 2004. It reached 10,1 % in 2004, *Les Echos*, January 25<sup>th</sup> 2006.
7. China joined the WTO on December 11<sup>th</sup> 2001 marking its will to join the powerful nations of the world, Minefi-DREE, China.
8. France is number 5 among foreign countries for registering brands.
9. *International Herald Tribune*, January 4<sup>th</sup> 2006.
10. A big producer of copies and fakes (parallel imports or pure counterfeit), Thailand is not a member of the WTO nor did it sign the TRIPS.
11. For Vietnam, the question of the country joining the WTO could entail the establishment of a minimum standard of rules to fight unlawful copying.