

Discussion on the Principle of Freedom of Imitation*

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Imitation in a commercial environment is sensitive. Freedom of imitation as a concept is even little short of danger. However, it is neither realistic nor rational to absolutely reject imitation and freedom of imitation, which is just like throwing the baby out with the bathwater.

I. Meaning

The word “imitation” is rich in connotation and indicates the study and utilization of prior achievements at dif-

ferent levels. Any relevant conduct from 100% copying to new achievements resulting from just a little inspiration, can be considered as imitation.¹

1. Imitation in a narrow sense

On account of the abundance of meanings of the word “imitation”, it may be replaced on different occasions by other words, such as learning, reference, plagiarism, reproduction, copying, piracy, copycatting, etc.² For easy discussion, here the meaning of imitation is strictly defined as follows: a reproduction that is substantially similar to oth-

ers' spiritual achievements. It is for sure that the imitation in this sense also covers identical copying.

2. Freedom of imitation

Freedom of imitation is the freedom of a party to carry out an imitation on its own. Freedom is in essence a right. Far more than that, freedom is a more powerful expression of right as it indicates its relation with the basic law.

While discussing the freedom of imitation, it is necessary to exclude the following situations: first, the imitation directly and definitely violates the intellectual property rights or other relevant civil rights of others. Under such circumstances, infringement is out of question and leaves no room for the freedom of imitation. Second, an imitated object stays completely in a public domain, and therefore others' private rights could be, in no way, violated. On this occasion, a party lawfully acts and his action has no relation to any private rights of any other person, so there is no need to use the freedom of imitation as a defense.

It can thus be seen that the freedom of imitation as understood herein applies to the gray area of the law, i.e., the areas where specific rules have not been set yet. Only in gray areas can a party finally have the opportunity to give the free rein to its imagination, participate in the game, maximize its own interests, and meanwhile get ready for the final judicial judgment and possible legal consequences. Since laws are abstract rules expressed in language, ambiguity inevitably exists. Moreover, because of the intangibility of intellectual achievements, it is much difficult to define intellectual achievements than physical objects. Thus, the gray area of the law always goes hand in hand with the protection system (intellectual property laws) of intellectual achievements.

In addition, such a gray area itself is also a turbulent zone on the grounds that on the one hand, with the development of legal practice, regulation system becomes more complicated and thorough, thus reducing uncertainty; and on the other hand, due to continuous technological progress and ongoing economic prosperity, the emergence of new business models will give rise to new uncertainties.

In short, such a gray area will exist and keep changing eternally, and that is why the freedom of imitation always plays a role.

3. The principle of the freedom of imitation

The freedom of imitation is not a theoretical hypothesis. Instead, it is a basic rule abided by and established by the existing laws.

As a legal principle, the freedom of imitation becomes a vital system of law and has the advantage of being superior to specific provisions. It influences the interpretation of specific provisions and also affects the judicial judgment in individual cases.

As a legal principle, the freedom of imitation is implemented in various departmental laws. The value systems of those departmental laws share something in common and have their own focus. For instance, the intellectual property law places emphasis on establishing a system to protect a private right to spiritual achievements³, so the principle of freedom of imitation can hardly obtain a value advantage. To the contrary, the competition law focuses on maintaining free commercial competition, so the principle of freedom of imitation may be in a more important position. It is beyond doubt that any law is a relatively independent, pluralistic and balanced value system, and all of them jointly make up of a legal value blueprint as a whole. In this blueprint, the freedom of imitation, though not being a core element, is surely indispensable.

II. Value

Imitation, in common parlance, is a basic way of cultural inheritance, and the history of human civilization is also the history of the technique, or rather the art, of imitation. Imitation is an instinct that humans are born to have, and a behavioral habit for all human beings. Even to date, imitation is still a pivotal mechanism that ensures the society works properly.

As for the imitation and the freedom of imitation strictly defined herein, they are valuable in multiple aspects, which can be summarized as follows:

1. To defend a public domain. The freedom of imitation can help people break away from the set pattern of thinking, that is, when discussing the protection of spiritual achievements, even of those in the gray area, people still blindly tend to protect the private right of a right holder, thereby resulting in overprotection at the sacrifice of public interests. Undoubtedly, such a tendency can be effectively curbed if an imitator can defend the legitimacy of its imitation.

2. To boost sustainable innovations. As far as imitators are concerned, imitation is surely a process of studying and absorbing of latest achievements. This process often goes together with assimilating and developing, which paves the

way for the imitators' own progress. As far as those who are being imitated are concerned, the pressure of being imitated will at least push them forward, that is, they have to be relentlessly in pursuit of improvements in order to stay in the leading position.

3. To safeguard free competition. The freedom of imitation has reserved a key space for market participants, so that they (even those latecomers) can get fully involved in competition, and provide alternative products and services to consumers and users for their selection, which benefits a prosperous market. In this sense, the freedom of imitation has become one of the core competitive weapons of business operators — to which equal importance is attached as creativity.

Of course, it is necessary to further clarify that the competition herein refers to competitive activities that business operator conduct on the basis of others' achievements under certain conditions. Notably, in the business circle, imitators and those who are being imitated are never unchanged. Those who are being imitated today were the imitators yesterday.

III. Basis

There is no doubt that to recognize the freedom of imitation as a legal principle, it is necessary to find out provisions affirming the freedom of imitation in the current laws. However, no law explicitly stipulates that "business operators are entitled to the freedom to imitate others' achievements". In this case, we can only settle for the next best by searching for indirect provisions implying the freedom of imitation.

1. The Constitution

Article 7 of the Amendments to the Constitution (1993) stipulates that "China implements the socialist market economy". The two cornerstones of the market economy are to protect private rights and to guarantee the market participants' freedom of action. In the following 25 years, legal practice in China has been centered on protecting private rights and safeguarding the freedom. The outstanding excellence of China's economic development proves that "crossing a river by feeling one's way over the stones" is a successful exploration in balancing the private rights and the freedom of action.

A market economy is a freely competitive economy. Free competition means maximizing oneself while respect-

ing the private rights of others — including the utilization of various internal and external resources to promote one's own undertakings⁴. Free competition implies that imitation, which is common in various areas, should also be given at least the minimum tolerance in economy.

In this article, attention shall be drawn to the often overlooked modifier "socialist" prior to "market economy". "Socialist" demonstrates that the State endeavors to share with all her citizens the fruits of economic progress. As a result, the protection of private rights is not the ultimate goal, but a bridge for constructing a "prosperous, democratic and civilized" country (Article 3 of the Amendments to the Constitution). Just because of this, an inevitable conclusion in logic is that the State recognizes the freedom of imitation to the minimum extent while establishing and improving the intellectual property protection, so as to prevent over protection to the latter which may hinder the realization of the ultimate goal.

2. The Antitrust Law

The existing Antitrust Law emphasizes that a market is an "open" system (Article 4) and one of the objectives of antitrust is to "safeguard the interests of consumers and boost technological progresses" (Article 1 and Article 7.1). One of the monopolistic conducts is the abuse of "a dominant position in a market", that is, "a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in relevant market, or to hinder or affect any other business operator to enter the relevant market" (Article 17.2). Factors including "technical conditions" of the business operator should be considered in determining whether the business operator is in a dominant position in a market (Article 18).

It is not difficult to understand that technological achievements protected by the intellectual property laws are one of the "technical conditions" that can render the business operator in a dominant position in a market. For this reason, the latter part of Article 55 of the Antitrust Law explicitly stipulates that "this law is applicable to the conduct by business operators to eliminate or restrict market competition by abusing intellectual property rights". Those provisions set a solid foundation for interpreting the principle of freedom of imitation.

3. The Anti-Unfair Competition Law

Article 2.1 of the existing Anti-Unfair Competition Law reads: "a business operator shall, in transactions in the market, observebusiness ethics". Business ethics are

behavioral norms generally recognized by business operators. Among its abundant contents, one of the kernel requirements undoubtedly is to respect the intellectual achievements of others. Meanwhile, free imitation is not completely prohibited because if so, the vitality of the market will inevitably be stifled, which goes against the real intent of businesses.

Article 6 of the Anti-Unfair Competition Law regulates the commercial imitation acts, which involves various commercial marks and designs. It is noteworthy that in Article 6, the legislator does not simply say no to all imitation, but specifies the conditions for the establishment of imitation in the sense of anti-unfair competition law.⁵

Protection of trade secrets is also established on strict conditions (see Article 9). Although reversing engineering, a process of imitating other's competing product by dissecting it to acquire hidden technique and know-how, is not mentioned, it is generally believed that reversing engineering is justified.

Of course, some people may doubt that the literal meanings of the above-mentioned principles and rules are quite clear, so why are we bothered to derive the so-called principle of freedom of imitation between the lines? Is such a derivation justifiable? In my opinion, the analysis on the value of the principle of freedom of imitation has answered the first question. As for the second question, it is a question concerning legal thinking. That is, no matter it is a principle or a specific provision, it should be allowed to explain and must be explained in order to fully reveal its essence and to facilitate its better application. During the interpretation of law, relevant contents in different laws can be merged to figure out those systems, inclusive of basic rules, which have been taken into account by legislators but not been explicitly stipulated yet. In other words, even after a large amount of effort for codification, it is still impossible for legislators to cover all the rules and principles in an exhaustive manner.

Therefore, we have good reasons to believe that the freedom of imitation is the principle that has not been directly stipulated by legislators. Although no legislator had said that a natural person is entitled to the freedom to breathe air, we indeed enjoy the principle of free breathing (under other explicitly stipulated legal provisions).■

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¹ It is for sure that if no element of the prior achievements can be found in the new achievement, there is no imitation. But if the hint given by the prior achievements is passed down into the new one in a very tiny amount but is still discernible, imitation occurs on the basis of that limited amount.

² The last example, namely the newly coined word "copycatting", particularly shows the complexity and vitality of imitation.

³ The Preface of Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁴ Article 3.3 of the Property Law issued in 2007 stipulates in more clear language that "the State implements the socialist market economy, ensuring equal legal status and right for development of all market operators."

⁵ "Other conducts" in the last paragraph of Article 6 are considered as conducts of unfair competition on the condition of "leading to misidentification".