

權。模仿秀其實是“山寨”最原始的表現。模仿本身並沒有問題，人人都是從學習開始的，中國如此國外也如此，但是一定要有所引導！即使現在是有便捷的，你寫文章或進行創作也必須尊重權利。

我最後說的就是目前的標準和規則，這是西方建立起來的。去考察一下我國古代的文人墨客是不是都注釋了，是不是說自己在哪兒寫的？不是，都是後人解釋的時候做注解。中國原來的作品和文化，文章越有典故說明越有水平。

我經常對學生說要遵守規則，最好是頁面注，一看就知道觀點出于何處。但是中國的底蘊不同，越隱瞞的、讓人看不出來的，層次越高。這正是兩種文化的差別，我們要遵守現有的規則，但也不能忘掉我們原有的東西。

以什麼標尺來度量“山寨”現象？

| 郭禾

“山寨”一詞並不屬法學術語發揮領域，用法學這個框架套“山寨”套不上。它有的部分屬於侵權，有的完全處在合法領域。當我們拿現有的法律來丈量它，很難得出一個結論。我覺得“山寨”的含義更多是文化學上一個概念，拿法學的這套體系去度量它，

可能不是太合適。

法律解決的是一個具體的問題，是侵犯了商標權、專利權，或是著作權的問題？總有一個非常具體的對象，而非籠統的一個“山寨”現象。

這個社會本身就有很多方面存在着“山寨”，從這種意義上講，很難說“山寨”是合法或是非法，一定要針對一個具體問題。李教授說拿掉“山寨”這個概念談具體問題，我覺得從法學家的眼界看就是這樣，就是拿着法律的尺子量一個具體的東西。

事情之所以炒的那麼熱，是因為大家覺得這事本身拋開了現有的法律規定，在人們的觀念裏面、意識裏面來談判此事，似乎有它的合理性。就像山寨，如果這個社會所有流行的都是一個主旋律，而且能夠讓大家滿意，那麼它不會炒的那麼熱。

剛才談到的模仿問題，可能很多人憑着自己樸素的觀念、意識，覺得是有問題的。從這種意義上講，回過頭去審視，我們的法律是否應該在這兒留一個口子？祇有根據現有的法律規範去考慮才有意義。當我們拿現有的法律尺子度量，使用他人的作品就是侵權。

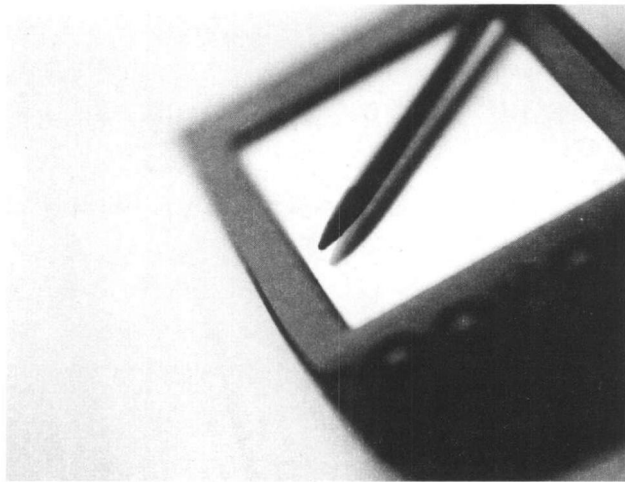
所以，現有法律未必都跟我們的觀念一致、都能夠適應當今社會發展的需要，否則我們就不需要修法了。就目前談到的這些問題，我同意蔣庭長提到的知識產權的新問題，我認為沒有什麼新問題，現行的法律都能夠說開，至于這個結論是不是讓所有人滿意那是另外一回事。

讓“山寨”在市場博弈中形成規則

| 金海軍

“山寨手機”最初的概念非常明確，我第一次拿到資料，一看那麼多的“山寨”，顯然這個概念已經流變、轉換了。分析“山寨”概念，這個不是法律所能講的，需要社會領域的專家，甚至是詞語上的專家來解讀這個問題。

談及“山寨”中的法律問題，我注意到，目前在法院提起訴訟的與山寨有關的案件一個都沒有，祇是



說海關有一個查扣的案件。要成爲一個法律問題，首先必須要能够構成一個司法上的案件。

援引北京電影學院的一個案件，將人家的小說拍攝成電影，但這部小說已經獨家授權許可給另外一個人了。當時就認爲法律當中確實是沒有課堂教學拍攝電影祇是復制和翻譯的明確規定，就做了一個擴大解釋，是不構成侵權。大家看，如果能够有司法的實際案件發生，就有可能給法官在解釋法律的時候找到一個很好的例子，或者說是一個很好的途徑來擴展我們的法律。否則就祇能導致大家在探討這個問題的時單純從法律上各自做解釋，不會形成一個法官的解釋，我們還是需要一個共同的基礎。

第三個更宏大的問題，如果這種現象逐步發生，我們是否祇能够適用現有的規則，用現有的法律約束它？可不可以在這個領域當中有一些甚至是當它處于不確定的時候，讓這個市場進行博弈，也可能會形成一些行業規範，進而上升到法律。

在這種情況下，尤其網絡中所謂的山寨，其實很大程度上就是在目前法律還不確定的時候，說鑽法律空子也好，說創新也好，或是推動一種制度創新也好。實際上就是在促使人們從立法、司法或其他層面去思考這個問題。

從這個角度來講，這裏提到的“山寨”現象，我認爲是值得肯定的，既提出了問題，也提出了思路。至于其他的意思就不是法律的層面了，就需要社會學、經濟學甚至語言學家來講解！

對“山寨”現象的四點理解

| 吳 革

吳革：我認爲山寨文化是網絡創造的平民基礎。

第一點，“山寨”文化已經形成現象，超過了“山寨”手機、電腦，更不是指生產這些產品的加工廠。他已經成爲網絡最有影響力的詞匯，是網絡創新的現象。

第二點，山寨文化談知識產權，山寨文化是網絡文化的創新！當你不把“山寨”理解成器物而是文化的時候，就不存在侵害其他人的知識產權的問題。

第三點，“山寨”現象是被逼出來的，當創造的精



神和物質產品被貼上馳名商標以昂貴價格出售的時候，往往也以知識產權保護的形式出現，特別是中國的平民享受這種高科技新文化物質成果的時候，往往需要付出高昂的代價，所以這個是網絡創造的平民機會。

第四點，什麼是山寨文化？我認爲山寨文化是網絡發展的創新現象，代表着廣大網民對昂貴商品裝璜的現代文化精英的不滿。

“山寨”擴大了社會參與

| 王天夫

大家有沒有反過來想一想，剛才張老師提到所有的創新所有的知識產權是建立在前人的成果之上。

一個簡單的例子，微軟的黑屏系統給員工帶來很多財富，我們不否定他的系統裏面有創新，但是這個創新是否和所得的財富吻合，或是說道義上符合？他的積累爲微軟帶來的財富裏有沒有對商業運作的極端應用，對法律保護知識產權法律條文的極端擁有？

“山寨”現象是一個平民化的現象，說的更細一點是技術平民化和商品消費化，包括產品的消費和文化的消費。一個很大的背景是社會富裕了，知識的傳播，技術的傳播更廣泛。

以前大品牌做的，現在很多普通的人都可以做了。我覺得“山寨”肯定會一直下去，“山寨”的商品可能會隨着社會的發展更加豐富。

stage of initiation, thus, they have to go through the stages of manufacturing, imitating and following.

Thirdly, as far as the issue that SHANZHAI product tries to avoid examination and authentication is concerned, from the viewpoint of public interests, the relevant authorities of the State should supervise it and not allow it to enter into market. If the products in the market do not have gorgeous packing, this is a question of business concept and management. As long as the quality of such product does not endanger people's lives and health, and if there is no compulsory standard, it is not necessary for all the cell phones to be made in conformity with the gorgeous standard, not all the cell phones can produce videos. Products with plentiful functions and low price are not concerned with question of infringement of intellectual property rights.

Fourthly, with respect to imitation show, it actually not concerned too much with the question of copyright. I was on the show of "shi hua shi shuo (telling the truth)" once and imitated a person's voice and moves when he is walking, then, what kind of copyright I have infringed? If you sing a singer's song, it is a question concerning the copyright of the writer not the singer. As a matter of fact, imitation show is the most original manifestation of SHANZHAI. Imitation itself has no problem, and everybody begins from learning, China is so and foreign countries make no exception, nevertheless, imitation must be led by righteous rules.

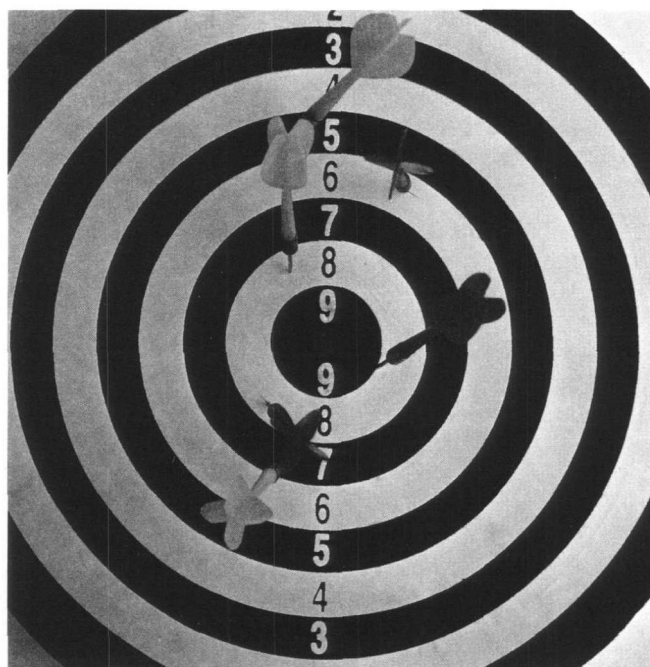
Finally, I want to talk about standard and rules. The current rules we have are established by the western countries but not be the products and culture of our country and the standard is different. The more classic of an article, the more academic of its writer, and the more academic of its writer, we can know whose products the writer has cited. Not all of these should be annotated. I used to teaching my students to follow the rules and they had better to annotate an article on its pages so that the reader gets to know the origins of a point of view ever

since he sees the annotation. Nevertheless, we should know that the culture of China is very different, the more profound the annotation is, the more academic an article is. This is just the different of these two cultures. We must obey the existing rules but cannot forget what we originally have.

Guo He: Which criterion can be used to evaluate the phenomenon of SHANZHAI?

The term of "SHANZHAI" (copycat) does not belong to the field of legal terminology, so we cannot use the framework of law to restrict it. Some parts of its meanings belong to torts and some parts are totally falling into the range of legitimacy. Hence, when we adopt the modern laws to evaluate it, it is hard to achieve a conclusion.

The former four experts have mentioned that there are several illegal activities and fields existing in the SHANZHAI phenomenon, however, there are several legitimate fields as well. In my opinion, the meaning of "SHANZHAI" is more like a concept in culturology, so it may be not so appropriate to evaluate it with the



system of law.

As far as some of the aspects of "SHANZHAI" is concerned, or even when "SHANZHAI" phenomenon is not so determined and formed, Whether or not to make the market to play the game, then some kinds of regulations in this field may be formed and may also be developed into law.

Jin Haijun: Making SHANZHAI to form its own rules in the market gaming

At present, there is no case concerning SHANZHAI brought into action in the court, there is only one case in customs concerning search and seizure of shanzhai products. In my opinion, to be a legal issue, it first must be competent to be a judicial case.

From this perspective, SHANZHAI phenomenon is currently has no relationship with law.

A more magnificent question is that if this phenomenon continues to happen, whether or not we should only apply existing rules and available regulation to restrict it. As far as some of the aspects of "SHANZHAI" is concerned, or even when "SHANZHAI" phenomenon is not so determined and formed, Whether or not to make the market to play the game, then some kinds of regulations in this field may be formed and may also be developed into law.

Under such circumstances, SHANZHAI, especially the so-called SHANZHAI in the internet, to a large extent, can be actually deemed as taking advantages of legal loopholes, a kind of creation or even a kind of promotion of system innovation. As a matter of fact, it urges people to think about this question from the perspective of legislation, judicature or other aspects.

Wu Ge: Four perspectives concerning SHANZHAI phenomenon

According to my understanding, SHANZHAI culture is an opportunity for civilians created by network.

Firstly, SHANZHAI culture has formed into a phenomenon, surpassing the meanings like SHANZHAI cellphone, SHANZHAI computer, and it does not refer to the manufacturer of those products. It has become the most influential terminology in the internet, it is the phenomenon of network creation.

Secondly, as far as intellectual property rights are concerned, SHANZHAI culture is the innovation of network culture. When we do not decipher SHANZHAI into a material but understand it into a culture, there is no problem as infringing other people's intellectual property rights existing.

Thirdly, SHANZHAI phenomenon is forced to come into being. When the spiritual and material products produced by human beings are labeled with famous trademark and sold in very expensive prices, they usually appear in the forms under the protection of intellectual property rights. Especially when the Chinese civilian enjoy these material products with high technology and new culture, they always pay expensive prices, therefore, SHANZHAI is civilian opportunity created by network.

Fourthly, what is SHANZHAI culture? I think it is innovation phenomenon developed by the internet.

Wang Tianfu: SHANZHAI has enlarged social participation

SHANZHAI culture is a phenomenon of civilianization. To be specific, it is civilianization of technology and

consumption of commodities, including consumption of commodities and consumption of culture. Moreover, a larger background is that the society is richer, the spread of knowledge and spread of technology is more extensive.

Qiu Feng: The advantages and disadvantages of SHANZHAI culture

The markets of cities and rural areas are divided, and the qualities between the commodities for export and commodities for domestic sale of the same factory are totally different, consequently, this provides the SHANZHAI products a very big market and makes them popular and prosperous.


In the past 30 years, shanzhailization is very serious. The shanzhailization I referred to here does not indicate that there is no creation, but an innovation which is downward and not in pursuit of perfection, and a creation with is totally based on instinct and in pursuit of short-term interests.

For the group of entrepreneurs, including people who are working in the field of culture and provide cultural products as well as people who provide various kinds of concepts and academic ideas, there is a kind of SHANZHAI spirit in their deep hearts, which is a fatal deficiency to the existence or renaissance of Chinese culture.

Mao Yuansheng: SHANZHAI is the socialized embodiment of the imitating and innovating activities

According to my understanding, there is "SHANZHAI" as long as there is product. SHANZHAI is the socialized embodiment of imitation and innovation and is the reaction of grassroots innovation and wisdom of people toward human life.

The development of SHANZHAI has gone through the process of learning, pirating, imitating and finally innovating, and then proceeded on the basis of innovation. Consequently, we can see that SHANZHAI can be deemed as a kind of means for the wisdom of people to promote the development of society.

Based on the understanding that "SHANZHAI is the general term for the phenomenon of imitating and innovating activities", SHANZHAI phenomenon or SHANZHAI culture should be encouraged and advocated, however, such encouragement and advocate should be under the premise of legal regulation. This is just the functions of law to lead, regulate, encourage and protection innovation in the process of the healthy popularity of SHANZHAI culture. Law has done something good in this process but not worthless. 

Jurisprudential and Sociological Review of Phenomena of SHANZHAI Culture (Excerpts)

Time: 14:00-17:50 on January 1, 2009

Venue: Room 9515, 5th Floor, Jingshi Building, Beijing Normal University

Co-Sponsors: China Law Magazine, Ltd., Hong Kong;

Weekend Edition of Legal Daily newspaper;

Institute of Case Law Studies of China Law Society;

Beijing Impact Law Firm

VIPs attending the symposium:

Jiang Zhipei, former chief of the Intellectual Property Rights Trial Division under the Supreme People's Court

Li Mingde, director of the Intellectual Property Rights Research Center under China Academy of Social Sciences

Suo Lajun, deputy director of China Copyrights Protection Center

Zhang Ping, professor with Law School of Peking University

Guo He, professor with Law School of Renmin University of China

Jin Haijun, associate professor with Law School of Renmin University of China

Wang Tianfu, associate professor with the Department of Sociology of Tsinghua University, PhD of Sociology of Chicago University

Qiu Feng, well-known scholar

Yu Guofu, director of Sam & Partners Law Firm

Mao Yuansheng, Chief Editor of China Law Magazine

Wu Ge, director of Institute of Case Law Studies of China Law Society

Ma Xiaolei, Deputy Editor-in-Chief of Weekend Edition of Legal Daily newspaper

Comper: Dong Yanbin, Executive Editor-in-Chief of China Law Magazine



Jiang Zhipei: To lead the development of SHANZHAI (copycat) culture with law

Although I have not done much research of phenomena of copycat culture, I am very interested in it. The scope of copycat culture is too extensive. Based on the web, it covers products, services, stars and even copycat police vans in all fields, giving rise to a cultural phenomenon.

Speaking from the perspective of the relationship between phenomena of copycat culture and intellectual property rights, I think what is the most fundamental in this respect is that there should be a standard measurable by law and by basic social ethics concerning production. Anything that goes beyond this standard will be problematic. For example, if you have totally copycatted trademarks owned by other parties or even the minimum safety standards prescribed by the State, you may have