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Weng Zhengwen v. Fuzhou Waixing Computer Science and Technology Co. Ltd. et al.

Citation: The Supreme People's Court's Civil Judgment No. Zhizhongzi No. 4/2000
Date of judgment: December 30, 2001

Procedural history

The Fuzhou Waixing Computer Science and Technology Co., Ltd. (Waixing) sued, in the Fujian Province Higher People's Court, Weng Zhengwen, Ye Xiujuan, the Fuzhou Dali Jiacheng Global Electrical Appliance Company (the Global Company), Urumchi City Lijun Electronical Appliance Company (Lijun), and Wang Xiaoyan for infringement of its copyright in the computer software of ten Chinese software games, including Contending between Chu & Han for Hegemony. In the first-instance judgment, was found the infringement. Weng Zhengwen appealed to the Supreme People's Court.

Issue

1. Whether the production and reproduction of the infringing software should be established based on the circumstantial evidence?

2. When it was impossible to compare the program codes, whether the allegedly infringing software should be determined as identical with the authentic game software based on a comparison of the settings, characters, sound, acoustic effect, etc.

Facts

From June 1996 to October 1997, Waixing applied for the registration of its copyright in the ten

computer software games, including the Contending between Chu & Han for Hegemony, it developed.

From January 1999, Weng Zhengwen et al. made and marketed the Biography of Liu Bang and other nine pieces of allegedly infringing software in the name of Zhenhua Company (set up by Weng Zhengwen et al., which did not really exist because it was not registered).

The Copyright Administration of Fujian Province made an appraisal by comparing the ten pieces of allegedly infringing game tapes, including the Biography of Liu Bang, from the sellers Lijun and the Global Company and the ten pieces of corresponding game tapes, including the Contending between Chu & Han for Hegemony provided by Waixing. The appraisal conclusion was that the ten pieces software of the allegedly infringing game tapes were exactly identical with the authentic software in the program design, pictures, music and acoustic effect, with the producer of the authentic game software displayed upon start-up deleted and the titles of the games changed.

As the comparison of the specifications of the Waixing's software with those of the allegedly infringing software showed, except that the specification of only one piece of software was different, the texts of the specifications for the rest nine pieces of the software were the same.

The first-instance court seized from Weng Zhengwen's residence the allegedly infringing programming record, prepared from January to March 1999, recording the game titles, the IC titles and the number of programming of the ten pieces of allegedly infringing software, and the files related to the production of the game software tapes, wherein the words "Waixing Technology" and the titles of the game products of Waixing were indicated.

The first-instance court held that without permission of the game software copyright owner, Weng Zhengwen et al. deleted, modified and reproduced the ten pieces of game software including the Contending between Chu & Han for Hegemony that have been distributed to the public by Waixing, changed the titles of said game software, and made them into game tapes to be sold all over the country, which severely infringed Waixing's right of authorship, right of modification, right of protecting the integrity of the product, right of use, and right of receiving remuneration for the ten

pieces of game software.

Weng Zhengwen argued in his appeal:
(1) The appraisal conclusion made by the Copyright Administration of Fujian Province did not involve any descriptions of the comparison of the instruction sequences formed of binary codes of the software concerned in the case, and it only involved the descriptions of a comparison of the artistic pictures, the music and acoustic effect, and the start-up operating procedure for playing the game. This comparison was contrary to the relevant rules on determination of the subject object of protection of the computer software copyright and infringement as stipulated in the Regulations for the Protection of Computer Software.

(2) All the allegedly infringing game tapes in suit were sequestrated from the Global Company and Lijun, which could not prove that they were produced by the appellant. They could not be reproduced by the Global Company and Lijun without authorization. It might be that Lijun and Waixing colluded to frame the appellant. The printing matter of the outer package of the game tapes was extremely easy to be imitated, so it could not be directly determined that the allegedly infringing software was produced by the appellant only on the basis that the appearances of the printing matter was the same. The ascertainment of this fact made by the first-instance Court was contrary to the principle of using the circumstantial evidences, i.e. the conclusion should be "unique".

Rule of Law

Rule 2 of the Regulations for the Protection of Computer Software *The computer software (hereinafter referred to as the software) mentioned in this Regulations means computer programs and the relevant files.*

Reasoning

1. The IC programming record sequestrated by the first-instance Court from Weng Zhengwen's residence contained the information, such as the titles of the ten pieces of allegedly infringing software and the quantity of the reproduction, and the documents relating to the production of the game software also contained the titles of some of the allegedly infringing software. The time

when the IC programming records were made substantially coincided with the time when he sold the allegedly infringing software to Lijun. Although the allegedly infringing game tapes in this case were not sequestrated by the first-instance Court from Weng's residence, the appellant failed to adduce evidences in the trial of first and second instance to prove that the game tapes he had produced and sold were different from the allegedly infringing game tapes, while the evidences, including the allegedly infringing game tapes, the outer packages, the records of production and sales of the Zhenhua Company, and the agreement sequestrated by the first-instance Court, could substantially prove the procedure of producing and selling the allegedly infringing game tapes in suit, and a complete evidence chain had been formed to prove that the game tapes were produced and sold by Weng Zhengwen. In the absence of evidences to the contrary, it should be found from said evidence that the game tapes sequestrated by the first-instance Court were produced and sold by Weng Zhengwen, and he had acted to directly produce (i.e. reproduce) the allegedly infringing software. With respect to the two possibilities raised by Weng Zhengwen, i.e. the Global Company and Lijun reproduced the appellee's software without authorization, and Lijun and the appellee colluded to frame Weng Zhengwen, they were only the appellant's presumption and were not proven by any evidence. Therefore, Weng Zhengwen's allegation that the allegedly infringing game software were not produced and sold by him was not based on the facts.

2. The computer game software had both the common technical characteristics of computer software and the application characteristics different from general computer software. The game software was used mainly for entertainment. How one felt about it was mainly realized through changes in settings, characters, sound, and acoustic effect in the game. This evidently and directly reflected whether or not the computer program codes of the game software were the same. Technically, different computer programs made the game software of the same function impart the same sensation, but it was almost impossible for two pieces of computer game software that were independently developed to have completely the same settings, characters, sound, etc., and it was also technically difficult to have completely the identical sensation.

Given that the appellant said explicitly that he would not request to compare the program codes of the software of the two parties, and he did not provide the source program of the allegedly infringing software, the court could determine whether the program codes of the game software were the

same on the basis of the comparison between what one felt about the scenes, characters, sound of the allegedly infringing software and those of the game software developed by the appellee in combination with other relevant evidences of the case. According to the appraisal conclusion made by the Copyright Administration of Fujian Province with the entrustment by the first-instance Court, the result of examining the game software of both parties on the spot, and the findings of the comparison between the specifications of the game software of both parties, the Supreme People's Court held that what one felt about the scenes, the characters, and the sound of the game software of both parties were exactly the same; and as was shown by the findings of the comparison between the Chinese and English game titles, the names of the producers, the surnames of the relevant persons, etc. displayed upon playing the game software, there were signs of modification in the game software of the appellant; the documents, such as the specifications of the game software of both parties, were substantially the same. In addition, re-developing a piece of game software that had completely the same scenes, characters and sounds as those in the game software of another party did not accord with the purpose of operation of the appellant as a game software operator. Meanwhile, the appellant could not reasonably explain why the sensation, the specifications, the target program, etc. of the game software of the two parties were identical or similar.

Therefore, on the basis of all the facts and evidences of the case, it was decided that the allegedly infringing software was reproduction of Waixing's software.

Holding

1. The circumstantial evidence could substantially prove the procedures of producing and selling of the allegedly infringing software in suit. It formed a chain of evidence showing that the game tapes were produced and sold by Weng Zhengwen. In the absence of evidences to the contrary, it was sufficient to determine that Weng Zhengwen had directly produced (i.e. reproduced) the allegedly infringing software.

2. The settings, characters, sound, and acoustic effect variations in the allegedly infringing software were exactly the same as those in the authentic game software, so were the specifications thereof, and the alleged infringer could not reasonably explain this, nor could he provide the

source codes of his software; hence in the absence of evidence to the contrary, it could be determined that the allegedly infringing software was a reproduction of the authentic game software.