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Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity

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COMMENT

SOVIET AND CHINESE COPYRIGHT: IDEOLOGY GIVES WAY TO ECONOMIC NECESSITY

INTRODUCTION

The United States affords protection and economic incentives to its authors through the Copyright Act. But to an author whose work has been pirated across international boundaries, internal copyright laws are of little use because they have no extraterritorial application. Thus, although an act may be considered copyright infringement under United States laws, if it occurs outside the jurisdiction of the United States, it is not actionable under the United States Copyright Act.

The most significant copyright protection for U.S. authors in foreign countries is through the Universal Copyright Convention ("UCC"). The United States became a signatory to the UCC in 1952 and, along with eighty-two other nations, promised "to provide for the adequate and effective protection of the rights of authors in literary, scientific and artis-
tic works.” Although the UCC does not define exactly what “adequate and effective protection” entails, it seems to be limited to treating a foreign author on par with a domestic writer for purposes of published and unpublished works. However, the flexibility of this provision is qualified by at least four minimum requirements: formalities for registration (Article III); duration of copyright (Article IV); rights of reproduction, performance and broadcasting (Article IVbis, 1971 revisions); and the right of translation (Article V). Hence, any country wishing to avail itself of the benefits and protections of the UCC must first promulgate domestic copyright laws that, at a minimum, satisfy these four requirements.

For communist countries, whose underlying philosophy is inconsistent with protection of individuals and economic incentives, enacting copyright laws and joining an international copyright convention present a dilemma. This comment will deal with two communist countries, the Soviet Union and the People’s Republic of China.

As to the Soviet Union, this comment will discuss the events leading up to the Soviet accession to the UCC in 1973 and the way in which the Soviets have discharged their membership obligations. China is not a signatory to the UCC, and presently has no treaty affording copyright protection to U.S. authors. This comment will explore the past and present status of, and attitude toward, copyright laws in China and China’s current movement toward what appears to be their inevitable accession to the UCC.

THE SOVIET UNION

Copyright Protection Prior to Accession to the UCC

The one issue upon which the Soviet Communists had kept faith with the Russian czars was that of international copyright. “Never

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6. UCC Article I provides in full:
Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.
Universal Copyright Convention, Sept. 6, 1951, 6 U.S.T. 2731, 2733, T.I.A.S. No. 3324.  
7. UCC Article II provides in full:
1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other state accords to works of its nationals first published in its own territory.
2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.
Id. This principle is known as “national treatment.” See generally, NIMMER, supra note 2, at § 17.04(B).
under the double eagle or under the hammer and sickle had Russia rec-
ognized international copyright obligations."\textsuperscript{8}

The Soviet Union has had a domestic copyright law since April
1828.\textsuperscript{9} Under that law, an author or translator was entitled to the exclu-
sive right to "reproduce, publish and disseminate" his or her work.\textsuperscript{10} In
1857, the Council of State extended copyright protection for the first
time to foreign writers if their works were first published in Russia.\textsuperscript{11}
When the copyright statute was changed again in 1911, the rights of for-
egn authors were accorded slightly more protection. The foreign work
was still considered to be in the public domain and could be freely trans-
lated, but the consent of the foreign copyright proprietor had to be ob-
tained prior to publishing the work in Russia in its original language.\textsuperscript{12}

During the 1860's, the Russians joined the international copyright
movement.\textsuperscript{13} In 1856, a treaty on commerce and navigation between the
Russian empire and France called for a special convention on copyright
protection. Several years later, a copyright agreement with France was
signed.\textsuperscript{14} But the Russo-French treaty placed restrictions only on works
in their original language and did nothing to restrict the free translation
of works in either country.\textsuperscript{15}

Due to the massive consumption of foreign literature in Russia,
abandoning the freedom of translation would have placed a substantial
financial burden on the Russians in the form of royalties.\textsuperscript{16} Therefore,
the Russians refused to sign anything that would restrict their freedom of
translation. Consequently, when the Berne Convention\textsuperscript{17} came into
existence in 1887, the Russians did not sign it.\textsuperscript{18}

In the early 1900's, those countries whose authors' works were being
pirated by the Russians began to utilize the copyright issue as a bargain-
ing tool in trade negotiations. As a result, the Russians signed copyright
treaties with France, Germany, Belgium, and Denmark.\textsuperscript{19} It was ex-

\textsuperscript{8} Lacy, \textit{Breaking Faith With the Tsars}, WORLD, May 22, 1973, at 15.
\textsuperscript{9} M.A. NEwCITY, COPYRIGHT LAW IN THE SOVIET UNION 6 (1978).
\textsuperscript{10} Id.
\textsuperscript{11} Id. at 7.
\textsuperscript{12} Id. at 9.
\textsuperscript{13} Id. at 11.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id. at 13.
\textsuperscript{17} The Berne Convention required that a member country grant foreign authors the same
protection as it afforded its own citizens. Id. at 12. The United States has never signed the
Berne Convention.
\textsuperscript{18} Id. at 13.
\textsuperscript{19} Id. at 15.
pected that the Russians would join the Berne Convention, but World War I precluded that possibility. 20

When the Communists came to power in November 1917, they unilaterally denounced all treaties signed before the Bolshevik Revolution. 21 Marxist-Leninist dogma dictated that literature be used to support the proletarian movement; books were not to be exploited for individual gain. To serve the proletarian purpose, the first Soviet copyright decree, passed in December 1917, "empowered the State Committee on Education to nationalize . . . the works of certain Russian authors and to declare a state monopoly of the publication rights in those works. . . ." 22

In 1925, doctrinal restrictions were loosened to some degree. As part of the New Economic Plan, 23 the Soviet government passed a copyright statute that recognized copyright as a fundamental private property right. 24 Yet the same statute that now explicitly recognized the rights of Soviet authors in their publications continued to deny protection to foreign writers. 25 Article four of the 1925 law provided that translation into another language did not violate the author's copyright. 26 This freedom of translation principle remained intact, withstanding the subsequent changes in the copyright laws in 1928 and the passage of the 1961 Fundamentals of Civil Legislation. 27

Rejection of copyright protection for foreign authors, by Czarist and Communist Russia alike, indicated that the Soviet attitude toward international copyright was not based solely on ideological grounds. More practical reasons existed for the Soviet policy of isolationism with respect to international copyright relations. Chief among these reasons was the Soviets' firm desire to maintain the freedom of translation of foreign materials.

The Soviet Union continues to be one of the world's largest producers of translations. Between 1946 and 1970, 26,737 different works by foreign authors were produced by Soviet publishers, with a total circulation of 1,088,295,000 copies. 28 During the same period, Soviet publishers

20. Id.
21. Id.
22. Id. at 17.
23. The New Economic Plan was introduced by Lenin in 1921 to encourage private enterprise and to provide property incentives to enterprising inventors and authors. Id. at 20.
24. The 1925 statute granted authors the "exclusive right to publish, perform, distribute, and receive payment for the use of their literary, scientific, and artistic works." Id. at 21.
25. Id. at 22.
26. Id.
27. Id. at 26.
28. Id. at 33.
published 5,528 American book titles, with a total circulation of 154,799,000 copies.\textsuperscript{29} The Soviets also admitted that they reproduced articles from some 300 American journals and distributed them in the U.S.S.R. and Eastern Europe in vast quantities.\textsuperscript{30} In contrast, the Soviet Union is not a great exporter of literature to the United States. There is, of course, a demand for Soviet books and periodicals in U.S. scientific and academic circles, but there is little demand for popular Soviet literature.\textsuperscript{31} Because the UCC requires that member states recognize "the exclusive right of the author to make, publish, and authorize the making and publication of translations,"\textsuperscript{32} adherence would force the Soviet government to give up a long-standing and deeply rooted tradition of freedom of translation, and expose the Soviets to the real possibility of a negative balance of royalty payments.

Nonetheless, the Soviet Union submitted its instruments of accession to the UCC on February 27, 1973 and became an official member of the Convention in May of that year.\textsuperscript{33}

Why would a country sometimes referred to as "the world's most active literary pirate"\textsuperscript{34} become a signatory to a convention that required it to compensate foreign authors for the use of their works? Russian officials were quoted as saying that their primary objective was "to facilitate an exchange of intellectual property [and] to create an international marketplace of ideas and culture."\textsuperscript{35} Many Westerners insisted that the U.S.S.R. had found yet another tool for the oppression and suppression of its dissident authors.\textsuperscript{36} An examination of the events leading up to the U.S.S.R.'s accession indicates that joining the UCC was a trade-off for commercial advantages from the United States.

\textit{The Road to Accession}

The wall of isolation surrounding the Soviet Union with respect to protection of intellectual property began to crumble in the mid-1960's.\textsuperscript{37} Development of modern technology became a priority on the Soviet

\textsuperscript{29} Id. at 169.
\textsuperscript{31} \textit{Newcity}, supra note 9, at 169.
\textsuperscript{32} UCC, Article V(1).
\textsuperscript{34} \textit{Newcity}, supra note 9, at 33.
\textsuperscript{35} Levin, supra note 33, at 129.
\textsuperscript{36} This comment will not attempt to deal with the complicated question of suppression of Soviet dissidents. \textit{See infra}, note 68. \textit{See generally}, \textit{Newcity}, supra note 9, at ch. 14.
\textsuperscript{37} \textit{Newcity}, supra note 9, at 38.
agenda, and acquisition of Western technology became a major government goal.\textsuperscript{38} To facilitate this acquisition, on July 1, 1965, the U.S.S.R. announced its adherence to the Paris Convention for the Protection of Industrial Property.\textsuperscript{39} The Paris Convention allowed the Soviets to license Western technology to be used in the U.S.S.R., and at the same time protected the patents and trademarks of the Western owners.\textsuperscript{40}

At about the same time, the United States began to exert pressure on the Soviet Union to join the UCC. In 1962 a delegation of American book publishers visited the Soviet Union. The purported objective of the visit was “to study the Soviet publishing system and to encourage the commercial exchange of books, magazines, newspapers and other publications.”\textsuperscript{41} Notwithstanding its official objective, the American delegation made every effort to present the Soviets with the advantages of Soviet accession to the UCC.\textsuperscript{42} The Russians expressed their suspicions of American motives. Boris Stukalin, Chairman of the State Committee, asked the delegation: “Why, if joining an international convention would be so much to the advantage of the U.S.S.R., are you as United States publishers urging such a course of action on us?”\textsuperscript{43}

A second delegation was sent to the Soviet Union in 1970, and again the pros and cons of the Convention were debated. The Soviets made it clear in both 1962 and 1970 that the major obstacle to their joining the UCC was the anticipated negative balance of payments resulting from royalties to foreign authors and the restrictions on freedom of translation.\textsuperscript{44} The Americans tried to convince their Soviet counterparts that the balance of payments would run in the Soviets’ favor.\textsuperscript{45} It is unlikely that the Soviets were convinced. However, when joining the UCC was placed on the bargaining table opposite tax concessions by the United States in 1972, the Soviets could not resist.

The U.S. tax laws impose a thirty percent withholding tax on the proceeds of all sales of foreign property in the United States.\textsuperscript{46} The Soviets wished to expand the sales and licenses of Soviet technology in the United States to counterbalance Western imports, but believed that the

\textsuperscript{38} Id. at 39.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Levin, supra note 33, at 129-30.
\textsuperscript{42} Id. at 130.
\textsuperscript{43} Id. at 136.
\textsuperscript{44} NEWCITY, supra note 9, at 168.
\textsuperscript{45} Id.
\textsuperscript{46} I.R.C. § 87(a)(1)(D).
U.S. tax laws limited their ability to do so. Soviet trade organizations claimed that they had lost potential contracts with American corporations because U.S. companies were unwilling to administer the withholding tax and because the tax made the prices for Soviet licenses and patents too high to be competitive.

In May 1972, during the Nixon-Brezhnev summit, the press was informed of the establishment of a U.S.-U.S.S.R. Commercial Commission ("Commission") as part of the "detente" between the two world powers. Nixon and Brezhnev signed the Basic Principles of Relations Between the United States and the Soviet Socialist Republics, which pledged that the two countries would promote the mutual growth of commercial ties. An agenda item in the joint communique announcing the formation of the Commission read: "E. Problems relating to the development of trade such as patenting and licensing." In July 1972 this agenda item was revised to read "... development of trade, such as patents, copyrights, and licensing" (emphasis added). At the same time, the draft of the tax treaty between the two countries precluded the levying of taxes by both countries with respect to "the sale or transfer of licenses for use of patents, trademarks, and related matters."

When the Commission reconvened in Washington two and a half months later, the Soviets evidently already had decided to accede to the UCC. They no longer wished to discuss whether or not they would accede, but instead asked specific questions about the consequences of their accession.

On February 23, 1973, Soviet newspapers announced that the Presidium of the Supreme Soviet was revising the Soviet copyright laws to conform with the UCC requirements. Shortly thereafter, on February 27, 1973, Soviet Foreign Minister Andrei Gromyko deposited the U.S.S.R.'s instruments of accession to the UCC, and in May 1973 the U.S.S.R. became an official member. By acceding to the UCC, the So-

47. NEWCITY, supra note 9, at 42.
48. Id.
49. Levin, supra note 33, at 137.
50. NEWCITY, supra note 9, at 41.
51. Levin, supra note 33, at 137.
52. Id.
53. Id. at 137-38.
54. NEWCITY, supra note 9, at 43.
55. Id.
56. Id. at 44.
57. Id. It is interesting to note that the U.S.S.R. signed the 1952 version of the UCC and not the revised 1971 version. The revisions basically created special exceptions for developing countries with respect to translation rights. Article Vbis provided that any contracting state
viet Union established reciprocal copyright relations with more than eighty nations, including the United States.

Subsequently, on June 20, 1973, U.S. Treasury Secretary George P. Schultz and Soviet Minister of Foreign Trade Nikolai Patolichev signed the tax treaty, which received U.S. Senate confirmation and became effective on January 1, 1976. The U.S. State Department representative confirmed that the tax treaty was a "quid pro quo" for the U.S.S.R.'s joining the UCC.

This record of events demonstrates that a trade-off of commercial advantages was the major factor leading to Soviet accession. The United States sought remuneration for its authors, and the Soviets needed favorable tax treatment. Whatever other factors the Soviets might have considered in deciding to accede, they must have concluded that the commercial advantages outweighed the disadvantages.

Soviet Membership in the UCC and Implementation of the UCC Requirements

The decision by the Soviet leadership to accede to the UCC was apparently made without much discussion with the Soviet publishing industry. In April 1973, two months after Soviet accession, publishing executives of McGraw-Hill traveled to Moscow to conduct business with the Soviets. They observed that the Soviet publishing houses were "uninformed and unprepared," and that it would take months for the implementation of administrative procedures.

Prior to Soviet accession to the UCC, the responsibility for administering Soviet copyright laws lay with various organizations within the

"regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations" may avail itself of the special benefits of the revisions. Perhaps the Soviet Union did not wish to depend on the General Assembly's categorization of developing nations. Perhaps the Russians simply did not have a chance to familiarize themselves with the revisions before joining the UCC, and opted for the more familiar version. In any case, the Soviets are signatories only to the 1952 convention.

It is also interesting to note that although the U.S.S.R. adhered to the UCC, it did not sign the three protocols following the Articles of the Convention. The most controversial is Protocol 1, entitled "Stateless Persons and Refugees," which in essence allows such persons to be "assimilated to the nationals" of their new home for purposes of international copyright protection. Seemingly, this would require the Soviets to pay royalties to authors such as Aleksandr Solzhenitsyn, the Soviet writer now living in the United States, if they ever decided to import his books.

58. Levin, supra note 33, at 140.
59. Id. at 138.
60. Id. at 143.
61. Id.
artistic trade union. It was not until the establishment of the VAAP (All-Union Copyright Agency or All-Union Agency for Authors' Rights) in September 1973 that the Soviets were able to centralize and effectuate the administration of the new domestic and international copyright procedures.

The VAAP is a nongovernmental agency created under Articles 125 and 126 of the Soviet Constitution. These Articles recognize the right of Soviet citizens to "unite in public organizations." The VAAP's statute makes the agency a legal entity with fixed and circulating assets and the ability to enter into transactions and agreements in its own name. The Agency answers to the fourteen members of the Conference of Sponsors of the Agency, including the Academy of Sciences of the U.S.S.R. and the Ministry of Foreign Trade. VAAP officials were probably a combination of people from the U.S.S.R. Writers' Union Copyright Protection Agency and the U.S.S.R. Artists' Union Copyright Protection Agency.

The VAAP is charged with the dual function of protecting and collecting on copyrights in and out of the Soviet Union, and buying and selling translation rights internationally. The Agency enjoys a monopoly in the field of copyright and the strong bargaining position that comes with a monopoly. The VAAP's statute expressly provides that the right to use the work of a Soviet author in a foreign country may be transferred only through the VAAP. The same procedure must be followed for Western works entering the U.S.S.R. The VAAP is also charged with acting as an intermediary in all negotiations of contracts and agreements between foreigners and Soviet citizens.

Soon after its initiation, the VAAP grew into one of the world's largest agencies of its kind, with approximately 400 employees and plans to expand further. The VAAP has also established permanent offices in foreign countries, including the United States and most Eastern European nations, with which the U.S.S.R. engages in intensive exchanges of

62. NEWCITY, supra note 9, at 126.
63. Id. at 126-27.
64. Id. at 127.
66. Id.
68. NEWCITY, supra note 9, at 130. This is one of the elements prompting some Western observers to fear that the works of Soviet dissidents may never reach the West.
69. Id. at 131.
70. NEWCITY, supra note 9, at 129.
71. Lottman, supra note 67, at 28.
literary works.\textsuperscript{72}

With the VAAP's help, the internal turmoil with respect to copyright changes began to subside, but the international problems were just beginning for the Soviet Union. An air of suspicion and distrust permeated the international relations between the United States and the U.S.S.R. because of alleged Soviet non-compliance with the UCC provisions.

In August 1973, a McGraw-Hill official who had visited the Soviet Union after its accession was quoted as saying that the Russians were ready to pay only "a token royalty, totally unrelated to value received" for the reprint rights.\textsuperscript{73} Also, speculation was rampant in the publishing community that having failed to secure the rights to many American publications, the Soviets were engaging in unauthorized photocopying.\textsuperscript{74} At a press conference in October 1974, the Association of American Publishers accused the Soviet Union of violating at least two sections of the UCC.\textsuperscript{75} The Russians were "caught" publishing the first two chapters of Kurt Vonnegut's \textit{Breakfast of Champions} and using "extensive extractions" and photographs from Grosset and Dunlap's \textit{Marilyn}.\textsuperscript{76} Both were used without approval from the copyright owners.

Rejecting complaints about the two publications, the Soviets invoked a copyright provision of their 1961 Fundamentals of Civil Legislation. Article 103(7) permitted the reproduction of works without either the consent of the author or the payment of royalties if the works were used for "scientific, educational, and enlightenment purposes, without the extraction of profits."\textsuperscript{77} The Soviet attitude in this matter made Western commentators question "whether there [was] in fact any real meaning left to Soviet adherence to the U.C.C."\textsuperscript{78}

Perhaps by using these loopholes the Soviets were attempting to

\textsuperscript{72} NEWCITY, \textit{supra} note 9, at 128.
\textsuperscript{73} Wagner, \textit{supra} note 30, at 248.
\textsuperscript{74} Wagner, \textit{Are Soviets Engaging in Unauthorized Photocopying? PUBLISHERS WEEKLY}, Aug. 19, 1974, at 22.
\textsuperscript{75} \textit{AAP Accuses The Soviets of Copyright Violation, PUBLISHERS WEEKLY}, Oct. 14, 1974, at 23.
\textsuperscript{76} Id.
\textsuperscript{77} U.S.S.R. Fundamentals of Civil Legislation, \textit{reprinted in NEWCITY, supra} note 9, at 184-85. Interestingly, the Russian introduction to the photographs from \textit{Marilyn}, a book about the late American actress Marilyn Monroe, averred that the photographs exposed the "sickness of bourgeois society and its spiritual decay." \textit{AAP Accuses the Soviets of Copyright Violation, supra} note 75, at 23. Perhaps the Soviets considered such use of photographs as educational, and thus not subject to copyright restrictions per Article 103(7).
cushion the heavy outflow of hard currency\textsuperscript{79} for royalties. During their two visits to the Soviet Union, in 1962 and in 1970, the American publishers tried to convince the Soviets that fears of a negative balance of payments in their literary trade were unjustified. The Soviet fears were realized, however, since the balance of trade was substantially in favor of the United States.\textsuperscript{80} For example, in 1974, Russian literary exports brought in approximately 777,000 rubles, while imports cost them 1,683,000 rubles. The figures for 1975 were even less favorable to the Soviets, with a difference of approximately 1,274,000 rubles. In 1976, the difference was 1,187,000 rubles.\textsuperscript{81} This hard currency problem continues to be the biggest impediment to the expansion of literary trade.\textsuperscript{82}

Current Status of Soviet Copyright Protection

Soviet membership in the UCC continues to be marred by minimal compliance with the letter of the law, and lack of adherence to the spirit of the Convention. Perhaps this is to be expected when copyright protections are not afforded for their own sake, but are given as a quid pro quo for commercial gain in other areas. The danger of such linking of literary creativity, for which copyright is an incentive, with economic expediency is that trade in artistic works will be clouded by the vicissitudes of the stormy political arena.

China

Copyright Protection: Historical Development\textsuperscript{83}

Ever since the Opium War of 1839-1842 and the unequal treaties forced upon Imperial China, the Chinese had great reason to distrust foreigners. The “Middle Kingdom” did not need aid from “barbarians,” but would allow foreigners to trade pending payment of tribute to the Son of Heaven, the Emperor of China. While the Opium War changed the nature of events in terms of trade, China’s basic attitude toward things foreign remained condescending and distrustful for many years. This attitude was reflected in the Chinese position on international copy-

\textsuperscript{79} The Soviets have given Western writers the option of being paid royalties in hard currencies rather than in rubles. NEWCITY, supra note 9, at 170.

\textsuperscript{80} Levin, supra note 33, at 157.

\textsuperscript{81} Id.

\textsuperscript{82} NEWCITY, supra note 9, at 170.

\textsuperscript{83} This comment cannot do justice to the complexities of Chinese history, and is therefore limited to a cursory discussion with an obvious focus on copyright. For an excellent treatise on Chinese history, see J. FAIRBANK, CHINA: TRADITION AND TRANSFORMATION (1978).
right laws. But just as China was forced to accept foreign trade, so was it pressured to accept international copyright protections.

In 1903 the United States and Imperial China signed the Shanghai Treaty As To Commercial Relations, which contained a copyright provision. The protections applied only to books, maps, prints, or engravings, and only when "especially prepared for the use and education of the Chinese people." No other protections were guaranteed. Subsequently, in 1946 the Shanghai Treaty was superceded by the Treaty of Friendship, Commerce and Navigation, which was entered into by the United States and the Nationalist government of the Republic of China. The treaty promised "effective protection" against unauthorized "reproduction, sale, and use of United States works," but specifically exempted translation rights. Thus, the pre-Communist history of China indicates a resistance, similar to the Russians', to part with freedom of translation.

In 1949, when the Communist Party, under the leadership of Mao Zedong, established the People's Republic of China, the new Chinese government repealed all laws and treaties of its predecessor, the Republic of China. Included in the class of nullified laws were several domestic copyright laws enacted during the reign of the Nationalist government. The new body of law conformed to Marxist-Leninist ideology, which placed possession of property in the hands of the state bureaucracy and out of individual control. Marxist-Leninist theory declared that the "renunciation of private property [was] essential to the success of the class struggle and the economic growth of the nation." Therefore, copyright laws, like other laws which protected personal property and impeded free use of that property by society at large, had no place in the socialist state.

Although China did occasionally agree to respect American copyrights as part of individual contracts, the incompatibility of Chinese Communist ideology with the theoretical underpinnings of copyright law—the protection of the individual—precluded a bilateral copyright treaty or Chinese accession to a copyright convention. Not surprisingly,

85. Id.
86. Id.
87. Id. at 421-22.
89. Id. at 410 n.41.
90. Id. at 411.
just as the Soviets had done following the 1917 Revolution, the Chinese began an era of isolationism with respect to international copyright and state control with respect to domestic publications.

This attitude predominated during the Cultural Revolution, which lasted from 1966 to 1969. During the turmoil of that period, anything even remotely foreign was considered evil. Codified laws in general were characterized as bourgeois tools of class oppression. During the reign of the so-called "Gang of Four" between 1966 and 1976, all forms of writing were inhibited, imports of foreign books ceased, universities were closed, and scholars and writers were sent to the countryside as farm laborers. During the reign of the Gang of Four, China experts noted:

The absence of a comprehensive statute for copyright protection supports the theory that the Chinese since 1949 have become increasingly wary of according extraordinary rights to creative individuals by law for fear of contributing to the establishment of an elite group.

The commentators also noted that a "drastic alteration of policy" would have to take place before the enactment of a Chinese copyright law.

After the Cultural Revolution ended and the Gang of Four was removed from power, China embarked on a course of reconstruction dictated by the economic pressures of the modern world: the Four Modernizations. This movement may have been the start of the "drastic alteration."

The Chinese government singled out four areas for special attention: agriculture, industry, national defense, and science and technology. At the start of the Four Modernizations in 1978, Chinese Premier Hua Guofeng stated, "We must race against time to strengthen ourselves economically . . . for this is the only way to cope effectively with possible social-imperialist and imperialist aggression against us."

While imperialist aggression was given as a major reason for the drive to modernize, imperialist countries were, ironically, also to be the

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91. Academics differ as to the precise duration of the Cultural Revolution. However, three distinct time periods have been recognized: 1966-69, 1966-71, and 1966-79. The current policy of China is that the Cultural Revolution ended in 1976 with the fall of the Gang of Four. Most American experts on China, however, refer to the Cultural Revolution's most violent phase of 1966-69 as the extent of the real "Revolution." For the purposes of this comment, the 1966-69 period is referred to as the "Cultural Revolution."

92. Carnese, U.S. Publishers, in Historic Visit, Discuss Copyright and Other Book-Related Matters, PUBLISHERS WEEKLY, June 4, 1979, at 27.


94. Id. at 424.

major suppliers of the technology China admitted it needed so desper-ately. Just as their Soviet counterparts did in the 1960’s, the Chinese realized that to acquire Western technology they had to provide protections to inventors and owners. Chinese interest in patent, trademark, and copyright laws increased proportionately.

China’s Movement Toward Joining the Universal Copyright Convention

In April 1979, the first U.S. delegation of publishers visited China, pursuant to an invitation by the China National Publications Import Corporation. One of the main objectives of this visit was to promote copyright laws within China. The publishers were prepared to use several negotiating tactics to make the Chinese feel uncomfortable with the idea of literary piracy. But the Chinese reasoned that (1) they could not join the UCC until China promulgated its own copyright laws and (2) until such time as China became a signatory it was not breaking any laws.

It was obvious to both parties, however, that China had an enormous economic incentive to defer accession. The same negative balance of payments problem that concerned the Russians was now impeding the Chinese. As was the case in the Soviet Union, Chinese imports of American intellectual property substantially exceeded their exports. Although China was extremely interested in U.S. creative and scientific literature, American imports from China consisted mainly of petroleum, cotton, and manufactured products. The Chinese needed more from the United States than a friendly publishers’ delegation preaching morality to persuade them. China wanted favorable trade terms, especially in light of the Four Modernizations and China’s need for Western technology.

The 1979 Trade Agreement (Agreement) was the first step toward improving Sino-U.S. relations. The Agreement gave China most favored nation status and created additional pressure on China to enact

96. Carnese, supra note 92, at 27.
97. Article X of the UCC provides that each member state must adopt “in accordance with its Constitution, such measures as are necessary to ensure the application” of the Convention. The Article further provides that any State wishing to sign the Convention “must be in a position under its domestic law to give effect to the terms” of the Convention.
98. Carnese, supra note 92, at 31.
Article Six of the Agreement provided that “both Contracting Parties agree that each party shall take appropriate measures ... to ensure to ... the other Party protection of copyrights equal to the copyright protection correspondingly afforded by the other Party.”\(^{102}\) Taken literally, this provision would necessitate Chinese enactment of copyright laws of the caliber of the U.S. Copyright Act.

It must be noted, however, that the Agreement was a tariff and trade document, and copyright was only a collateral matter. Furthermore, section 405(b)(5) of the 1974 U.S. Trade Act provides that most favored nation status may be granted to a country that is not a member of the UCC only if the agreement “provides rights for United States nationals with respect to copyrights in such country not less than the rights specified in” the UCC.\(^ {103}\) Therefore, it may be argued that Article Six was included merely to conform with the requirement of the Trade Act and was not a substantive provision requiring compliance. Nevertheless, this was the first bilateral document referring to copyright laws since the Communist takeover, and it is significant to note that it was done in the context of a commercial trade agreement.

Shortly after the Trade Agreement was signed, Chen Hanbo, director of the Publishers’ Association of China, stated that a copyright law would soon be presented to the National People’s Congress.\(^ {104}\) At the same time, Wang Heng, China’s leading copyright authority, said that a ten-member group had been set up in Beijing to draft China’s first copyright law.\(^ {105}\) Earlier, however, Wang had also pleaded that the Americans be patient and that China would first draft a patent statute before turning its attention to copyright.\(^ {106}\) This was a fascinating revelation considering the history of Chinese Communist hostility toward laws protecting intellectual property.

**Protection of Other Forms of Intellectual Property in China**

Among the laws abolished by the Chinese Communist Party when it came to power were patent and trademark laws. The Communists considered their abolition “a means of eliminating a literary elite and creat-

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\(^{102}\) Goldstein, *supra* note 88, at 426.


\(^{104}\) Nelson, *supra* note 101, at 758.

\(^{105}\) Id.

\(^{106}\) Carnese, *supra* note 92, at 32.
ing a socialist democracy." But as antithetical as trademark and patent laws were to Communist ideology, the importance of technical development and consumer protection forced the Chinese to adopt both.

Adoption of China's first trademark law came on March 10, 1983. In China, a trademark is a symbol of quality rather than an identification of the manufacturer. Therefore, trademark laws were easy to reconcile with Marxist-Leninist ideology as a consumer protection device, rather than as a recognition of the proprietary interest.

The enactment of China's patent law was accomplished in reaction to China's great need for Western technology. The Chinese were impressively methodical in their adoption of the patent laws. They spent approximately six years studying patent laws of several countries, including Japan, the United States, France, West Germany, Australia, Brazil, Switzerland, Romania, and Yugoslavia. Finally, in April 1985, China enacted its first patent law.

Before the patent laws became effective, China reported the establishment of a patent agency by the China Council for the Promotion of International Trade (CCPIT). To establish the agency, CCPIT recruited experts in technology, law, and foreign languages. To learn how a patent agency operated, CCPIT invited foreign experts to give seminars and teach courses on patents and their administration.

The Chinese were also quick to announce that foreign applicants for patent rights would get priority in patent registration. China did not hide the fact that adoption of patent protections was a move to encourage the import of foreign trade and technology into China. On the first day of the patent law, hundreds of Chinese and foreign businesses filed some 4,000 patent applications.

If Wang Heng was correct, copyright laws should be next on China's agenda. The Chinese have already taken steps toward affording some copyright protections within its borders. In 1982, China's Ministry

107. Goldstein, supra note 88, at 419.
108. Id.
110. Goldstein, supra note 88, at 420.
113. Id.
of Radio and Television promulgated provisions that required royalties
to be paid to authors and performers as determined by the Ministry of
Radio and Television. Thus, it is becoming clear that the ideological
barriers to the enactment of a comprehensive copyright system are not
unbreakable.

If China's method of enacting patent laws is any indication, the Chi-
nese will spend several years studying the copyright laws of other nations
before enacting their own. When China adopts an internal copyright sys-
tem, it should not be long before it submits its instruments of accession to
the UCC.

At present, however, other than the 1979 Trade Agreement, the
only other bilateral document referring to copyright laws is the very re-
cent and as yet unratified Tax Agreement signed by President Reagan
and Zhao Ziyang on April 30, 1984. This agreement is "the first com-
plete income tax treaty" between the United States and China, and
reduces the tax which each country may impose on certain types of in-
come, including royalties. In April 1984, prior to the signing of the
Tax Agreement, the Chinese classified the U.S. tax treatment of China as
discriminatory and called for prompt amendment or deletion of such pol-
icies. When the Tax Agreement was finalized, Article 11 contained a
fleeting mention of copyrights in its definition of "royalties":

The term royalties . . . means payments of any kind received
as consideration for the use of, or the right to use, any copy-
right of literary, artistic or scientific work . . . .

The Tax Agreement is new and not yet in effect; therefore, its implica-
tions are open to speculation. But since the provisions in Article eleven
are fairly standard for bilateral tax treaties, it is likely that as with the
Trade Agreement in 1979, the mention of copyright is merely a standard
inclusion with no substance or backbone. Thus, the status of copyright
relations between China and the United States remains unclear, while
China continues its unauthorized copying of the works of American
authors.

117. President's Message to Senate transmitting the Agreement Between the Government
of the United States of America and the Government of the People's Republic of China for the
Avoidance of Double Taxation and the Prevention of Tax Evasion With Respect to Taxes on
118. Id. at Art. I and II.
120. AGREEMENT, supra note 117, Art. II(3) at 8.
CONCLUSION

The historical development of China's attitude toward international copyright protections parallels that of Russia. First, both China and Russia initially exercised a policy of isolationism with respect to international copyright. Second, after each nation's Communist revolution, both China and the U.S.S.R. erected ideological barriers to copyright laws, and in both cases ideology gave way to economic necessity. The Soviets needed tax concessions; the Chinese needed trade expansion, technology imports, and international goodwill. Third, prior to joining the UCC, the Soviets were concerned about the resulting negative balance of payments in literary trade, but decided that the tax concessions would put them in the black. The Chinese are experiencing similar concerns, but joining the UCC may increase their goodwill status sufficiently to compensate for the difference. Finally, similarities may be found in the means employed by the United States to convince both countries that joining the UCC would be advantageous. The friendly American publishers' delegations, in reality trained negotiators, were common to both China and the U.S.S.R.

Although the precursors are similar, it is unlikely that China will duplicate the Soviets' initial inexperience in implementation of the copyright changes. China has been painstakingly methodical in its approach to enacting patent laws. China is already studying copyright protections in other nations and is seeking foreign assistance in drafting its first copyright laws, and the passage of China's trademark and patent laws has bought the country some time free from commercial pressures to protect foreign intellectual property. Seven and a half years elapsed from the time the Soviet Union joined the Paris Convention for the Protection of Industrial Property, thus affording trademark and patent rights to foreigners, and its accession to the UCC. Judging by the Soviet experience, it will be several more years before international pressure brings China into the UCC.

When China does become a signatory, U.S. authors' optimism that their works will finally receive due protection should be tempered. Such protection will not be granted because the Chinese finally will have accepted the theoretical underpinnings of monetary rewards for individual efforts. As with the Soviets, accession to the UCC will be a quid pro quo for commercial concessions from the United States, and hence will mirror the political relations between the two countries.

China's history and modern politics are characterized as pendulum swings from the pragmatic to the steadfastly ideological. The current movement toward ideology seems to have begun with the recent crack-
down on literary freedom by outlawing all books, magazines, and newspapers published without government approval.\textsuperscript{121} Specifically, the new regulations are aimed at publications which feature stories about sex, romance, and crime.\textsuperscript{122} Thus, even if the Chinese agree to respect copyrights, American popular works may be in danger of not being imported, of being confiscated, or of being used without compensation for "educational" purposes—to teach about the decadent bourgeoisie.

The Soviet and Chinese experiences and struggles with copyright laws seem to lend truth to the saying that you can lead a horse to water, but you cannot make it drink. The U.S. pressure on both countries to join the UCC can lead to accession, but the respect for and adherence to the spirit of international copyright laws cannot be forced.

\textit{Natasha Roit}\textsuperscript{*}

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121. \textit{China Bars Publication of Unapproved Works}, Los Angeles Times, Jan. 20, 1986, at 1. Although the new constitution, adopted in 1982, states that the Chinese people "enjoy freedom of speech, of the press, of assembly, of procession and of demonstration," a Chinese legal system publication warned that some people had misunderstood this as freedom "to air what is in one's mind at will." \textit{Id.} at 13.

122. \textit{Id.} at 1.

\textsuperscript{*} The author is a native of the U.S.S.R., has a B.A. in Chinese studies from the University of California at Los Angeles, and has studied in Taiwan on a graduate fellowship.
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