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China's Protection of Foreign Books, Video Tapes and Sound Recordings

YUANYUAN SHEN*

With the largest population in the world, China is considered a huge market for exporters of books, video tapes, sound recordings and other copyrighted materials. In 1987, China spent about sixty million dollars importing foreign books, one-third of which were from the United States. In contrast, China only published about 40,000 - 50,000 books that year. Between 1950 and 1979, China had only one record company and did not produce any cassettes. By 1985, China produced about seventy-two million cassettes¹, and in 1986, China had at least one hundred twenty-six record companies.² In 1987, over twenty-one billion tickets were sold to Chinese film-goers. Also in 1987, eighty foreign video tapes were licensed in China for televised broadcasting, up from thirty the previous year.³

Despite the notable increases described above, the market opportunities for Western businesspersons might not reflect the immensity of China's population. Besides China's shortage of foreign exchange, the most difficult problem affecting exporters of books, videos, and sound recordings to China is copyright protection. This article briefly discusses the current status of copyright protection in China, and then, specifically focuses on how foreign copyrighted works (such as books, video tapes and sound recordings) can be protected under China's existing legal structure. Finally, this article will briefly introduce new developments in this area.

I. THE CURRENT STATUS OF COPYRIGHT PROTECTION FOR PRC NATIONALS

The absence of a specific copyright statute in China has led many foreign observers to conclude that there is no protection available in China for materials that other countries protect by copyright law.⁴

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1. See *1985 Zhong Guo Chuban Nianjian* (China Publishing Yearbook, 1985).

2. See *1986 Zhong Guo Chuban Nianjian* (China Publishing Yearbook, 1986).

3. See *China Daily*, Apr. 2, 1987.

4. Westerners are inclined to think that China has no copyright law because copyright has a very precise meaning in most western legal systems and in the international conventions.

However, Chinese laws, regulations, and administrative practice combine to offer protection for PRC Nationals that is in many ways similar to that provided by copyright law in other countries.

Currently, copyright protection is available under two areas of Chinese law: (1) provisions of both the Constitution and general laws dealing with issues of intellectual and other property, and (2) administrative regulations and practices focusing upon authors' rights and closely related subjects.

A. The Constitution and More General Laws

Article 47 of the Constitution⁵ provides that:

Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.

More specific support can be found in the General Principles of the Civil Law. Article 44⁶ indicates that, "[c]itizens and legal persons enjoy the author's right (*zhuzuo quan*) and are entitled by law to sign, publish and print their works and obtain remuneration therefrom"

In addition, Article 118⁷ provides that, "[w]here the author's rights . . . of a citizen or legal person are infringed by such acts as plagiarizing, altering or passing off, he or it has the right to demand that the infringement be ceased, its effects be eliminated and any loss be compensated."

Along with these measures, the PRC's economic contract law recognizes the validity of contracts that authors have signed with publishers. Further, China's inheritance law permits an author's heirs to inherit an interest from such agreements.

B. More Specific Provisions and Practices

There are more specific regulations supplementing the general provisions described above. Some regulations are publicly promulgated and others are for internal circulation only. Both kinds of regulations govern relationships between authors, publishers and end-

5. See The Constitution of The People's Republic of China art. 47.

6. *Id.* art. 44.

7. *Id.* art. 118.

users. The most important of these are the Provisional Rules Governing Remuneration for Printed Works (*Shuji gaochou shixing guiding*)⁸ issued by the Ministry of Culture in 1954, and the Provisional Regulations Concerning the Protection of Copyright on Books and Periodicals (*Tushu qikan banquan baohu Shixing tiaoli shishi xize*) and its Detailed Rules for Implementation.⁹ These two regulations are internal and became effective on January 1, 1985.

These provisional copyright regulations establish a framework for copyright protection. They are intended to "protect the legitimate rights and interests of authors of literary, artistic, and scientific works" so as to promote creation in the spirit of "socialist spiritual and material culture." For books, articles, translations, musical scores, choreography, paintings, calligraphy, photographs, maps, drawings, and other specified forms of expression, protection is available to Chinese citizens for the author's remaining lifetime, plus thirty years.

The rights recognized under the provisional copyright regulations include those of publication, revision, performance, broadcast, recordation, translation, adaptation, arrangement, editing, and receiv-

8. In 1949, China established a system for remuneration of printed works which was intended to govern the relations between publishers and authors. Modelled after the Soviet Union's system, this system provided that fees would be calculated according to the number of copies (literally "fixed impressions" or *dinger yinshu*) made of a book. After the nationalization of the entire publishing industry in 1959, this system was amended to provide for a scheme of basic fees combined with impression fees. The basic fee was to be calculated in terms of the number of Chinese characters, with the amount per thousand characters to vary according to the quality of the work (as determined by the publisher). Typically, the basic fee accounted for approximately 90% of the author's total remuneration for the book, but yielded amounts that were low by Western standards.

Two points should be noted in understanding such a system. The first is that reliance upon a basic fee was intended to provide more remuneration for authors who published works of high quality that were not likely to be distributed in significant numbers. The second is that because professional writers in China receive salaries in the same range as university professors and also are provided with professional expenses (including the defraying of transportation and accommodation expenses by the government), the fees that they might earn from their books were regarded as a supplement rather than the staple of their livelihood. See Rengan, *An Overview of Copyright Protection in China*, 4 CHINA PATENT AND TRADEMARKS 49 (1988).

9. Because these are internal regulations, they are not openly published, although they would be available to Chinese lawyers, publishers, and authors. With all their limitations, these regulations reflect the work that has been going on in the copyright field in China. The regulations can be viewed as providing at least a basis for a copyright law, until a specific law in this field is published. Interestingly, it is in these regulations that the words copyright protection (*banquan baohu*) were first used in the title of a People's Republic of China law or set of regulations.

ing remuneration for works used by other persons. After initial publication, compensation for subsequent use diminishes.

Rights may be assigned or inherited in accordance with inheritance law. However, moral rights, the right of an author to revise his work or put his name on his creation, cannot be assigned or inherited. The right of publication of a work which an author or copyright owner assigns to a publishing unit is exclusive for an effective term of no less than ten years.

There are also two regulations that deal primarily with videos and sound recordings. The first is the Trial Provisions on the Administration of Audio-Visual Products promulgated in 1982 by the Ministry of Radio, Film and Television. The second regulation is the Notice on Rationalizing Audio and Video Market and Prohibiting Illegal Publication and Sale of Such Products, jointly issued in 1986 by the Ministry of Radio, Film, and Television, the Ministry of Commerce, and the State Administration for Industry and Commerce.

According to the video and sound recording regulations, publishers must respect the legitimate rights and interests of the authors and performers. A publisher is entitled to produce these audio-visual products only in accordance with an agreement made with the author or performer. Another publisher may not reproduce, publish or change the same work without the permission of the original publisher.

Should infringement occur, the author and other copyright owners¹⁰ have the right to demand cessation and compensation for losses sustained. Such problems may be taken to the national or provincial copyright offices or to the people's courts for resolution.

Thus, it is clear that Chinese law provides copyright protection, but this protection is far from adequate both in its coverage and its effectiveness when compared to that of much more developed nations. For example, although the provisional copyright regulations provide a principal basis for current copyright protection, these regulations are internal and therefore are not generally known to Chinese users or authors.¹¹ As a result, more people believe that it is necessary for China to formulate and publicly promulgate a specialized copyright law and corresponding rules to give the law meaningful effect.

10. According to the video and sound recording regulations mentioned above, copyright owners include authors, heirs of authors, or publishing houses that have obtained part or all of an author's copyright in accordance with a publishing contract.

11. *See supra* note 9.

II. THE SITUATION FOR FOREIGNERS

A. *First Publication Requirement*

The copyright situation for foreigners is less certain. On the international level, China has neither joined the international copyright conventions nor signed bi-lateral treaties for international copyright protection. However, the 1979 Sino-American Trade Agreement does contain a clause dealing specifically with copyright issues.¹² Under Article 6, paragraph 5 of the Agreement, each party promised to "take appropriate measures" under their laws and "with due regard to international practice" to ensure copyright protection "equivalent to the copyright protection correspondingly accorded by the other party to foreign nationals."¹³ However, in the minds of Chinese scholars there is doubt as to whether, in view of its language, the clause is self-executing and therefore imposes an immediate obligation upon China to protect works of United States nationals.

Domestically, the above Chinese laws provide that only works by foreign authors that are initially published in China will enjoy the same rights as those of Chinese authors. For those works by foreign authors that do not meet this requirement, some measure of protection may be obtained under the existing administrative regulations and practices through the means described below.

B. *Some Alternatives*

1. Licensing Contracts

Even though China has no specific provision offering foreign works copyright protection, a number of Chinese publishing companies have agreed to enter into licensing contracts with foreign publishers, under which the foreign publishers pay a copyright licensing fee.¹⁴ However, these licensing contracts have their problems. On the one hand, they can only bind the parties that enter into the contract. Therefore, it is difficult for a foreign copyright holder to secure relief

12. Additionally, China's cultural agreement with the Philippines includes a provision dealing with copyright issues. Under Article 4, each party agrees to take the necessary measures under its law to protect literary and artistic property of foreign nationals. See Z. XIONWEN, *ZHUZUO QUAN (COPYRIGHT)* 53.

13. 19 U.S.C. § 2335(b)(5) (1988).

14. In October 1985, a Chinese publishing company paid \$1,800 to a French licensor for the right to reprint its French children's book which was possibly the first book licensed in the People's Republic of China, see *ShiJie Tushu* (World Books), Jan. 1987. In June 1988, Chinese publishing companies closed approximately forty reprint licensing contracts, including a ten percent royalty agreement for the individual sales of certain books.

against a third party's infringement. On the other hand, according to the internal regulations and other administrative rules,¹⁵ no two publishing units can publish and distribute the same work. In other words, a publishing unit has the exclusive right to publish a particular work, so that foreign licensors are afforded some measure of protection for their works by entering into licensing contracts. Similar rules can also be found in those regulations concerning videos and sound recordings.

2. Co-Publication

There are various forms of co-publishing. Co-publication of a work involves two parties signing a contract and agreeing to perform certain work related to the publication and subsequently sharing the copyright of the work. Foreign publishers can therefore obtain protection by entering into co-publication contracts with Chinese publishers.¹⁶ This cooperative format has been used by a number of foreign Chinese film producers, as well as video and sound recording companies.¹⁷

A good example of co-publication by Chinese and foreign publishers is the Encyclopedia Britannica Collection. Under this publishing joint venture, the translation and editing was done by Chinese staff in Beijing, while the editorial review board of Chinese and American scholars supervised policy decisions. The Chinese side paid royalty to Britannica on a per sale basis, while Britannica had sales rights outside China.

3. Administrative Approval and Supervision

Recently, in the case of licensing or co-publishing of video and sound recordings, stricter controls have been established. According to the video and sound recording regulations and practices, a foreign investor can sign a contract only with a state-approved unit that holds a business license. In addition to entering into contracts, a foreign investor must get advance approval before distribution of licensed or co-published products. Once they have been approved, foreign video

15. See, e.g., "Notice on Protecting Publishers' Rights" issued by National Publishing Administration in 1981. Similar provisions also can be found in the Model Publishing Contract.

16. Up to 1986, Chinese publishers had signed more than 700 cooperative contracts with foreign publishers.

17. In 1988, ten co-productions were scheduled between Chinese and foreign film corporations. *Hollywood Reporter*, Mar. 2, 1988.

and sound recordings are effectively protected. The underlying policy of some approvals is based on censorship considerations. The State Administration of Industry and Commerce is empowered to confiscate both the infringing products and the equipment used in the infringement process. It is also empowered to force the infringers to compensate the person or unit damaged. If an infringement is discovered, the Chinese government will issue a letter to the State Administration of Industry and Commerce seeking action against the infringement.¹⁸

Currently, even with the above-mentioned alternatives, there is no promise of adequate and effective protection for foreign copyright holders in China. First, it appears unlikely that many foreign authors would like to initially publish in China unless the work is aimed at a Chinese market. In addition to the practical difficulties involved, foreign authors' compensation would be limited to the rates established by Chinese law. These rates, designed with Chinese authors in mind, are extremely low by western standards.

Second, the other alternatives, which are based on existing administrative regulations and practices, derive their protection by taking advantage of the monopoly in China's publishing and entertainment industry. These administrative approaches may become less effective because economic reform has lessened state control over business enterprises.

III. PREPARATION FOR FURTHER PROTECTION

China has taken steps through patent and trademark laws to protect other forms of foreign intellectual property. China appears eager to take further steps toward improving its copyright system and also protecting foreign works.¹⁹ China considered formulating a specialized copyright law as early as 1979.²⁰ Since its first contacts with the

18. It might be a good idea for a foreigner to cooperate with larger Chinese enterprises, such as China's Publication Import/Export Company, which controls eighty-five to ninety percent of China's foreign exchange allocated for the importation of publications. Otherwise, a foreigner would have to sign an agreement with the ministries concerned before the transaction. The agreement may state that if an infringement occurs, the Ministry (or the Chinese side) will take it upon itself to investigate the matter.

19. See generally Rengan, *supra* note 8, at 50-51. Z. CHENGSI & Z. ZHISHI, CANQUAN FA TONGLUN (FUNDAMENTALS OF INTELLECTUAL PROPERTY LAW) 145 (1986).

20. See Formulating the Copyright Law and Opening to the Outside World by Legal Affairs Department Advisor, Patent Agency, China Council for the Promotion of International Trade (CCPIT), *China Patents & Trademarks* (April 1987 No. 2). See also Rengan, Zhong Yingke, *Banquan Fa Qiant'an* "An Elementary Introduction to Copyright Law," 1983.

World Intellectual Property Organization (WIPO) in Beijing, in 1981, China has begun preparing for the new copyright law by, among other things, organizing nationwide copyright training courses for Chinese nationals. China has received the help of experts from WIPO, UNESCO and other foreign countries, which sent representatives to various meetings and seminars held by international copyright organizations.²¹

One significant step was the establishment of the State Copyright Administration in 1985. Its current duty, among others, is finalizing the drafting of the copyright law and carrying out work in preparation for the promulgation of the law.²² A draft of the copyright law was revealed on the front page of *China Daily*, September 11, 1986. The *Daily* reported that the draft had been set for examination by the highest levels of the government during the October 1987 session of the Standing Committee of the National People's Congress.²³ This proposed law has since attracted the attention of people with interests both inside and outside of China. Although more than two years have passed, it still remains under discussion today.

The hot debate on the contents of the proposed copyright law is certainly one of the reasons for the delay in promulgating the law. The question of whether copyright protection should be provided to foreigners at all is of particular difficulty and controversy. Since China lacks the foreign exchange to pay full royalties for all the foreign publications it needs for educational and economic development, many (including some well-known scientists) strongly question whether foreign copyrights should be protected in China, at least until its economic condition improves. Even if China agrees to pay royalties, there is the concern of a "book famine;" western publishers might refuse to license works in China for fear of royalties dropping too low to even cover transaction costs.²⁴ As a consequence, a provision²⁵ regarding protection of foreign works was removed from the

21. See *Copyright*, WORLD INTELLECTUAL PROPERTY ORGANIZATION 257 (June 1984). See also "Making the Right Moves," *China Trade Report* (July 1987).

22. See Rengan, *supra* note 8, at 50-51; Z. Xionwen, *supra* note 12, at 45.

23. See *Wen Wei Pao* (H.K.), July 18, 1987.

24. Based on discussions with Vice Dean Liu Chuntian, Law Professor at People's University of China, a member of The Copyright Law Drafting Group.

25. Article 2 of the November 1988 draft copyright law provided:

Copyright shall be granted to foreigners for their works first published or not published but located in the territory of the PRC. Protection shall be granted to foreigners in works first published outside the territory of the PRC in conformity with bilateral agreements and international treaties to which the PRC is a party.

most recent version of the draft law.²⁶ Whatever the outcome on this issue, the controversy over whether China should recognize foreign copyright will continue, even after a specialized copyright law is adopted.

Practical Aspects of Technological Transfer in China

THEODORE W. WU*

In the realm of international political and economic relations since 1950, perhaps the most dynamic change occurred in the area of Sino-United States relations. During the last ten years, the relationship between the United States and the People's Republic of China has grown from one of mutual toleration to one of friendship and mutual respect. If the dichotomy seems too stark and dramatic, it is because the change is undeniably dramatic and dynamic; the relationship is of a miraculous nature in light of the fact that it was not so long ago that the two countries barely acknowledged each other.

Politics, trade and commerce, and scientific and cultural exchange are the areas of Sino-United States relations which have experienced the most remarkable transformation. Regarding trade and commerce, the United States has, in a few short years, become a major trading partner with China. In 1987, the United States became China's third largest investment partner. Since the open-door policy was established in 1979, the total dollar value of United States investments in China has grown to more than \$10 billion.

This remarkable change was the result of two primary factors. The first was the change in the technology export control policy of the United States toward the People's Republic of China. The second involved the important progress made by the government of the People's Republic of China in its promulgation and implementation of

26. The current draft law has not been officially published, although it has been widely circulated among scholars and publishers in China. Copies are available to foreign governments, publishers and lawyers. See generally Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1 (1988).

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