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THE 1990 COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA

Yiping Yang†

I. INTRODUCTION

Since the adoption of the open-door policy at the end of the 1970s, China has felt strong pressure from Western nations, the United States in particular, to enact more protective intellectual property laws. The Chinese Government responded by passing the Trademark Law in 1982 and the Patent Law in 1984. Further, the long-awaited Copyright Law of the People's Republic of China (the "Copyright Law") was adopted by the 15th Session of the Seventh National People's Congress Standing Committee on September 7, 1990,¹ and went into force on June 1, 1991.²

However, the promulgation of the Copyright Law did not satisfy many Western nations, as evidenced by episodes of diplomatic conflict between Washington and Beijing soon after its enactment. In April 1991 the United States Trade Representative (USTR) placed China on the "Special 301 priority watch list"³ (together

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1. *China's Copyright Law*, BBC Summary of World Broadcasts, Sept. 11, 1990, available in LEXIS, Nexis Library, NEWS File.

2. *Beijing Newspaper Highlights*, Xinhua General Overseas News Service, May 31, 1991, available in LEXIS, Nexis Library, NEWS File.

3. "Special 301" is a provision of the U.S. Omnibus Trade and Competitiveness Act that aims to protect American intellectual property rights in foreign countries with whom the U.S. has trade agreements. Omnibus Trade and Competitiveness Act of 1988, § 301, 19 U.S.C. §§ 2242 (a)(1), 2411 (1988). As one commentator states:

Under the 'Special 301' provision . . . , failure to provide adequate and effective protection for [American] intellectual property rights constitutes an unreasonable trade practice. The [A]ct requires the [United States Trade Representative (USTR)] to identify countries engaging in such practices or denying fair and equitable market access to [American] companies that rely on intellectual property protection. Countries so identified are designated 'priority countries.'

with India and Thailand) for the third time due to perceived computer software piracy. When China's new Computer Software Copyright Regulations (the "Software Regulations") were published on June 13, 1991,⁴ two weeks after the Copyright Law took effect, Western businessmen immediately expressed their displeasure with the Copyright Regulations, stating that they were "not completely up to the standards of the multilateral conventions."⁵

Although the Chinese Government strongly opposed China's inclusion on the "Special 301 priority watch list," China was required to respond to the USTR's action within six months as prescribed by the 1988 Omnibus Trade and Competitiveness Act (the "Trade Act"). By November 1991, U.S. imposition of a tariff penalty on China appeared likely. Compromise negotiations between the two countries continued until January 17, 1992, when both sides signed a Memorandum of Understanding on the Protection of Intellectual Property ("MOU") in which China made several concessions.⁶ Most significantly, China agreed to accede to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")⁷ in October 1992 and to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms ("Geneva Convention") in June 1993, and to amend its new Copyright Law and relevant implementing regulations consistent with these two international conven-

Pitman B. Potter, *Prospects for Improved Protection of Intellectual Property Rights*, CHINA BUS. REV., July-Aug. 1989, at 27. If no improvements are made by the named country within a specified period of time, usually six months after being named by the USTR, the country faces potential trade retaliation from the U.S.

No country has yet been identified as a "priority country" although dozens of countries have been placed on either the "watch list" or the "priority watch list." China was placed on the "priority watch list" in both 1989 and 1990 by the USTR for inadequate intellectual property protection and for its lack of a copyright law. Other countries and areas on the 1989 "priority watch list" were Brazil, India, Mexico, Saudi Arabia, South Korea, Taiwan, and Thailand. Those on the "watch list" were Argentina, Canada, Chile, Columbia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, the Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia. See also Shoukang Guo, *Wulagui huihe tanpan yu zhuzuoquan* [*The Uruguay Round Negotiations and Copyright*], 1 ZHUZUOQUAN [COPYRIGHT] 15 (1991).

4. *U.S. Envoy Warns Software Makers about China's Copyright Law*, UPI, June 15, 1991, available in LEXIS, Nexis Library, NEWS File.

5. *Lawyers Wary of China's New Software Protection Rules*, UPI, June 14, 1991, available in LEXIS, Nexis Library, News File. The dissatisfaction focuses on the provision in the Copyright Regulations that accords protection only to computer programs (1) that are published first within China, or (2) are first published outside of China but thereafter are registered in China within 30 days.

6. Memorandum of Understanding Between the Government of the People's Republic of China and the Government of the United States of America on the Protection of Intellectual Property [hereinafter MOU], art. 3 §§ 1-2, 4 (1992). See also *Measure to Carry Out Sino-U.S. Agreement*, CHINA DAILY, Jan. 20, 1992, at 1.

7. Berne Convention for the Protection of Literary and Artistic Works, Paris Additional Act, July 24, 1971, 828 U.N.T.S. 221.

tions. The Chinese Government also promised to extend unrestricted legal protection to copyrighted works, including computer programs and sound recordings, published by U.S. nationals outside of China until China has fully acceded to the aforementioned conventions.⁸ In return, the United States agreed to terminate its "Special 301" investigation of China, and to remove China from the "priority watch list."⁹

The events that occurred before and after the promulgation of the Chinese Copyright Law raises interesting questions about its development and adoption. For example, why was the Copyright Law adopted so late? How did Chinese law protect works published domestically by Chinese authors before the passage of the Copyright Law? If China could function without a copyright law for four decades, why was a copyright law deemed necessary? What policies does the Copyright Law promote? Will it effectively protect the published copyright works of Chinese nationals? Will it provide equivalent protection for foreign works? Will it safeguard computer software? These questions will be discussed in this Article.

This Article focuses on several specific features of the new Copyright Law, including its foundations, its underlying legal and social concepts and the protection that it provides for copyrighted works by foreign nationals.

II. A BRIEF HISTORY OF CHINESE COPYRIGHT LAW

Prior to the 1990 Copyright Law, China had promulgated three official copyright codes: the copyright law of the Qing Dynasty, enacted in 1910 during the reign of the last feudal emperor, Xuantong (1909-1912); the copyright law issued in 1915 by the temporary Northern Warlords Government (1912-1927); and the Copyright Law of the Republic of China promulgated in 1928 by the Nationalist Government (1912-1949).¹⁰ The concept of copyright can be traced back as early as the Song Dynasty (960-1279), when publishers stated on the last page of a book that reproduction was prohibited.¹¹ During the Song Dynasty, an individual who copied a manuscript without the publisher's consent was subject to fines and corporal punishment.¹²

The three foregoing copyright laws were relatively similar.

8. See MOU, *supra* note 6, art. 3, § 9.

9. *Id.* art. 7.

10. Muwen Song, *Zhongguo de banquan baohu* [Copyright Protection in China], 2 ZHUZUOQUAN [COPYRIGHT] 1 (1991).

11. STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 875 (2d ed. 1989).

12. *Id.*

Although the Qing Dynasty copyright law was never actually implemented because the Qing Dynasty was overthrown in the 1911 Revolution led by Dr. Sun Yat-sen, the 1915 and 1928 copyright laws were essentially derived from the Qing Dynasty law and adhered to its basic principles.¹³ When the Communist Party (the "Party") established the People's Republic of China ("PRC") in 1949, it abolished all statutes enacted by the Nationalist Government on the ground that the new socialist system would not inherit any aspects of its illegitimate predecessor.

In contrast to the Soviet Union, China lacked a developed legal system with officially promulgated statutes and regulations until the end of the 1970s, almost three decades after the PRC's founding. Chinese copyright protection had been ad hoc and informal, limited to quasi-copyright relationships and the provisions of certain laws which, taken together, exhibited characteristics of a copyright regime.¹⁴ According to the accepted international definition of copyright, the PRC did not have a true copyright law until 1990.¹⁵

The PRC's copyright provisions during the last four decades primarily governed remuneration between authors and publishers. These rules usually existed in the form of administrative orders or internal regulations. For example, during the 1950s the General Publishing Office of the Central People's Government issued public and internal resolutions governing the relations between authors and publishers. A per-word and per-copy royalty system was formulated for the benefit of authors and translators.¹⁶ Starting with the Anti-Rightist Movement in 1957, per-word and per-copy royalty payments to authors and translators were reduced significantly in accordance with the Party's intention of narrowing the income gap between mental and manual labor.¹⁷ During the Cultural Revolution, the system of publishing contracts was dismantled.¹⁸ Thereafter, the issue of copyright protection did not emerge again until the end of the 1970s.

In 1980, the State Publishing Administration issued the Provisional Regulations on Book Royalties, which served as the basic rules governing payments to authors.¹⁹ Prior to the passage of the Copyright Law in 1990, copyright protection was provided by the

13. Song, *supra* note 10, at 2.

14. MICHAEL D. PENDLETON, *INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA: A GUIDE TO PATENTS, TRADEMARKS, AND TECHNOLOGY TRANSFER* 39 (1986).

15. *Id.*

16. Mark Sidel, *The Legal Protection of Copyright and the Right of the Authors in the People's Republic of China, 1949-1984: Prelude to the Chinese Copyright Law*, 9 *COLUM. J. ART & LAW* 477, 479-87 (1985).

17. *Id.* at 486.

18. *Id.* at 487.

19. *Id.* at 488-99.

State Council's Notice of Audio-Visual Measures issued in 1982.²⁰ The Audio-Visual Measures were enacted to censor and combat the illegal import of audio-visual materials deemed unsuitable for the Chinese population.²¹ Despite this purpose, the Audio-Visual Measures addressed major concerns in copyright protection, such as royalty rates, payment methods, reproduction and duplication of audio-visual materials. Moreover, the Audio-Visual Measures authorized, for the first time in Chinese history, judicial action against copyright infringers.²²

III. ANALYSIS OF THE 1990 COPYRIGHT LAW

The 1990 Chinese Copyright Law reflects both an ideological and a political purpose. In addition to providing copyright protection for authors of literary, artistic and scientific works, as well as copyright-related rights and interests, the stated objective of the Copyright Law is to encourage "the creation and dissemination of works conducive to socialist spiritual and material construction," and to "promote the development and flourishing of socialist culture and sciences."²³ An in-depth discussion of the political aspects of the Copyright Law is beyond the scope of this Article. This Article focuses on the traditional Chinese influences which help give rise to the Copyright Law.

A. PROTECTION OF MORAL RIGHTS

The Copyright Law, according to one Chinese scholar, is "likely [to be] the most up-to-date and perhaps the most fair copyright legislation in the world."²⁴ Nearly twelve years in its formulation, the Copyright Law is a progressive enactment that provides a full range of protection of copyright and related rights.²⁵ It demonstrates a high level of modern sophistication and compares favorably to copyright laws enacted by developed nations.²⁶ The Copyright Law contains protections that are suggested by the Berne Convention, as well as provisions required by the Convention. Furthermore, the merit of the Copyright Law is reflected in its provi-

20. The complete title of the notice is Notice of the State Council Approving the Circulation of the Interim Measures on the Management of Audio-Visual Manufactures by the Ministry of Radio and Television. *Zhonghua Renmin Gongheguo Guowuyuan Gongbao* [State Council Gazette of the People's Republic of China] 15 (1983).

21. Sidel, *supra* note 16, at 492.

22. *Id.* at 493.

23. See Chinese Copyright Law, art. 1 (1990) (P.R.C.).

24. Jianming Shen, *The P.R.C.'s First Copyright Law Analyzed*, 14 HASTINGS INT'L & COMP. L. REV. 529, 530 (1991).

25. *Id.*

26. Chengsi Zheng, *Zhuzuoquan fa shishi qian yingdang mingque de ruogan wenti* [Some Issues to Be Clarified Before the Implementation of the Copyright Law], 1 ZHUZUOQUAN [COPYRIGHT] 19, 20 (1991).

sions that protect authors' moral rights.²⁷

Although it may be argued that the protection of moral rights is rooted in Western legal systems, it also is grounded in Chinese legal tradition. Authors' moral rights were protected by the first official Copyright Law enacted in 1910 which provided that when publishing or duplicating a work on behalf of an author, a publisher should neither sever or alter the original nor change the name of the author or the title of the work.²⁸

The Copyright Law contains three provisions that protect authors' moral rights. Article 16 ensures that authors of certain occupational works²⁹ retain signatory rights in addition to the economic rewards of publication. Further, Article 20 secures an unlimited period of protection for an author's right to sign, revise, and prevent the alteration of his work.³⁰

With respect to moral rights, the Chinese Copyright Law offers protection that is equivalent, if not superior, to the protection afforded by the laws of the world's developed nations. This conclusion is supported by an examination and comparison of relevant provisions of the U.S. Visual Artists Rights Act of 1990 and of the Berne Convention.

Section 106A of the United States Copyright Act of 1976, enacted as part of the U.S. Visual Artists Rights Act of 1990, provides as follows:

106A. Rights of certain authors to attribution and integrity

(a) RIGHT OF ATTRIBUTION AND INTEGRITY.-

Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art

(1) shall have the right-

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name

27. By comparison, the American copyright law has been amended four times in a period of 186 years. PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 528 (3d. ed. 1990). However, the protection of authors' moral rights, an element in the Berne Convention, was not incorporated into American copyright law until 1990. See Berne Convention, art. 6, *supra* note 7. In 1990, the U.S. Congress enacted the Visual Artists Rights Act of 1990, which added a new Section 106A to the current Copyright Act of 1976. MELVILLE NIMMER, *NIMMER ON COPYRIGHT* 19 (Matthew Bender, Release No. 28, June 1991). Section 106A, which focuses on authors' moral rights, protects the integrity of an author's copyrighted work in order to prevent "distortion, mutilation, or other modification of the work which would be prejudicial to . . . her honor or reputation." *Id.*

28. Song, *supra* note 10, at 2.

29. "Occupational works" in the Copyright Law are analogous to "works for hire" in the U.S. Copyright Act. See Chinese Copyright Law, art. 16; cf. 17 U.S.C. § 601 (1988).

30. See Chinese Copyright Law, art. 20.

as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right-

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Article 6bis of the Berne Convention provides for the protection of authors' moral rights.

[Moral Rights: 1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author's death; 3. Means of redress]

(1) Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Because the Chinese Copyright Law covers almost all that is stipulated in the Berne Convention with respect to moral rights protection, the claim that the Copyright Law is quite sophisticated is not without basis.³¹

B. MODERATE PROTECTION OF ECONOMIC RIGHTS

Contrary to its advanced protection of moral rights, the new Chinese Copyright Law provides only moderate protection for the

31. See *supra* note 24 and accompanying text.

economic interests of authors in their works.³² This restrained protection of economic rights was predicted in 1984 by Zheng Chengsi, a Chinese copyright scholar:

The general theory of future Chinese copyright has yet to be the subject of an official publication. My own view, however, is as follows: (1) we recognize that copyright is a type of property; (2) we recognize that copyright, generally speaking, is a type of right that may be owned by an individual; (3) we recognize that copyright is a type of exclusive right (all this is elementary and needs no specific reference); (4) we will give adequate protection to both the moral and economic rights of the author; and (5) such rights of the author will be neither unduly wide, nor will they be too narrow to meet the requirements of the Universal Copyright Convention. (These last two points have been made clear more than once by the leader of the Chinese Copyright Group of the Ministry of Culture).³³

Zheng described the forthcoming economic rights protection in China as being narrower than that provided by most Western nations, but broader than that of some socialist nations:

The scope of the author's economic rights may not, even in the future, be as wide as in most Western countries. For example, rights such as a public lending right, or the right to get royalties from educational photocopying, or from domestic radio and video recording, may not appear in the Chinese copyright law in the foreseeable future. The scope, however, will not be narrower than the minimum requirements of the UCC, since it has been said by the competent department that in due course China will consider adhering to the UCC. So, in the final analysis, the level of protection in China must be higher than that currently provided in some other socialist countries.³⁴

The Copyright Law addresses the economic rights of authors primarily in Article 10(5). Under this article, an author enjoys the right to use his copyrighted work and to receive remuneration—or the rights to reproduce, show, broadcast, exhibit, publish, film, televise or videotape the works; or to adapt, translate, annotate and edit them; as well as the rights of permitting other people to use their works with aforementioned methods and receiving remuneration therefrom.

Article 21 allows economic rights granted under Article 10(5) to last throughout the author's lifetime, plus 50 years after his death. However, the fair use provision in Article 22, which limits exclusive economic rights of authors, results in a less restrictive level of economic rights protection compared with the copyright laws of many Western countries.

32. Rengan Shen, *Shilun woguo zhuzouquanfa de tedian* [*Characteristics of the Chinese Copyright Law*], 2 ZHUZUOQUAN [COPYRIGHT] 9 (1991).

33. PENDLETON, *supra* note 14, at 42.

34. *Id.* at 43.

Most copyright statutes contain a fair use provision. Generally, a fair use exception allows reasonable use of copyrighted works that are lawfully available to the public, without the consent of the copyright holder. For example, the United States Copyright Act of 1976 provides that fair use, which encompasses any use for the purpose of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not a copyright infringement.³⁵ United States copyright law generally identifies these six exemplary fair use purposes and lists factors to help determine whether an activity constitutes a fair use.³⁶

In contrast, the Chinese Copyright Law identifies twelve fair uses which include those enumerated in the United States Copyright Act of 1976.³⁷ By creating additional fair use exceptions, Article 22 restricts authors' economic rights more tightly than Western copyright laws.

The Copyright Law's unique features providing a high level of protection for an author's moral rights but only a moderate level of protection for his or her economic rights developed as a result of three factors: (1) economic reasons, (2) the socialist ideology, and (3) traditional influences.

1. *Economic Reasons*

China remains a developing nation. Its protection of economic rights in copyrighted works must correspond to its economic capacity. At the present stage, it is impossible and unrealistic for the Chinese Copyright Law to contain economic protection provisions equivalent to those in the copyright laws of developed countries. According to conservative statistics, among China's population of 1.6 billion there are 180,000,000 illiterates and semiliterates, more than ten percent of the country's people. Additionally, 269 out of over 2000 counties have no public libraries, and the annual personal income of five percent of the rural families is less than 200 RMB *yuan*, or approximately thirty-eight US dollars.³⁸ The Copyright Law's modest protection of economic rights reflects the moderate development of the Chinese economy.

A more specific factor attributable to China's economic system

35. See 17 U.S.C. § 107 (1988).

36. GOLDSTEIN, *supra* note 27, at 629. See also *infra* note 71.

37. The twelve Chinese Copyright Law fair uses are: "personal enjoyment and education" in art. 22(1), "comment" in art. 22(2), "news reporting" in arts. 22(3)-(5), "classroom teaching" in art. 22(6), "use by state organs" in art. 22(7), "reproduction by libraries and archives" in art. 22(8), "non-profit performances of already published works" in art. 22(9), "copy and photographing of outdoor public exhibits" in art. 22(10), "translation of Chinese works into ethnic minority languages" in art. 22(11), and "translation into languages for the visually impaired" in art. 22(12).

38. Shen, *supra* note 32, at 10.

helps explain the limited protection of authors' economic rights. The majority of Chinese writers and artists are employees of official working units and receive fixed salaries, and thus do not rely on income from their copyrighted works for support. Therefore, Chinese authors do not require copyright laws to provide them economic protection in the manner necessary in the West.

2. *Socialist Theory*

The People's Republic was founded on socialist tenets. This dogma influences all aspects of Chinese society, from laws to social mores. Inevitably, socialist theory is at least partially responsible for the limited economic rights protection provided by the Chinese Copyright Law.

a. *Marxist-Leninist Theory*

China is one of the few socialist countries where Marxist-Leninist theory is still followed. This theory is reflected in China's statutes and regulations. Since the early days of the People's Republic, and as evidenced by its 1954 Constitution, China has sought to abolish the system of human exploitation. Marxist-Leninist theory considers private capital to be a means of exploitation. Thus, renunciation of private property is "essential to the success of the class struggle and the economic growth of the nation."³⁹

The Chinese Government drew a clear line between means of production and means of livelihood. Individuals who control means of production hold the potential for exploitation, so the state must exclusively own all means of production. Means of livelihood, however, are necessary for every individual's existence, so means of livelihood can be owned by individuals. A basic principle in the socialist economy is "from each according to his ability, to each according to his work."⁴⁰ This means that every individual must work and is rewarded for his efforts, but no individual can profit more than another due to a greater ability or a better situation. Thus, acquiring private property, other than in modest portions for purposes of livelihood, has been largely forbidden by law in China.

Consistent with this principle of rewarding different workers equally, after 1949, the Communist Party repeatedly emphasized that literary and artistic works should be afforded no higher status than the efforts of manual laborers or peasants. If extraordinary rights were accorded to creative individuals, it was feared that a literary elite would emerge.⁴¹ Acknowledging intellectual property

39. Richard Goldstein, *Copyright Relations Between the United States and the People's Republic of China: An Interim Report*, 10 BROOK. J. INT'L L. 403, 411 (1984).

40. XIANFA [Constitution] art. 6 (P.R.C.).

41. Jon A. Baumgarten, *Copyright Relations Between the United States and the Peo-*

rights would widen the gap between laborers and intellectuals. To narrow this gap, an author would be paid a lump sum of money for completing a literary or artistic work, usually according to the number of words in the work or some related measure.

This antipathy toward private property prevailed in China for more than thirty years. The Copyright Law, although encouraging and protecting intellectual property rights, was enacted by a legislature that had been guided by China's Marxist-Leninist traditions, and understandably bears its marks.

b. Slow Enactment of the Copyright Law

China's antagonism against private property is also demonstrated by the order in which its intellectual property statutes were enacted. The Copyright Law was the last of China's three intellectual property statutes enacted. The first statute enacted was the Trademark Law of 1982. The Trademark Law is furthest removed from the sensitive issue of private property because protection of trademarks and trade names is provided mainly to enterprises and institutions, the majority of which are owned either by the whole Chinese people or collectives of the "working people."⁴²

In 1984, the Patent Law became the second intellectual property statute enacted. In enacting the Patent Law, the Chinese legislature moved one step closer to protecting private property rights: inventions and innovations, which are covered by the Patent Law, are considered to be individual efforts. However, those inventions and innovations are viewed as means of production and as productive forces for modernization. Therefore, those inventions that are occupational in nature belong to state-owned enterprises. In addition, the aim to quicken the pace of modernization has led China to import advanced foreign technology protected by foreign patent laws. Without guaranteeing adequate legal protection of patent rights, China could not obtain advanced scientific and technological innovations from foreign patent owners. As a result, the Patent Law's protection primarily benefits those state-owned enterprises seeking to modernize. Although individuals who create an invention or innovation could also be beneficiaries of the Chinese Patent Law, they are not the legislature's primary concern.

Last came protection of "pure" private property interests.⁴³

ple's Republic of China—the Seventeenth Annual Jean Geiringer Memorial Lecture, 27 BULL. COPYRIGHT SOC'Y U.S.A. 419, 423-24 (1979-80).

42. A state enterprise is formally designated as owned by the "whole people." Agricultural cooperatives and other forms of cooperative economy, such as producers', supply and marketing, credit, and consumers' cooperatives, are termed as those owned by the "working people." See XIANFA [Constitution] *supra* note 40, arts. 6-8 (P.R.C.). These two sectors constitute the basis of the socialist economic system in China.

43. "Pure" is used in comparison with the Trademark Law and the Patent Law.

Although the enactment of the Copyright Law had been on the government's agenda since the signing of the Sino-American agreement in 1979, the concept of copyright remained bewildering to the Chinese administration and legislature.⁴⁴ When the Patent Law was adopted, wariness of fostering elitism was overcome by the ardent goal of social modernization. However, in the literary and artistic fields, there was no corresponding interest powerful enough to overcome the government's distaste for according extensive rights to an elite group.⁴⁵ The long interval between the passage of the Patent Law in 1984 and the enactment of the Copyright Law in 1990 may be a reflection of the Chinese socialist theory.

c. Writers and Artists as a Distinct Class

Prior to 1980, the Chinese people were divided into different classes according to Mao Zedong's "class struggle" theory.⁴⁶ Intellectuals were labelled as semi-bourgeoisie and were compelled to try to become part of the working class. Further, Chinese intellectuals were subdivided into groups. After the Yanan period (1936-1948), artists and writers were considered more bourgeois than other intellectuals. They were required by the Communist Party to "shift their stand" and "gradually move their feet over to the side of the workers, peasants and soldiers, to the side of the proletariat."⁴⁷ Bringing writers and artists to the side of the working people would, according to Mao, create "truly proletarian literature and art"⁴⁸ to serve the working class. This radical notion sought "to ensure that literature and art fit well into the whole revolutionary machine as a component part, that they operate as powerful weapons for uniting and educating the people and for attacking and destroying the enemy."⁴⁹ This literary and artistic ideal predominated in China for more than forty years.

Discrimination against writers and artists was an inveterate trait of Chinese totalitarian governments which the Communist

Occupational copyrighted works, whose copyrights are not held by individuals, form only a proportionately small part of the general copyrighted works.

44. When some representatives of a Chinese publishing delegation visited the United States Copyright Office in 1980, they stated forcefully that the strange concept of copyright was an obstacle to adopting a copyright law in China. See Baumgarten, *supra* note 41, at 432.

45. *Id.* at 423-24.

46. In *On Practice*, Mao pointed out that "[i]n class society everyone lives as a member of a particular class, and every kind of thinking, without exception, is stamped with the brand of a class." 1 MAO ZEDONG, *On Practice*, in *SELECTED WORKS OF MAO ZEDONG* 296 (1967).

47. 3 MAO, *Talks at the Yanan Forum on Literature and Art*, in *SELECTED WORKS OF MAO ZEDONG*, *supra* note 46, at 78 (1967).

48. *Id.*

49. *Id.* at 70.

Party inherited and developed to its extreme. For more than 2,000 years Chinese authors have been considered an unstable social force. By expressing their thoughts and opinions, they aroused and spread discontent among the people. In particular, they criticized authorities by innuendo in their literary or artistic works. Starting with the Ming Dynasty (1368-1644), anti-establishment writers could be legally persecuted. Imprisonment of authors for writings considered offensive was not uncommon under the imperial governments. The imprisonment was not necessarily political persecution in the modern sense. Some people were jailed simply because they used a word which happened to be the name of an emperor.⁵⁰ An extreme example was a Qing Dynasty poet who was imprisoned because of the particular wording he used in a poem.⁵¹

The Cultural Revolution, as its name indicates, was rooted in literary and artistic controversy: the Revolution was triggered by criticism of an historical play entitled *Hai Jui Dismissed from Office*.⁵² During the Cultural Revolution many literary and artistic works, whether they were Chinese or foreign, ancient or contemporary, were denounced and prohibited from dissemination as revisionist materials of feudalism and capitalism. Mao's Yenan Forum on Literature and Art, established the sole criterion by which prospective published works were judged. According to Mao, there was "no such thing as art for art's sake, art that stands above classes or art that is detached from or independent of politics."⁵³ Under Mao's theory, Chinese writers were compelled to conform their expression to the so-called "revolutionary" criterion whereby an author should aim to have his or her literary or artistic work published and accepted by the workers, peasants, and soldiers, thus joining the "side of the working class."⁵⁴ Receiving lump-sum remuneration, Chinese writers should have no entitlement to such

50. For quite a long time in Chinese history, emperors' given names were regarded as taboo and could not be used in ordinary contexts. See K.H. FAN, *THE CHINESE CULTURAL REVOLUTION—SELECTED DOCUMENTS* 72 (1968).

51. While reading, the poet was disturbed by a blast of wind turning pages of the book. Joking with the wind, the poet wrote, "The breeze, illiterate as it is, why should it turn over my pages?" By a farfetched explanation, the poet was accused of attacking the censorship of the government since the word "breeze" sounded homonymic with the words "Qing Dynasty" in Chinese.

52. Hai Jui was a high ranking official in the Ming Dynasty, during the reign of Jiajing (1522-1567) who was famous for his righteousness and outspokenness. He dared to express his disagreement with the emperor and was eventually dismissed for his dissenting views. The author of the play, Wu Han, the then-Peking Deputy Mayor and a well-known historian in China, was accused of insinuating that Party Chairman Mao Zedong was self-willed and arbitrary in the Anti-Rightist movement launched in 1957. See ANDREW HALL WEDEMAN, *THE EAST WIND SUBSIDIES—CHINESE FOREIGN POLICY AND THE ORIGINS OF THE CULTURAL REVOLUTION* 1, 172-75 (1987).

53. 3 MAO, *supra* note 47, at 86.

54. *Id.*

“bourgeois” rewards as royalties. Given this recent domination of Chinese cultural affairs by state socialist doctrine, it is somewhat remarkable that a Copyright Law providing *any* protection of an author’s economic rights exists at all.

3. *Traditional Influences*

The last factor limiting the Copyright Law’s protection of authors’ economic interests is Chinese societal tradition. Traditional concepts of value, attitudes toward profit-seeking activities, and the relations between individuals and the state have influenced China’s statutes and regulations, especially those governing individual property rights. The legislature may enact new legislation and repudiate old laws. However, the effects of traditional influences persist for decades or even centuries.

a. *Hostility Towards Profit-Seeking Activities*

As early as the Confucius-Mencius era, the word “profit” was criticized as “expediency as opposed to right; worldliness as opposed to morality.”⁵⁵ Confucius associated “righteousness” with “gentleman,” but “profit” with “small man.” To Mencius, “concern about individual profit, with all those above and below scrambling for it, would bring the kingdom into peril.”⁵⁶

Profit-seeking activities have also been consistently discouraged since this era. At the early stage of China’s unification by the first emperor of the Qin Dynasty in 211 B.C., individuals who pursued economic gain were perceived as threats to the “strong unified control of the state and economy” because it was crucial to “maintain the dynasty’s hold on power against potential rivals from both within and without China’s borders.”⁵⁷ It was feared that these activities could challenge the supremacy of the emperor or the state if permitted to develop without interference. Therefore, private merchants were regarded not only as “harmful amoralists” but also as threats to the state’s complete dominance of Chinese society.⁵⁸ By the 1950s this concept had evolved into the modern revolutionary creed, which held that “the making of profit for oneself prevented one from serving the whole of the people and such selfish aims had to be eradicated.”⁵⁹

This historical antipathy against economic gain largely explains China’s discouragement and suppression of private economic

55. Brian Barron, *Chinese Patent Legislation in Cultural and Historical Perspective*, 6 INTELL. PROP. J. 313, 317 (1991).

56. *Id.*

57. *Id.* at 319.

58. *Id.* at 318.

59. *Id.* at 323.

activity for over 2000 years. Because copyright royalties result in profits for individuals, copyright protection lacks historical legitimacy in China. Although this has changed somewhat, it is understandable that authors' economic rights receive less protection in China than in developed countries with histories of safeguarding copyright.

Because profit-seeking activities traditionally have been considered disgraceful, it is undignified to engage in profit-seeking activities or even to bargain for economic entitlement, especially for intellectuals. There are numerous Chinese idioms, proverbs, and parables that satirize money-grubbing or make fun of persons obsessed by a lust for wealth. In contrast, people who are not concerned with personal profit and wealth have been admired for centuries.

However, Chinese tradition does not reject all fame and profit. What is strongly opposed is "individual obsession with profit to the detriment of others."⁶⁰ The Chinese prefer to pursue renown and economic gain in an indirect, or more "natural," way. The best and most virtuous path is through scholarly endeavor: one Confucian doctrine holds that a good scholar will become an official. Scholarly pursuits also benefit other aspects of one's life. A successful scholar can enjoy not only an official career, but also good fortune and a happy marriage. Therefore, scholarly or academic achievements which indirectly bring about fame or profit have been highly esteemed in China, and have been favored over more direct means of profit-seeking.

b. Dominance of the State over the Individual

The control and dominance of the state has been maintained for centuries in China through the continuity of successive dynasties which has reinforced the concept of state supremacy. According to this philosophy, the interest of each individual is deemed insignificant and is subordinated to the perceived welfare of the state and the commonwealth at large. Each person is encouraged through both overt and indirect means to link his fate to the country's, and to share the honor and disgrace of the state. It is common for the Chinese people to attribute their personal successes to their country.

Two recent events attracted national attention in the People's Republic. First, a twenty-one year old Chinese woman, Xie Jun, won the women's world championship in chess in Manila, the Philippines, on October 29, 1991.⁶¹ Xie's triumph ended the former Soviet Union's forty-one year monopoly in world women's chess.

60. *Id.* at 316.

61. See Robert Byrne, *Chess*, N.Y. TIMES, Nov. 10, 1991, § 1, at 75.

When interviewed by journalists, Xie credited her country and teammates, and explained that she had only tried her best. Second, a thirty-year old Chinese professor, Chen Zhangliang, was awarded the 1991 UNESCO Javed Husayn Prize for Outstanding Young Scientist in Paris on October 28, 1991.⁶² Chen became the first Chinese from the P.R.C. to win an international academic award. Like Xie, Chen attributed his award to the motherland and the Chinese people.

Xie and Chen may have honestly expressed their sentiments since both received special support from the government as a result of China's social and economic system. Chen's laboratory receives generous government funding because the laboratory's genetic engineering project is one of the key programs in China's modernization plan. Reliable financial support permits Chen and his colleagues to focus their time and energy on research and not on finding sources of financing. In Xie's case, her triumph was also facilitated by China's economic system: athletes and coaches are government employees and draw a regular salary from the state.

In China, stringent state regulations restrict the freedom of individuals to pursue profits for themselves.⁶³ An individual's success is not considered to be solely caused by her own efforts. She benefits from other factors such as knowledge and skills accumulated by her predecessors, opportunities provided by society, and social recognition of her achievements. Therefore, many individuals attribute their accomplishments to the public and the state, and share financial rewards with the public after they receive reasonable personal compensation. In the case of copyright, an author is considered to be justly compensated when she is paid by a publisher at the time her literary or artistic work is published. Royalty payments after publication are considered unfair compensation.

c. Equalization

"Equalization" is an idea first introduced by two peasant leaders, Li Shun and Wang Xiaobo, as the slogan for their uprising at the end of the Song Dynasty (960-1279). The uprising sought to eliminate the disparity in wealth between rich and poor by apportioning the ownership of land equally among all members of society. Although the insurgence ended in failure, the "equalization" notion has persisted. Many generations of Chinese fought for that goal which has held a great appeal to the impoverished public. For example, the 1911 Revolution led by Dr. Sun Yat-sen pursued the equalization objective. The Chinese Communist Party also em-

62. See BBC Summary of World Broadcasts, Nov. 6, 1991, available in LEXIS, Nexis Library, NEWS File.

63. Barron, *supra* note 55, at 322.

ployed this idea to enlist the masses of poor farmers in its successful struggle against the Nationalist government.

The persistent influence of the equalization concept helps illustrate why the Chinese have not embraced legal entitlement to copyright royalties. Royalties, viewed as windfall income to authors, would not foster social equality, but instead would exacerbate existing inequities. Arguments for economic rights are not persuasive where assertion of the rights militates against equalization. The more ingrained the goal of equalization, the more alien any rationale for copyright protection will seem.

d. Competition

Individuals have been discouraged from competing against one another throughout China's history. Competition is repugnant to the Middle Way doctrine of moderation in conduct and opinion, which is a "well-known hallmark of the true gentleman."⁶⁴ It is unclear whether discouraging competition has hindered the growth of business and trade, or whether the backwardness of China's economy has obstructed the public's acceptance of competition. However, one thing is certain: Confucius did not advocate competition between individuals for fame or profit.⁶⁵

Although the last 2000 years of Chinese history have seen innumerable political power struggles, competition outside of politics has scarcely existed. Perhaps competition reminds people of the ruthless power struggles which mark China's history, or maybe people fear that a preoccupation with winning would lead to widespread cheating and fraud. In any case, the concept of competition has been particularly unpopular among intellectuals. Examples in history show that many intellectuals prefer to stand aloof from worldly success or to live a cloistered existence rather than struggle against others for success. Tales which have been passed down through the ages include the magistrate who quit his official position to become a hermit, and the gentleman who rejected the emperor's appointment as a government minister to return to his home village and fish from the top of a cliff.⁶⁶ These stories, which may indicate failure by Western standards, have been read with admiration in China for centuries. Even Mao Zedong, who vowed to fight Nationalist government chief Jiang Jieshi for every inch of China's

64. ARTHUR WALEY, *THE ANALECTS OF CONFUCIUS* 36 (1938).

65. "The Master said, gentlemen never compete. You will say that in archery they do so. But even then they bow and make way for one another when they are going up to the archery-ground, when they are coming down and at the subsequent drinking-bout. Thus even when competing, they still remain gentlemen." *Id.* at 95.

66. The cliff towered hundreds of feet above the river. His hook dangling well above the water's surface, the gentleman obviously could not hope to catch any fish. This story illustrates his virtuous rejection of fame and profit.

territory during the civil war after World War II, advocated an accommodating attitude in a poem that commented on fame and social recognition.⁶⁷

Traditional anti-competitive sentiment impedes the enactment and implementation of a modern, progressive Chinese copyright law. However, in China's recent transition from a closed to an open society,⁶⁸ traditional ideas are gradually giving way to innovative concepts which reflect a new economic situation. Since the adoption of the open-door policy, profit-seeking activities, competition, and similar ideas are becoming increasingly acceptable in China. Whether this change represents progress in entering the world economic sphere or the deterioration of traditional Chinese morality hardly matters. Once the Chinese society becomes more accepting of the concept of competition, it will be difficult for the government to retreat to its original stance of almost complete opposition to private property rights.

C. SCOPE OF FAIR USE

The passage of the Chinese Copyright Law reflects demand both within and outside China for legal protection of copyrighted works. However, the adoption of the Chinese Copyright Law has not satisfied expectations. The Copyright Law contains most of the Berne Convention and Universal Copyright Convention provisions, and incorporates internationally acknowledged terminology. However, some terms contained in the Copyright Law, such as "fair use," bear different connotations.

Article 22 of the Copyright Law ("Article 22") limits an author's exclusive rights. Article 22 enumerates twelve uses of copyrighted works for which there is no need to obtain a copyright holder's permission or pay any usage fees. This notion of a fair use exemption is compatible with Article 10(3) of the Berne Convention.⁶⁹ However, the scope of fair use in Article 22 appears to be

67. The poem's principal focus is not competition, but social recognition of personal achievement or merit. Mao wrote his poem after reading a work by a Song Dynasty poet, Lu You, who compared himself to the wintersweet plant that was envied by flowers who could not bloom in winter, even though the wintersweet did not wish to compete to be the herald of spring.

Mao disagreed with Lu's position. In his poem Mao wrote that the wintersweet should become the spring herald and disregard others' jealousy and their anguish over their obscurity. The poem is said to demonstrate Mao's revolutionary optimism. However, Mao agreed with Lu by commending the wintersweet's accommodating attitude.

68. See generally 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 200 (1963).

69. Article 10 of the Berne Convention states in part:
[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

(3) Where use is made of works in accordance with the preceding paragraphs of

broader than the fair use provisions in either the Berne Convention or the copyright laws of Western nations.

1. *Personal Enjoyment*

The personal enjoyment exception within the Chinese Copyright Law does not depart fundamentally from international copyright protection principles. Article 22(1) of the Copyright Law provides that copyrighted works may be used freely for personal study, research, or enjoyment. Personal enjoyment can include copying literary or artistic works which would otherwise constitute an infringement under Western standards. The Copyright Law contains no conditions of fair use analogous to those found in the Berne Convention⁷⁰ or the United States Copyright Act of 1976.⁷¹ While Article 22(1) articulates three permissible fair use purposes, the law fails to determine whether such use encompasses some or all of a copyrighted work. Free use is defined only as personal in nature, not commercial. For example, no copyright infringement would occur where individual A borrows an audiocassette tape from his friend B (who has lawfully purchased the tape) and copies the tape for personal enjoyment. The Chinese Copyright Law has no provision similar to Section 109 of the United States Copyright Act to restrict an owner's disposal of a particular copy or phonorecord.⁷²

Although the Chinese Copyright Law has widened the scope of fair use with its personal enjoyment exemptions, these provisions do not substantially impair an author's exclusive rights. First, the "enjoyment" is confined to uses of personal nature only, which is compatible with the exclusion of "direct or indirect commercial advantage" in Section 109(b)(1) of the United States Copyright Act. As long as no commercial purpose is involved, distinctions between

this Article, mention shall be made of the source, and of the name of the author if it appears thereon. Berne Convention, *supra* note 7, art. 10(3).

70. Article 10(1) of the Berne Convention requires that the free use of a copyrighted work be compatible with fair practice and the extent not exceed that justified by the purpose. Berne Convention, *supra* note 7, art. 10(1).

71. The Copyright Act of 1976 identifies four factors to be considered in determining the character of the use:

- (1) . . . whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

See 17 U.S.C. § 107 (1988).

72. The Copyright Act of 1976 makes it legal for the owner of a particular copy or phonorecord to sell or otherwise transfer the possession of that copy or phonorecord. But the owner may not rent, lease, or lend the copy or phonorecord for purposes of direct or indirect commercial advantage. 17 U.S.C. § 109.

study, research, and enjoyment are unnecessary. Second, it is more realistic to include a personal enjoyment exemption within the scope of fair use, given the difficulties of policing personal use copyright infringements. Unauthorized, noncommercial copying of audio-visual materials by individuals in their private homes is commonplace in both developed and developing countries. Most American copyright infringement cases involve unlicensed copying or other use for commercial profit. American courts largely have not addressed the individual use of copyrighted works for personal enjoyment. For example, in *Sony Corp. of America v. Universal City Studios, Inc.*,⁷³ the United States Supreme Court held that the private, noncommercial "time-shifting" home copying of a copyrighted television program did not constitute a copyright infringement.⁷⁴ As new technology allows more convenient duplication of video tapes, records and compact discs, a fair use standard that distinguishes between copying for profit and for personal enjoyment will provide a more realistic protection of copyright entitlement. The Chinese Copyright Law's inclusion of personal enjoyment as one category of fair use appears to be a reasonable approach.

2. Use by State Organs

Article 22(7) of the Chinese Copyright Law is another distinctly Chinese fair use provision. Article 22(7) approves the use of published works by state organs to carry out their official duties as fair use. When the Chinese Copyright Law was enacted in September 1990, this state organ exemption aroused confusion and alarm in Western countries. A November 1990 report on world intellectual property published by Baker & McKenzie, a prominent American international law firm, commented that the state organ exemption excessively weakened copyright protection in China because all state-owned corporations and institutes were deemed to be state organs under the Copyright Law.⁷⁵

However, such criticism misreads the Chinese law. In China, the term "state organ" refers to legislative, judicial, and administrative bodies at various levels. As part of the economic reform pro-

73. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

74. In *Sony*, the defendants manufactured and sold home video cassette recorders ("VCR"s). Some consumers used Sony VCRs to record TV programs broadcast by the plaintiffs. Instead of suing the copying consumers, however, the plaintiffs sued Sony, alleging that the sale of the copying equipment to the public violated the U.S. Copyright Act. The Court rejected the plaintiffs' fair use argument, stating that the VCRs were used for a noncommercial purpose. The Court also found that it was Congress' function to decide the proper treatment under copyright law of technology that facilitates commercial or noncommercial duplication of protected works. *Id.* at 456.

75. Zheng, *supra* note 26, at 20.

cess, some former administrative bodies are becoming profit-producing corporations. For example, the former Ministry of Petroleum Chemical Industry became the General Corporation of Petroleum Chemical Industry.⁷⁶ It is true that certain non-state entities are affiliated with some state organs,⁷⁷ which may raise copyright infringement disputes. However the state organ exemption will not expand the scope of fair use as far as critics such as the claims of the Baker & McKenzie report contend. Implementation Regulations to the Copyright Law⁷⁸ contain specific restrictions on the free use of copyrighted works by state organs. Article 29 of the Implementation Regulations stipulates that the use of published works by state organs may not disrupt the regular use of the works, nor unreasonably impair the legitimate rights of the copyright owners.⁷⁹ This provision reflects the traditional state supremacy concept and China's socialist theory of governmental and economic organization, while guarding against the undue erosion of copyright protections by state entities.

3. Translation

Translation is deemed a "fair use" by two sections in Article 22 of the Copyright Law. Section 11 classifies as fair use the translation of works previously published in the Han ethnic group language⁸⁰ into a domestic minority ethnic group's language, as well as the publication and distribution within China of such translations. This provision aims to encourage the dissemination of Han culture and technology to Chinese minorities, an important objective given the underdeveloped state of most ethnic minority regions.

Section 6 of Article 22 touches upon a more sensitive issue, the translation of foreign language works into Chinese. This provision permits the translation or duplication of a small portion of a published foreign work when the copy or translation is used strictly for classroom teaching or scientific research provided that the publication of such translation or duplication is prohibited. Article 29 of the Implementation Regulations also imposes restrictions on translations, i.e., a translation may not affect the regular use of the copyrighted works nor unreasonably impair the legitimate rights of the copyright owners. Such provisions reveal that China has taken a

76. *Id.*

77. *Id.*

78. See *Implementation Regulations to the Copyright Law of the People's Republic of China*, reprinted in *PEOPLE'S DAILY* (overseas ed.), June 3, 1991, at 2 [hereinafter *Implementation Regulations*].

79. *Id.*

80. This refers to the language used by the Han ethnic group, which constitutes the majority of the Chinese population.

step toward the international protection of foreign copyrighted works.

Translation of foreign copyrighted works into Chinese has been controversial since the beginning of this century. A 1903 treaty between China and the United States stated that "Chinese subjects shall be at liberty to make, print and sell original translations into Chinese of any works written . . . by a citizen of the United States . . ." ⁸¹ Translation was not considered a copyright infringement even when the translation was made, printed, or sold without the author's permission. After the signing of the 1946 Treaty of Friendship, Commerce and Navigation between the United States and China's Nationalist government, more effective protection was granted against the unauthorized "reproduction, sale, and use" of American works. A separate protocol governed translation rights. ⁸²

Initially under the open-door policy there was great demand in China for foreign materials, especially reference books such as dictionaries and university textbooks. Lacking foreign currency, some Chinese publishing houses made unauthorized copies of untranslated foreign works. The copies were sold to Chinese readers in certain rooms within bookstores inaccessible to foreigners; purchasers were not allowed to take their copies out of China for fear of copyright infringement actions.

Another copyright infringement not uncommon in China was the translation of foreign university textbooks and their publication for use in classrooms. Prior to 1980 China suffered from a shortage of social science textbooks. Shortly after the adoption of the open-door policy, new courses such as tourism, hotel management, marketing, and international banking were offered to meet employment demands in these fields. Foreign professors were invited to China to teach such courses, and China sent scholars abroad for study in these areas. Foreign textbooks were brought into China and were used in university and college classrooms. Entire texts were translated and published without the permission of the authors. Chinese translators may not have considered the issue of copyright infringement, given the differing concept in China of intellectual property as an honorary award recognizing intellectual accomplishment rather than an economic interest. However, many in the United States characterized such practices as the blatant piracy of American texts, responsible for losses of one million dollars annually. ⁸³

81. W. Scott Lawler, *The New Taiwan Copyright Law: Does It Spell Doom for Counterfeiters?*, 8 *COMPUTER L.J.* 171, 173 (1988).

82. Baumgarten, *supra* note 41, at 422.

83. *China Promulgates New Copyright Law*, *INT'L EXEC. REP.*, Oct. 15, 1990, available in LEXIS, Nexis Library, NEWS File.

D. PROTECTION OF FOREIGN COPYRIGHTED WORKS

After promulgation of the Chinese Copyright Law, and specifically the non-publication restriction on translated materials for classroom use and scientific research, the infringement of copyrighted foreign reference books and textbooks should be gradually eliminated. Although the Chinese Copyright Law primarily governs the use of Chinese works, Article 2 protects works by non-Chinese authors that are published first in China. Under Article 25, Section 3 of the Implementation Regulations to the Copyright Law, books published outside China receive protection if also published in China within thirty days of their initial foreign publication. Section 4 of Article 25 provides that foreign authors' works first published in China (after authorized adaptation or translation) are deemed to be originally published in China for purposes of copyright protection.

At the time the Chinese Copyright Law went into effect, China had not signed any international copyright treaties such as the Berne Convention or the Universal Copyright Convention. Protection of foreign works was inadequate by Western standards because the Copyright Law and the Implementation Regulations are designed to cover only works first published in China.

The United States expressed its discontent with the Copyright Law's failure to sufficiently safeguard American works by including China on the "Special 301 priority watch list."⁸⁴ Unauthorized software duplication was claimed to cost American companies "upwards of \$400 million" annually in lost sales in China.⁸⁵ Software protection is provided in Articles 3⁸⁶ and 53⁸⁷ of the Chinese Copyright Law, and the more stringent Computer Software Copyright Rules took effect on October 1, 1991.⁸⁸ However, one American businessman declared that the Rules grant "a virtual license to steal the software" because the unenciphered "source code" for a foreign software program must be registered within thirty days of the program's publication outside of China in order for the program to receive copyright protection in China.⁸⁹

Although China recently signed the MOU with the United

84. See Potter, *supra* note 3.

85. David Holley, *U.S. Vows Tariffs if China Fails to Curb Piracy of Software*, L.A. TIMES, Mar. 4, 1991, at D1.

86. Article 3 of the Copyright Act provides: "Works referred to in this law include works of literature and art, and works about natural sciences, social sciences, engineering and technology in the following forms . . . (8) Computer software; . . ."

87. *Id.* art. 53. Article 53 provides that measures for protection of computer software shall be formulated separately by the State Council.

88. See *U.S. Envoy Warns Software Makers About China's Copyright Law*, *supra* note 4.

89. *Id.*

States, it is unlikely to provide the degree of copyright protection demanded by Western countries. China is a developing country; its Copyright Law provides legal protection commensurate with the strength and sophistication of the Chinese economy.⁹⁰ The United States' demand that China extend copyright protection to foreigners borders on the hypocritical: the U.S. afforded such protection only in 1952, 162 years after enacting its first Copyright Act in 1790.⁹¹

In the last ten years China has exerted tremendous effort and has made great progress in implementing intellectual property legislation and policing infringements. China has demonstrated its sincerity and ability to protect foreign intellectual property rights in trademark,⁹² patent,⁹³ and copyright.⁹⁴ China has consistently prohibited the unauthorized copying of foreign audio-visual works, and joined the Berne Convention and the Universal Copyright Convention in October 1992.⁹⁵ In its dealings with China, the United States should recognize China's advances in copyright protection and demonstrate a greater degree of patience and understanding, which may be a more productive negotiation strategy than threatening to impose economic sanctions which impair trade and business relationships. Western businessmen have the choice of tolerating a limited and declining amount of copyright piracy in the short-term, or forfeiting a vastly profitable future market by curtailing intellectual property exports and otherwise restricting trade with China.

Michael Pendleton states that "the matter of copyright protection for foreigners has often been a simple question of national self-interest."⁹⁶ China may provide foreign copyright protection equivalent to Western standards when it stands to benefit from more stringent safeguards.⁹⁷ If full protection is best seen as a means to achieve reciprocal rewards, China may not profit greatly

90. Huaishi Xie, *Zhuzuoquan yanjiu de xinjieduan* [*The New Phase of Copyright Study*] 1 ZHUZUOQUAN [COPYRIGHT] 13 (1991).

91. PENDLETON, *supra* note 14, at 41.

92. See Jerome Cohen & Wing-Wah Wong, *The IBM Case: A Milestone for Intellectual Property Protection?*, CHINA BUS. REV., May-June 1989, at 6, 6-8. For example, China has successfully prosecuted a number of U.S. trademark infringement cases, such as the IBM case and the M&M case.

93. See Yuan Zhou, *Chinese Patent Law Amended*, CHINA DAILY, Oct. 19, 1991, at 2. Chinese patent officers proposed two major amendments to the country's patent law: (i) prolonging the protection period for inventions from the present 15 years to 20 years; and (ii) extending the patent protection for a production process to include the end products of the process.

94. See Xie, *supra* note 90. China has purchased licenses from foreign publishers to reprint a large number of foreign books, including the Encyclopedia Britannica and the Longman English Dictionary.

95. *China to Implement Key Copyright Pacts*, Reuters European Business Report, Oct. 14, 1992, available in LEXIS, Nexis Library, NEWS File.

96. PENDLETON, *supra* note 14, at 41.

97. *Id.*

by heightening the protection of foreign copyrighted works because China exports fewer copyrighted works than it imports. Although one-fourth of the world population is Chinese, most reside within Chinese territory; there is a very limited market outside of China for untranslated works in original Chinese. China's accession to key international copyright conventions and its promise to amend its copyright laws and regulations signal greater protection of foreign copyright owners.

IV. CONCLUSION

The new Chinese Copyright Law enacted in 1990 is an amalgam of both Marxist-Leninist theory and traditional Chinese legal philosophy, a product of domestic necessity and foreign pressure after China opened itself to the outside world during the 1980s. The Copyright Law provides an international level of moral rights protection to copyright holders, and accords economic rights protection that is commensurate with China's status as a developing country. To reach its goal of integration in the world economy, China must observe international copyright conventions. In the long run, protection of foreign copyrighted works will improve, as the economic benefits to Chinese society from restrictive copyright laws increase.