

COPYRIGHT IN THE PEOPLE'S REPUBLIC OF CHINA: A FOREIGNER'S GUIDE

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Research for this article was conducted in Beijing during the spring of 1988. Special thanks are extended to the following persons for their assistance: Wang Chenguang of Beijing University, Guo Shoukang, Xiao Xionglin and Wei Zhi of People's University of China, Edward Epstein, Mark Sidel, David Ben Kay, Michael Hickman, Gregory Barton of China Law and Practice, Peter Jaszi, Eric Smith of the International Intellectual Property Alliance and William P. Alford, R. Randle Edwards and Margot E. Landman of the Committee on Legal Education Exchange with China (CLEEC).

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I. INTRODUCTION

Since 1979, the People's Republic of China ("PRC" or "China") has swiftly moved to rebuild a legal system that was virtually nonexistent by the time of the Cultural Revolution.¹ As

¹ See Hsia & Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV.

part of this rebuilding, and in order to facilitate social and economic development, the PRC government has enacted a wide range of new laws.² Among these, trademark and patent laws were enacted in 1982 and 1984, respectively,³ to encourage local creators and the influx of foreign investment and technology. Efforts have also been made to prepare for the enactment of a copyright law, a separate computer software protection law⁴ and an unfair competition law.⁵

The range of activities geared toward creating conditions for the protection of copyrights have been especially comprehensive, however, and include the creation of interim regulations to deal with copyright matters,⁶ greater acceptance of copyright-related

INT'L L.J. 249, 250 (1987)[hereinafter Hsia & Zeldin]. The status of "law" in the PRC prior to the Cultural Revolution was subject to oscillation between ideological extremism and attempts by moderates to institutionalize a modern legal system. While under attack, these moderate attempts were branded as "rightist," while the extremism culminating in the Cultural Revolution is now considered "ultra-leftist." See *id.* at 250-57. The tension between "right" and "left" in the PRC before 1979 is manifest in the relationship between "law" and "party policy." Law, referring to codified norms, was accorded limited importance, while "policy", representing the will of the Communist Party of China ("CCP"), was considered to have ultimate binding force. *Id.* at 281-83. With ideological moderation and increased codification, the relationship between policy and law is gradually being reversed. The program of political reforms announced in 1987 during the CCP Congress was also designed to reduce the arbitrary powers of Party officials and to bolster the rule of law. See B. STAVIS, CHINA'S POLITICAL REFORMS: AN INTERIM REPORT (1988).

For a discussion on the role of law in China before and after 1979, see Baum, *Modernization and Legal Reform in Post-Mao China: The Rebirth of Socialist Legality*, 19 STUD. IN COMP. COMMUNISM 69 (1986).

² Before 1979, the PRC had no formal laws or codes. Under the leadership of Deng Xiaoping, in 1979 two codes and five major laws were enacted, including criminal laws and criminal procedure codes, an electoral law, and a law governing joint ventures and foreign investments. See Hsia & Zeldin, *supra* note 1, at 249. Hsia and Zeldin also discuss the range of laws enacted and planned for the future, as well as the expanding role of the courts. *Id.* at 259-68.

³ Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L.J. 259, 273-74, 282-83 (1986)[hereinafter Sidel I]. The Trademark Law came into force on March 1, 1983; the Patent Law, on March 1, 1985. *Id.* The PRC acceded to the Paris Convention of Industrial Property on March 19, 1985. MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 35 (Supp. 1987). Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 1, 828 U.N.T.S. 107; as revised July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305.

⁴ See *infra* notes 190-200 and accompanying text.

⁵ "Consumer protection" regulations, which contain provisions similar to unfair competition laws in other countries, have been adopted in various cities and provinces in China during 1987 and 1988. These regulations were likely conceived as experiments toward the formulation of national legislation. For the texts of these negotiations, see Fagui Xinxu (LAW & REGULATION NEWS), p.45, no. 12 1987 (Shanghai); Zhongzuo Fazhi Bao (Legality Daily), Sept. 24, 1987 (Fujian Province); Zhongzuo Xiaofeizhe Bao (China Consumer News), October 20, 1988, at 1 (Zhejiang Province); *id.*, Aug. 18, 1988, at 1 (Guizhou Province); *id.* Jan. 14, 1988, at 1 (Hubei Province); *id.*, July 21, 1988, at 1 (Jiangsu Province); *id.* Oct. 11, 1988 (Jilin Province). While consumers are clearly protected, these regulations do not explicitly grant commercial competitors a cause of action where unfair competition or passing off has occurred.

⁶ Regulations on remuneration of authors were issued in 1977, 1980 and 1984.

disputes by courts and administrative organs,⁷ the establishment of regional dispute mediation and information offices and various educational activities.⁸ In 1985, the State Council established the National Copyright Administration (“NCA”),⁹ and in 1986, the National People’s Congress (“NPC”) enacted the General Principles of the Civil Code, which includes broad provisions for the protection of copyrights.¹⁰ Chinese authorities have also discussed numerous drafts of a copyright law,¹¹ as well as accession to the Universal Copyright Convention (“UCC”) and the Berne Convention.¹² A copyright law was reportedly slated for enact-

although none of them recognized the existence of a “copyright” per se. See *infra* notes 143-155 and accompanying text. The first regulations to explicitly recognize the right were issued in 1980. These rules, dealing with taxation of individuals and joint ventures, mention copyright as a source of taxable income. As Professor Zheng Chengsi has pointed out, however, the absence of a copyright law makes any use of the term “copyright” questionable. See C. ZHENG, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 92 n.9 (1987) [hereinafter ZHENG, CHINESE INTELLECTUAL PROPERTY]. The first regulations to deal substantively with the copyright issue were the 1982 regulations on films and video. However, the thrust behind these regulations was the intent to control distribution of illegal works, and the copyright provisions were accordingly spare. *Id.* at 91. In 1985, “internal” regulations governing copyright in books and periodicals were issued. See *infra* note 53. In 1986, a circular specifically dealing with copyrights on audio and video products was published jointly by the Ministry of Radio, Film and Television, the Ministry of Commerce and the State Administration of Industry and Commerce. C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra*, at 92.

⁷ See *infra* notes 100-14 and accompanying text; see also Appendix for summary of disputes reported in the Chinese press.

⁸ Thousands of publishers and other cadre have received training in courses conducted by foreign and domestic copyright experts. *Id.*

⁹ NCA (Quanguo Banquan Ju) has also been translated into English as the “State Copyright Administration.” See Sidel I, *supra* note 3, at 267.

¹⁰ *General Principles of Civil Law of the People’s Republic of China*, art. 94 and 118, translated in 34 AM. J. COMP. L. 715, 734 (1986) (adopted April 12, 1986, effective January 1, 1978). Article 94 states: “Citizens and legal persons enjoy the right of authorship (copyright); in accordance with law they have rights such as [the right] to sign [works], to publish [their work], and to receive remuneration.” Article 118 states: “Where the rights of a citizen or legal person to authorship (copyright), patent, trademark, invention, discovery or other fruits of scientific and technological research are infringed by such [acts] as plagiarizing, distorting or passing off, there is a right to demand that infringement cease, its effects be eliminated and any loss be compensated.” Since the enactment of the General Principles, these articles have served as the primary authority for the courts handling copyright disputes. For background on the General Principles enactment, see Epstein, *The Evolution of China’s General Principles of Civil Law*, 34 AM. J. COMP. L. 705 (1986).

The Supreme People’s Court of China issued its first interpretations regarding copyright matters on January 26, 1988, which addressed fairly fundamental questions of the law, including attachment of copyright, joint authorship and the inheritance of copyright. See *Zhong Hua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* (Chinese Supreme People’s Court Reporter) 1988 No. 2 at 30 (arts. 133-36).

¹¹ China Daily, Apr. 29, 1988, at 3. Over the past nine years, 18 drafts of a copyright law have been generated. *Id.*

¹² Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 735 U.N.T.S. 368, reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT app. 24 (1985) [hereinafter NIMMER], amended by Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, reprinted in 4 NIMMER, *supra*, app. 25 (1985) [hereinafter UCC]; Convention Concerning the Creation of an International Union for the Protection of

ment during the October 1987 session of the Standing Committee of the National People's Congress,¹³ but has since been delayed.¹⁴

Despite the existence of copyright laws in China¹⁵ before the

Literary and Artistic Works, Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971, reprinted in 4 NIMMER, *supra*, app. 27 [hereinafter Berne Convention]. The United States is a signatory of the UCC and will accede to the Berne Convention sometime in 1989. On Oct. 20, 1988, the Senate ratified accession to the Berne Convention. S. CONG. REC. J. 16939-40 (1988). See also *infra* note 41 (comparing the UCC and Berne Convention, and Chinese considerations in deciding to accede to either or both of the conventions).

¹³ See, e.g., FBIS, March 27, 1987, at K-7. For other discussions on PRC copyright, see C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 86-181; Gao, *China's Forthcoming Copyright Law*, 15 CHINA BUS. R. 53, 1988 [hereinafter *Forthcoming Law*]; Goldberg & Bernstein, *Proposed Chinese Copyright Law*, N.Y.L.J., Sept. 18, 1987, at 1 [hereinafter *Proposed Law*]; Guo, *Some Opinions on Copyright in the People's Republic of China*, 1 J. CHINESE L. 63 (1987); Guo, *China and the Berne Convention*, 11 COLUM. J.L. & ARTS 121 (1986); Sidel, *The Legal Protection of Copyright and the Rights of Authors in the PRC 1949-1984: Prelude to the Chinese Copyright Law*, 9 COLUM. J.L. & ARTS 477 (1985) [hereinafter Sidel II]; Zheng, *The Future Chinese Copyright System and its Context*, 15 INT'L R. INTELL. PROP. & COPYRIGHT L. 141 (1984) [hereinafter *Copyright Context*]; Owen, *Copyright in China*, 1 RIGHTS 3 (1987); Comment, *Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity*, 6 LOYOLA ENT. L.J. 53 (1986); Baumgarten, *Copyright Relations Between the United States and the People's Republic of China*, *The 17th Annual Joan Geiringer Memorial Lecture* 27 BULL. COPYRIGHT SOC'Y 419 (1979) [hereinafter *Copyright Relations*]; Leung & Chan, *Copyright on Audio-Visual Materials*, 5 ASIAN EXECUTIVE REP. at 8 (June 1983); Loeber, *Copyright Law and Publishing in the People's Republic of China*, 24 UCLA L. REV. 907 (1977); Hsia & Haun, *Laws of the People's Republic of China on Industrial and Intellectual Property*, 38 LAW & CONTEMP. PROBS. 274 (1973) [hereinafter *Intellectual Property Laws*]; Salisbury, *On the Literary Road: American Writers in China*, N.Y. Times, Jan. 20, 1985 (Book Review), at 3.

IPASIA is a new periodical based in Hong Kong that occasionally presents news on PRC, as well as Taiwan, copyright. The government in Taiwan refers to itself as "The Republic of China" (ROC) and is sometimes confused with the PRC. Taiwan revised its copyright law in 1985. See Simone, *Protection of American Copyrights in Books on Taiwan*, 35 J. COPYRIGHT SOC'Y U.S.A. 115 (1988) [hereinafter Simone, *Taiwan Copyright*]. While the PRC and ROC are technically in a state of civil war, the governments appear to be rapidly moving toward some form of reconciliation. Both sides now sanction at least indirect trade, and both have recently devised regulations providing for protection of each other's copyrights. See Renmin Ribao (People's Daily), Nov. 14, 1987 (describing new Taiwanese regulations protecting Mainland authors' copyrights) and Zhongzuo Fazhi Ribao (Legality Daily), April 21, 1988 (describing PRC regulations for the protection of Taiwan, Hong Kong and overseas Chinese copyrights). Hong Kong, which will revert to PRC sovereignty in 1997, currently protects foreign copyrights by way of British legislation. Chinese lawyers in Hong Kong are currently drafting new law for the territory.

¹⁴ See *infra* notes 17-37 and accompanying text.

¹⁵ See ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 86-90; Zheng, *Printing and Publishing in China and Foreign Countries and the Evolution of the Concept of Copyright (I)*, CHINESE PAT. & TRADEMARKS, Oct. 1987 no. 4, at 41; Zheng, *Printing and Publishing in China and Foreign Countries and the Evolution of the Concept of Copyright (II)*, CHINESE PAT. & TRADEMARKS, Jan. 1988 no. 1. See also, Chuban Gong Zuo, Mar., 1987, at 108; *id.* July, 1987, at 104. During the Han Dynasty (206 B.C.-220 A.D.), authors of interpretational texts on Confucianism were indirectly afforded copyright protection through controls in publication of these works aimed toward preventing errors in reprinting and preserving their authority. In the Song Dynasty (960-1279), a copyright decree was issued by a local government that cited the "effort, money and time" expended in creating original works. The decree also criticized the avarice of unauthorized reprinters and noted that their acts prevented the original publisher from recouping his investment. See also *id.* Aug., 1988, at 107, which notes that during the Eastern Han and Song Dynasties, oral

establishment of the PRC in 1949,¹⁶ there is no evidence that these laws were widely respected or understood. This lack of familiarity with copyright continues today. As in the case of other lesser developed countries ("LDCs"), delays in enacting a copyright law and in providing protection to foreign works can be traced to apprehension over the economic costs of copyright.¹⁷ In addition, Chinese law makers must face other practical and ideological questions which have been generated by the country's economic reform and "Open Door" policies. These law makers must consider the relationship between the future law in regions of China in which economic reforms have progressed at drastically different rates.

This Article will first discuss the timing for passage of the copyright law, accession to the international conventions, and the various methods for foreign copyright owners to obtain protection under existing regulations and practices. Part II will briefly review the contents of a draft of the copyright law which was circulated in 1987 and 1988, and discuss government administration of copyright matters, including dispute resolution channels. Part III will examine the existing markets for books, films and video, sound recordings and computer software¹⁸ in China. Part IV will examine foreign exchange issues related to copyright licensing. Finally, recommendations for foreign copyright licenses will be presented. An appendix is included which contains sum-

contracts for the right to publish works were described as "numerous." One Song Dynasty history text contained the following notice: "[p]ublished by Chen of Meishan; the government has authorized us and prohibited others from copying." Another work contained the following stern warning: "[i]f there is illegal printing, I will travel a thousand miles to sue!" *Id.*

¹⁶ See Simone, *Taiwan Copyright*, *supra* note 13, at 122-24. Copyright laws were published in 1910 by the Qing Dynasty government, in 1915 by the Republican government, and in 1928 by the ROC (*Guomindang* or Nationalist) government. The ROC law was amended in 1944, 1949, and subsequently in Taiwan, in 1964 and 1985. *Id.* at 122-25.

¹⁷ *Id.* at 119-21 for an overview of the literature on LDC attitudes toward international copyright.

The per capita Gross National Product of the PRC in 1987 was less than \$300. This figure is perhaps misleading since the population in the Chinese countryside, representing 80% of the population, is significantly less well off than those in urban centers. Approximately one half of one percent of the entire population has achieved a secondary education, while only eight percent of the population has even acquired a high school education. Shen, *Formulating a Copyright Law Suited to China's Realities*, 2 CHINA PAT. & TRADEMARK 45 (1988). See also *infra* note 117 and accompanying text.

¹⁸ For convenience sake, discussion will be limited to these subjects. The draft copyright law extends protection to the full range of subject matter specified in the UCC and Berne Convention. Significantly, copyright officials have indicated that the future law will not extend protection to "useful articles," though the method for distinguishing between protectable and non-protectable aspects in such works has not been elaborated. Interview with Shen Rengan, Director, Legal Division, NCA, in Beijing (May 19, 1988).

maries of infringement disputes reported by the Chinese legal and popular press.

A. *Prospects for Passage of a Domestic Copyright Law*

The traditional subject matter of copyright, including books, sound recordings and films, enjoys basic protection in China under regulations issued piecemeal over the past few years by various administrative organs.¹⁹ Due to the vagueness of these regulations and the fact that they have not been legislatively approved, however, the need for a comprehensive copyright law appears to be universally accepted.

On April 29, 1988, the Chinese press reported that a draft copyright law ("banquan fa"²⁰) had been submitted to the Legal Bureau of the State Council for review.²¹ Enactment of the law by the Standing Committee of the NPC should occur within the next two years,²² though further delays are possible.²³ Despite continuing pressure from the United States, the future copyright law will probably not extend protection to computer software. Instead, a separate *sui generis* law is currently under consideration, though such a law is not likely to be enacted for at least three to four years.

Uncertainty over the timing of the copyright law's enactment is due in part to the complexity of the subject matter, but also to increasing sophistication and tolerance for debate within the PRC's legislative process. Until recently, virtually all draft laws that have reached the Legal Bureau of the State Council were passed without substantial alteration.²⁴ Within the last two years,

¹⁹ See *infra*, notes 59-78 and accompanying text.

²⁰ There are two terms in Chinese that are frequently translated as "copyright." The term *banquan* translates literally as "publishing rights" or "rights related to publishing." *Zhuzuoquan*, by contrast, can be translated either as "author's rights" or "rights related to works." Although the draft copyright law and existing copyright regulations display a high regard for an author's moral rights, Shen Rengan has argued that use of the term *zhuzuoquan* is inappropriate, since it can too easily be associated with political movements for greater freedom for authors. See Shen Rengan, *Chuban Gong Zuo* (Publishing Work) Feb., 1987, at 110. The draft copyright law utilizes the term *banquan* and the Supreme Court equivocates by referring to copyright as *zhuzuoquan* (*banquan*). See Supreme People's Court Reporter, note 6. Taiwan's copyright law utilizes the term *zhuzuoquan*.

²¹ China Daily, Apr. 29, 1988, at 3.

²² Gao, *supra* note 13 (stating that China was "likely" to enact a copyright law in 1988).

²³ In 1986, an NCA official projected that the law would be enacted before 1991. China Daily, Sept. 11, 1986, at 1. Interviews conducted during May and June of 1988 with scholars and NCA staff members examining the draft law confirmed that the law will probably not be passed before 1991. Some interviewees were more pessimistic, estimating delay beyond 1993.

²⁴ The lack of resistance to new legislation in the past—including, to some extent,

however, committees within the NPC were reported to have engaged in "heated debates" about various legislative action, resulting in a series of delays in passage of important reform-oriented laws, such as the Bankruptcy Law and the Enterprise Law.²⁵ Similarly, the shelving of a draft copyright law in 1987, following press reports which confidently anticipated its enactment, clearly suggests the existence of deep reservations over copyright on the part of legislators.²⁶

While debates over drafts of the copyright law have not been widely publicized, it is likely that reticence over copyright²⁷ stems from the practical and ideological concerns discussed in sections one through four below.

1. Inadequate Training of Personnel

Many fear that a detailed copyright law would present excessively complex questions about which judges,²⁸ lawyers, publishers, distributors and creators are still inadequately educated.²⁹

reformist legislation—was perhaps a manifestation of the CCP's dominance over all governmental matters. Once drafts were approved by the relevant Party organs, their enactment by the NPC or its Standing Committee was assured.

²⁵ See Chang, *The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process*, 28 HARV. INT'L L.J. 333 (1987). The Bankruptcy Law became effective in November, 1988. While the current debates over legislation may not compare to the debates found in Western democracies, greater tolerance of dissent is clearly evident and could eventually lead toward institutionalization of democratic processes. See Chang, *supra*, at 370-72.

²⁶ In fact, debates over the contents of the draft copyright law (including copyright protection for software, neighboring rights, work for hire, etc.) have already been described as "heated." Speech by Shen Rengan, Director of NCA, in Shanghai (Mar. 2, 1988) [hereinafter Shen Speech].

²⁷ The Preamble to the draft law states that the purpose of copyright is to "protect the rights of authors . . . ; to regulate relations among creators, distributors and the general public; to encourage creation and distribution of excellent works; and to foster science and culture." See Gao, *supra* note 13 (text of draft law). The "copyright clause" of the United States Constitution appears less concerned with the rights of authors: "Congress shall have power. . . to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

This lack of concern for authors is reflected in the absence of so-called "moral rights" within the Copyright Act of 1976. 17 U.S.C. §§ 101-914 (1982 & Supp. IV 1986). See generally *infra* notes 78-88 and accompanying text.

²⁸ Despite the fact that the Patent Law went into effect in 1985, the first patent infringement dispute was not resolved by Chinese courts until 1988. China Daily, May 15, 1988, at 15.

²⁹ Many publishers reportedly believe that since they are the ones empowered to publish, copyright vests in the publisher. Shen Rengan, Zuexi Banquan Zhishi (Study on Copyright), Chuban Gong Zuo (Publishing Work) Jan., 1987, at 108.

According to reports, the degree of trademark infringement is staggering and thus bodes badly for the future of copyrights. In 1985 alone, Chinese authorities handled over 17,000 trademark infringement cases. FBIS, July 1, 1986, at K-37. Most infringements appear to involve state enterprises. China Daily, May 25, 1988, at 2. It has been theorized that much of the current trademark infringement can be tied to the almost

2. Inundation of Litigation into the Courts

Many legal cadre fear that a copyright law and the publicity surrounding its enactment will encourage frivolous litigation or, at the very least, that copyright disputes will unnecessarily burden the courts which are already fully occupied by disputes over what are perceived to be more serious economic and criminal matters. These cadre feel that society's interests are adequately served by the existing regulations governing remuneration for authors,³⁰ as well as administrative channels for dispute resolution.

3. Ideological Concerns

"Class struggle" during the Maoist era was often directed against intellectuals³¹ as a group and distrust of intellectuals as a class is clearly quite strong in China today.³² Since most creators are considered intellectuals, rejection of copyright is to some extent a manifestation of ideological tendencies to repress the educated class and thereby maintain a perception of egalitarianism.³³ Furthermore, the notion of private property itself contradicts earlier orthodox communist tenets which held that the possession of property would invariably be at the expense of the public. Copyright represents rights to intangible property—something perhaps also conceptually difficult to accept.³⁴

4. Effects of International Copyright

It is widely accepted among copyright experts in China that

complete absence of commercial competition in the country prior to reforms instituted after the Cultural Revolution.

³⁰ See, e.g., Huang, Qinnan, Lun Baohu Zhuzuoquan (Discussion on Copyright Protection), 25 FAXUE YANJIU (Legal Research) 47, 49 (1983).

³¹ The term "intellectuals" (*zhishi fenzi*) generally refers to all persons who have achieved a secondary education or who perform primarily mental labor.

³² For example, factory managers have been criticized in the Chinese press recently for adhering to "deep-rooted ideology" and ignoring the role of engineers and other college educated technicians in upgrading production standards. See S. China Morning Post, Dec. 5, 1988, at 14 (Business Section).

³³ See Hsia & Haun, *Intellectual Property Laws*, *supra* note 13, at 290. Notably, in 1957, work on a draft copyright law was apparently abandoned due to "leftist" extremism. "Interim Regulations Concerning the Protection of Copyright in Published Works" were drafted by the Ministry of Culture, but were never published due to ideological and political turmoil. See ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 90.

³⁴ See Hartshorn, *Copyright Laws Could Be Difficult to Enforce*, S. China Morning Post, Nov. 7, 1987, at 5; Note, *Copyright Relations Between the United States and the People's Republic of China: An Interim Report*, 10 BROOKLYN J. INT'L L. 403, 411 (1984) (noting the common ideologically-based perception that "renunciation of private property [was] essential to the success of the class struggle and the economic growth of the nation." *Id.*)

See *infra* notes 78-88 and accompanying text for questions relating to "works for hire" in the socialist context.

once the domestic law is in place there will be greater pressure to accede to one of the international copyright conventions.³⁵ Once this occurs, China will undoubtedly be a net-importer of copyrights. Consequently, other Chinese share the fears of those in other LDCs that protecting foreign works in the near term would pose an unacceptable economic burden to publishers and consumers, impair access to needed educational and scientific works for students and researchers³⁶ and unnecessarily drain the country's foreign exchange holdings.³⁷ Many Chinese therefore believe that enactment of the domestic law should be postponed until the country is more economically and administratively prepared to deal with the problems presented by protection of foreign copyrights.

II. STATUS OF FOREIGN COPYRIGHTS

A. *Accession to the International Conventions*

Chinese copyright authorities have stated on numerous occasions that the PRC will accede to either or both the UCC or Berne Convention³⁸ within three years after enacting its domestic

³⁵ See *infra* notes 49-52 and accompanying text on the effect of the 1979 U.S.-China Trade Agreement on Chinese protection of U.S. copyrights after enactment of the copyright law.

³⁶ See generally Simone, *Taiwan Copyright*, *supra* note 16.

³⁷ Most Chinese licensees do not earn foreign exchange which can be used to purchase foreign rights. In the future, the central government is likely to arrange for limited access to foreign currency through some sort of quota. Administering such a program is cumbersome and will surely involve added red tape. See *infra* notes 209-14 and accompanying text describing the PRC's foreign exchange and currency system.

³⁸ Professor Zheng Chengsi has written that the decision to accede to either the UCC or the Berne Convention will hinge largely on the issue of retroactivity. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 129. The current understanding by the Chinese of the retroactivity provisions in each of the conventions is that the UCC does not require retroactive protection for foreign works, while the Berne Convention does. *Cf.* UCC, art. VII:

This Convention shall not apply to works . . . which, at the effective date of the Convention . . . are permanently in the public domain in the said Contracting State.

with Berne Convention, art. 18, para. 1:

This Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the Country of origin through the expiry of the term of protection.

Given the severe imbalance of royalty payments expected to be paid to developed countries, the Chinese fear that granting retroactive protection to works from Berne member countries could have a disastrous effect on economic and cultural development.

Notably, however, the report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention pointed out in 1985 that the Convention provided "flexibility" on the issue of retroactivity and listed three views expressed by earlier commentators: first, that "as a matter of Convention theory and/or actual practice . . . it is permissible to abrogate the principle of retroactivity entirely"; second, that a "reasonable application" of the Convention's article 18(1) requires protection of "at least some pre-existing

copyright law.³⁹

A consensus appears to exist among the Chinese that, despite obvious economic disadvantages and transitional difficulties, protection of foreign copyrights constitutes an international norm, even among developing nations, and that joining one of the international conventions would encourage greater foreign investment. Many Chinese further expect that accession will permit the PRC to expand its influence in international organizations dealing with copyright, including the United Nations Educational, Scientific and Cultural Organization ("UNESCO") and the World Intellectual Property Organization ("WIPO"), the administrative organs of the UCC and Berne Convention, respectively.⁴⁰ In addition, the Chinese have increasingly pointed out

works"; and third, "[t]hat a country can modify the principle of article 18(1) to the extent necessary to 'protect' those who acted in reliance on the assumed or earlier public domain status of a work, whether by legislation or by judicial consideration in particular cases." Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, *reprinted in* 10 COLUM. J.L. & ARTS 513, 593-94 (1986) (also noting the absence of any recent comprehensive study on the perspectives of the newly adhering Berne countries toward retroactivity issues). The report concludes, however, that limiting retroactive protection to foreign works under the Berne enabling legislation might undermine governmental efforts to obtain retroactive protection from other countries (such as China), and indicates that this might be the controlling factor in determining U.S. policy on the issue. *Id.* at 587. None of the bills pending before Congress on Berne adherence accorded retroactive protection. The USSR joined the UCC in 1973, but, consistent with the Convention, denied retroactive effect of its copyright law to foreign works.

China also has concerns over the consistency of the draft law's work for hire provisions with the Berne Convention. See *infra* notes 84-87 and accompanying text.

³⁹ See CHINA TRADE REPORT (July, 1987) (citing sources estimating accession to one of the copyright conventions within seven years). These figures were confirmed in interviews held in May and June of 1988 with NCA officials, some of whom noted that serious study of the decision to accede to one of the conventions would not begin until after promulgation of the domestic copyright law.

Both the UCC and Berne Convention require that member countries "be in a position under [their] domestic law to give effect to the terms of [the] Convention[s]." UCC, art. X (1971), *supra* note 12; Berne Convention, art. 36, *supra* note 12. Although the PRC does have various sets of administrative regulations governing copyright in certain subject matter, these regulations would not satisfy the requirements of either convention.

The PRC may attempt to sign bilateral copyright agreements before joining one of the treaties in order to test its ability to handle international copyright problems, or, conversely, to whet the appetites of the U.S. copyright industry, and thereby wrest concessions from the industry as an inducement to more timely accession to one of the treaties. The disadvantages of concluding numerous bilateral treaties have been acknowledged by some Chinese. See, e.g., C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 123 (warning of confusion for Chinese publishers and disruption of relations with unprotected foreign publishers).

⁴⁰ The PRC is currently a member of both organizations, but is not a signatory to either one. Both of these conventions have historically been revised every twenty years. If the PRC were to be directly involved in negotiations toward the next versions, the leverage of LDC members over developed world members would likely be increased substantially. Accordingly, the PRC would increase its prestige among LDCs.

The UCC and Berne Convention lack effective enforcement mechanisms, and the

the benefits to be derived from protecting foreign works.⁴¹

Beyond the desire to instill investor confidence and increase its influence in international affairs, China's movements toward accession to one of the conventions are also a product of trade negotiations with the United States government. The most noteworthy programs under which the United States encourages LDCs to protect its copyrights are Generalized System of Preferences ("GSP")⁴² and the Caribbean Basin Initiative.⁴³ These programs, which grant preferential market access to LDCs in exchange for greater efforts to protect United States intellectual property rights, are inapplicable to the PRC.⁴⁴ However, China appears to have already begun negotiating intellectual property protection in exchange for trade benefits. Under the 1979 U.S.-China Trade Agreement,⁴⁵ both governments are required to "take appropriate measures, under [their] laws and regulations and with due regard to international practice," to protect the copyrights of citizens in each country.⁴⁶ This commitment—which, for reasons described below, is of dubious legal value—was, in part, procured in exchange for Most-Favored-Nation

U.S. government is currently attempting to bring intellectual property within the scope of the General Agreement on Tariffs and Trade ("GATT"). See M. GADBAW & T. RICHARDS, PROSPECTS FOR IMPROVEMENT OF INTELLECTUAL PROPERTY PROTECTIONS IN SEVEN DEVELOPING NATIONS, ch. 7 (1987). Coincidentally, China appears poised to join the GATT in the near future. See Li, *Resumption of China's GATT Membership*, 21 J. WORLD TRADE L. 25 (1987); Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 L. & POL'Y INT'L BUS. 371 (1986). The Chinese are likely aware of developed world efforts to bring enforcement of intellectual property rights under the GATT framework.

⁴¹ There is unanimous agreement among the Chinese that protection of their citizens' copyrights in other countries is desirable. Of course, obtaining such protection requires reciprocal protection for foreign works in China, a fact that the Chinese government appears increasingly willing to accept. See 31 BEIJING REV. 21 (Oct. 31-Nov. 6, 1988). On the benefits of international copyright to developing nations, see UNESCO, *Piracy and Creativity*, 15 COPYRIGHT BULL. 3 (1981) (noting that piracy encourages flooding of the markets with foreign editions, consequently molding public buying behavior and standardizing tastes of both buyers and local authors). See also UNESCO, *Piracy: Contribution to an Analysis of the Phenomenon*, 17 COPYRIGHT BULL. 10 (1983) (noting that non-protection for foreign works can depress market prices for domestic works and thereby reduce resources available to local authors).

⁴² 19 U.S.C. §§ 2461-2465 (1982 & Supp. 1987).

⁴³ 19 U.S.C. §§ 2701-2705 (1982 & Supp. 1987). The U.S. has also had success in South Korea through use of Section 301 of the Trade Act of 1974, which authorizes the President to take unspecified retaliatory measures against countries which fail to protect U.S. intellectual property rights.

⁴⁴ The GSP program specifically excludes communist states from participation, except under certain circumstances. 19 U.S.C. § 2462(b). See *infra* notes 219-22 and accompanying text, recommending amendment of § 2462 to grant the GSP privileges to the PRC.

⁴⁵ Agreement on Trade Relations, July 7, 1979, United States-People's Republic of China, 31 U.S.T. 4651, T.I.A.S. No. 9630, reprinted in 79 DEP'T ST. BULL., Dec., 1979, at 33-35; 18 I.L.M. 1041-1049 (1979).

⁴⁶ *Id.* at 4658.

("MFN") status. Notably, accession to the UCC by the USSR was reportedly a *quid pro quo* for comparable tax benefits from the United States.⁴⁷ Given this scenario, it is possible that the PRC will accede to one of the international copyright conventions on the basis of a possible trade benefit to be accorded by the United States or other foreign governments.

B. *Effectiveness of the 1979 U.S.-China Trade Agreement*

Although the language cited above from the 1979 Trade Agreement may be encouraging at first glance, there are two compelling legal arguments supporting the view that the commitments with respect to reciprocal copyright protection are not legally binding. First, commentators have noted that the Agreement contradicts its enabling statute.⁴⁸ Section 2435(a) of the 1974 U.S. Trade Act permits MFN status to be granted only to countries providing copyright protection equivalent to the level established by the UCC.⁴⁹ Since the aggregate of Chinese copyright regulations, both published and unpublished, do not appear to satisfy this requirement, and since they are not currently applied on an equal basis to United States works—even at a substandard level—accordance of MFN status and the Trade Agreement itself are arguably illegal.⁵⁰

The second argument looks to the language of the agreement with respect to copyright. Both sides have merely committed themselves to prospectively "take measures" that accord with "international practice." To avoid self-execution of the agreement of a domestic copyright law, the PRC could easily argue that delay in protecting United States copyrights is proper, since copyright relations are customarily established only through separate bilateral or multilateral copyright treaties.⁵¹ Some Chinese copyright scholars regard the 1979 Trade Agreement as self-executing and thus believe that China will be required to protect American copyrights immediately upon enactment of a copyright law. The official PRC position on this issue is still unknown.

⁴⁷ See M.A. NEWCITY, *COPYRIGHT LAW IN THE SOVIET UNION* 43-44, 168 (1978); Levin, *Soviet International Copyright: Dream or Nightmare?*, 3 J. COPYRIGHT SOC'Y U.S.A. 127, 137-40 (1953). See also Loeber, "Socialist" Features of Soviet Copyright Law, 23 COLUM. J. TRANSNAT'L L. 297 (1984); Levitsky, *Soviet Copyright Law at the Crossroads*, 9 REV. SOCIALIST L. 5 (1983); Levitsky, *Continuity and Change in Soviet Copyright Law: A Legal Analysis*, 6 REV. SOCIALIST L. 425 (1980).

⁴⁸ Note, *supra* note 34, at 428-29.

⁴⁹ 19 U.S.C. § 2435(a); § 2435(b)(5) (1982).

⁵⁰ It has also been argued that the 1979 Trade Agreement illegally attempts to circumvent 17 U.S.C. § 104(b) (1982). See Note, *supra* note 34, at 428-29.

⁵¹ See 17 U.S.C. § 104(b) (1982).

Given the consequences, one could anticipate that the prevailing view would be against self-execution by the PRC government. The 1979 Trade Agreement should, however, provide leverage to the United States government after a domestic law is enacted and encourage the Chinese to formally extend protection under the law to United States works. Accordingly, one could speculate that delays in the law's enactment are at least partly designed to avoid United States pressure.

C. *Protection Offered to Foreign Works Under Existing Regulations and Practice*

Although insignificant in relative terms, cooperation between the Chinese and foreigners, particularly in publishing and film, has increased dramatically over the past few years.⁵² To support this cooperation, the PRC provides limited copyright protection through various administrative regulations and practices. China's reliance on administrative mechanisms in lieu of laws and the custom of designating many important regulations as "temporary" (*Zhanxing*) are disquieting to foreigners seeking more solid guarantees of protection. This gap in the law is recognized by the Chinese and efforts at codification are continuing apace. The administrative approach also reflects a more traditional Chinese conception of law as a particularly flexible tool—a conception which will likely be apparent even after the copyright law is enacted. Keeping this in mind, foreign licensors will perhaps be surprised at the degree of protection currently available (excluding computer software) for works actually licensed in China.

1. Protection of Licensed Books

According to a set of unpublished regulations governing copyright in literary works,⁵³ publishing houses automatically en-

⁵² In 1988, ten co-production projects were scheduled between Chinese and foreign film corporations. *Hollywood Reporter*, Mar. 2, 1988, at 1, col. 4 (quoting Teng Jinxian, General Director of the Film Bureau of the Ministry of Radio, Film and Television). In 1987, China purchased licenses for eighty foreign videos, up from thirty the previous year. *China Daily*, Apr. 27, 1987, at 6. Imported theatrical films numbered approximately sixty in 1987. *Id.*

Through 1986, sixty Chinese publishers signed a total of over 700 cooperative contracts with foreign publishers. PUBLISHERS ASSOCIATION OF CHINA, *BOOK PUBLISHING IN THE PEOPLE'S REPUBLIC OF CHINA* 7 (1986) [hereinafter PUBLISHERS ASSOCIATION]; C. ZHENG, *CHINESE INTELLECTUAL PROPERTY*, *supra* note 6, at 120-21.

⁵³ These unpublished (internal or *neibu*) regulations are, or were at the time of their promulgation in 1984, considered restricted government documents. In a recent article, Shen Rengan referred to these regulations as "policy papers" or "policy documents" (*zheng wenjian*). Shen Rengan, *An Overview of Copyright Protection in China*, 4 *CHINESE PAT.*

joy the exclusive right to publish particular works.⁵⁴ Consequently, except as provided by agreement, no two publishers can distribute the same work—regardless of whether or not the author of the work is Chinese. Therefore, foreign licensors can achieve at least indirect protection for their works simply by entering into reprint⁵⁵ or co-production contracts with Chinese publishers.⁵⁶ The State Publishing Administration reportedly issued a declaration some time in 1988 supporting this interpretation.⁵⁷ It is unclear, however, whether the foreign party acquires the right to directly litigate infringement claims, or whether the Chinese publisher solely retains that right.⁵⁸

2. First Publication of Books

Books first published in China, including those authored by

& TRADEMARKS, Oct. 1988, 49, 50 [hereinafter *Copyright Overview*]. The regulations are now freely available to Chinese lawyers, publishers and authors, but they were never published and made accessible to foreigners. This secretive approach toward laws and regulations represents a traditional attitude toward information, which is steadily — and fortunately — eroding. As a rule of thumb, authorities increasingly permit access to classified regulations by foreigners where these regulations have a direct effect on their economic interests in China. Unfortunately, since the classification of documents is not regularly reevaluated by the relevant authorities, the official status of a given set of regulations may not be ascertainable at a particular point in time.

Professor Zheng Chengsi of the Academy of Social Sciences stated in an interview that some judges reject the validity of *neibu* regulations in court proceedings based on their “secret” nature and on the fact that they were not issued by legislative organs. Interview with Prof. Zheng Chengsi, Researcher at Institute of Law, Chinese Academy of Social Sciences, in Beijing (June 7, 1988) [hereinafter *Zheng Interview*]. The chances are slim that the regulations would ever be challenged on this basis in a dispute involving foreign parties. However, even if the regulations were to be ignored by a court, the copyright involved would, if reasonably obtained, probably be upheld out of political deference to administrative organs that Chinese courts traditionally demonstrate. The PRC is currently preparing a complete administrative law code that will deal with such issues.

⁵⁴ These regulations include extremely broad fair use and library reproduction clauses, as well as relatively low infringement damages.

⁵⁵ Some copyright officials have indicated that reprints of translations are not protected under these regulations.

⁵⁶ Shen Speech, *supra* note 26, stating:

[A]s long as the contract is valid, the rights transferred by the foreign copyright owner in the contract are respected and protected not only by the Chinese party of the contract, but also by the competent authority concerned. For example, if a foreign writer grants the exclusive right to reprint his book in China to a Chinese publisher, other publishers in China are not allowed to reprint the book.

⁵⁷ *Copyright Protection for Overseas Work*, BEIJING REV., Oct. 31-Nov. 6, 1988, at 21.

⁵⁸ The article does, however, state that foreign authors are entitled to the “same” protection as that accorded to Chinese authors. *Id.*

Since most American book publishers prefer to delegate responsibility to the licensee for pursuing infringers, this distinction is perhaps unimportant. It is recommended that contractual language on pursuing infringers be stated in particularly emphatic terms in reprint licensing contracts so that Chinese licensees are appropriately impressed by the gravity with which piracy is viewed by the licensor.

foreigners, are protected under the 1984 Regulations for Trial Implementation on Remuneration for Book-Writing.⁵⁹ Given the realities of international publishing, few foreign authors or publishers will find first publication in the PRC a desirable prospect.⁶⁰ Meanwhile, Article 14 of the regulations stipulates that compensation to the authors of such works⁶¹ is limited to the extremely low rate established for Chinese writers.⁶² To avoid application of these regulations, a foreign writer considering first publication in China should seek to characterize the distribution of his or her work as a "co-production" contract for which remuneration can be freely negotiated. Although there is no rule specifying what contributions may constitute "co-production," some publishers have demonstrated flexibility regarding this question. Thus, a foreign author could offer to perform certain tasks related to publication that are beyond the normal scope of authorship and thereby claim that that work represents the contribution of two publishers instead of one.⁶³

3. Films and Sound Recordings

Pursuant to regulations and, to the extent that these are incomplete, pursuant to government "policy," films and sound recordings licensed or "co-produced" in China receive basic protection. Regulations governing the distribution of videos and sound recordings require censorship approval of all foreign works before distribution⁶⁴ and approval by the Ministry of Radio, Film and Television of all licensing and co-production activities by audio-visual units.⁶⁵ Although the apparent policy behind these regulations and practices is censorship-based,⁶⁶ foreign li-

⁵⁹ The regulations are translated in C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 297-302 [hereinafter Remuneration Regulations] and also apply to the works published by Taiwan, Macao, Hong Kong and overseas Chinese.

⁶⁰ See *infra* notes 62-63 and accompanying text.

⁶¹ Article 14 specifically excludes translations from its effective scope.

⁶² Remuneration rates are discussed *infra* notes 143-64 and accompanying text. The language of Article 14 indicates, however, that foreign authors may be paid in an equivalent amount of hard currency. Chinese authors may only be paid in the local currency, the *renminbi* ("RMB"). See *infra* notes 209-14 and accompanying text (discussing the foreign currency system and its implications for copyright).

⁶³ Contributions by the foreign author toward printing and distribution expenses would probably be the best method for achieving co-publication status. See also *infra* note 146 and accompanying text.

⁶⁴ See 1986 CIRCULAR ON RATIONALIZING AUDIO-VIDEO MARKETS AND PROHIBITING THE ILLEGAL COPYING OF SUCH PRODUCTS, discussed in C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 92-93.

⁶⁵ Temporary Regulations for the Protection of Audio and Visual Works, art. 8.

⁶⁶ Ironically, from a marketing perspective, a wholly piratical market may be in the best interest of foreign rightsholders. Unrestricted consumption of foreign works could

censors should note that the overall market for their works has, unlike in other "pirate" countries, been generally preserved. Meanwhile, government policy (possibly expressed in unpublished regulations or notices) appears to prohibit commercial reproduction of foreign film and sound recordings⁶⁷ and supports protection of foreign copyrights actually licensed or co-produced in China.⁶⁸ As in the case of licensed literary works, it is still unclear whether foreign licensors are entitled to take direct action against third party infringers, or whether the licensee solely retains this right. In either case, the Chinese appear increasingly interested in licensing greater numbers of works.⁶⁹

4. Contractual Protection for Computer Software

In general, Chinese parties to licensing contracts are bound by the stated contractual terms. In case of breach of contract, the PRC's Foreign Economic Contract Law ("FECL") provides the right to sue for compensation and to terminate the contract.⁷⁰ Subject to other regulations referred to above, third parties are not bound to respect copyrights licensed under contract. Since no regulations exist to protect either domestic or foreign software,⁷¹ contract provides the only means of protection for this subject matter.⁷² To date, many foreign software companies have refused to sell software to China in an attempt to avoid facilitating distribution of pirated copies of their works throughout the country. Consequently, most licensing of foreign software to China is incidental to the sale of hardware.

create consumer preferences which could then translate into higher revenues once legal protections and legitimate marketing channels are in place.

⁶⁷ No published authority for this proposition is available, though its validity was confirmed in numerous interviews with Chinese officials.

⁶⁸ Shen Speech, *supra* note 26.

⁶⁹ See *supra* note 38 (statistics on video and film imports). By contrast, licensing of foreign sound recordings is still negligible, although this will probably change as cultural liberalization continues.

⁷⁰ Article 19 of the FECL states that compensation for breach of contract is to be limited to actual damages that were foreseeable at the time the contract was entered into. It is unclear how a Chinese court would calculate actual damages with respect to a licensing contract involving copyright. The FECL went into effect on July 1, 1985.

⁷¹ See *infra* notes 185-203 and accompanying text (describing the software industry in China).

⁷² Software is protected under the PRC Patent Law, but only provides protection for software that is part of a larger machine which is the primary subject of the patent.

Software sales contracts normally include confidentiality clauses. However, these are virtually impossible to enforce. See generally, C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 177-81 (discussing software licensing).

III. HIGHLIGHTS OF THE DRAFT COPYRIGHT LAW

The draft law has not yet been officially published, although it has been widely circulated within China. Copies have also been made available to foreign governments, publishers and lawyers. Specific provisions from a draft circulated in April, 1987 have been discussed in Chinese and foreign publications.⁷³

A. *Duration of Copyright and Assignments*

The basic duration of copyright under the draft is fifty years plus the life of the author. Regulations currently grant authors only thirty years plus life.⁷⁴ The law further grants a duration of only fifty years for copyrights initially vesting in "units" (*danwei*), pursuant to work for hire provisions.⁷⁵ The draft also grants "neighboring rights" protection of twenty-five years to book publishers for their plate rights, to phonogram producers and to television broadcasters. United States film and music industry groups have expressed disappointment with this limited duration.

The draft also contains an interesting termination of transfer provision pursuant to which any assignment of copyright is limited to twenty years. After this period the copyright automatically reverts to the original owner. Similar provisions in United States law limit assignments to approximately thirty-five years.⁷⁶ As has been the case under United States copyright law, the Chinese termination of transfer provision will likely generate conflicts and present complex questions over ownership and the scope of rights, particularly with respect to derivative works.⁷⁷

⁷³ See, e.g., Shen, *Copyright Overview*, *supra* note 53; Gao, *Forthcoming Law*, *supra* note 13; Owen, *Copyright in China*, *supra* note 13; Goldberg & Bernstein, *Proposed Law*, *supra* note 13.

⁷⁴ Remuneration Regulations, *supra* note 59, at 300.

⁷⁵ See *infra* note 87-88 and accompanying text.

Works for hire under the 1976 Copyright Act expire seventy-five years from the date of first publication or 100 years from creation, whichever is shorter. 17 U.S.C. § 302(c) (1982).

The use of the term "units" (*danwei*) in the draft presents an interesting legal question. *Danwei* refers to all types of work-oriented organizations, including non-legal persons. In contrast, the General Principles of the Civil Code states that only individuals and legal persons may enjoy copyright. It is therefore unclear whether organizations which are not legal persons may enjoy copyright.

⁷⁶ 17 U.S.C. § 302(a) states: "Copyright in a work created on or after January 1, 1975, subsists from its creation and . . . endures for a term consisting of the life of the author and fifty years after the author's death."

⁷⁷ See Comment, *Bleak House Revisited: An Appraisal of the Termination Provisions of the 1976 Copyright Act: Sections 203 and 304(c)*, 65 OR. L. REV. 829 (1986); Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights and the Public Interest*, 28 UCLA L. REV. 715 (1981).

B. *Moral Rights and Works for Hire*

Various provisions of the draft law demonstrate a concern for the rights of individual authors over their works. This concern may reflect a sincere interest in furthering authors' rights; however, it may also reflect a desire to satisfy the more rigorous requirements of the Berne Convention and thereby allow China to play a leading role in WIPO. The "moral rights" provisions within the draft, clearly satisfy the minimum requirements of the Convention.⁷⁸ Berne merely requires respect of the "paternity" right (the right to claim authorship)⁷⁹ and the "integrity" right (the right to prevent mutilation or alteration).⁸⁰ The draft, however, also protects the right of "divulgation" (the right to withhold publication),⁸¹ and the right to revise a published work, subject to compensation to the user.⁸² Upon China's accession to one of the international conventions, foreign authors will also be able to exercise these rights.⁸³

The questions surrounding works for hire have reportedly generated serious debates among the Chinese.⁸⁴ These conflicts probably result from the fact that virtually all Chinese authors, most of whom are specifically employed as writers, receive some sort of salary from their units and, thus, granting them additional rights to compensation through copyright ownership would result in overcompensation.⁸⁵

Furthermore, imposition of the author's moral rights could interfere with the functioning of the employing unit. Denying the author copyright, by contrast, appears to violate the spirit of

⁷⁸ Berne Convention, art. 6bis,(1) (1971). Moral rights were first introduced in the Rome Revision of the Convention in 1928. WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, 42 (1978) [hereinafter BERNE GUIDE]. The UCC contains no equivalent provisions.

⁷⁹ *Id.* at 41.

⁸⁰ *Id.* at 42.

⁸¹ *Id.* at 42-43.

⁸² See, e.g., Verbit, *Moral Rights and Section 43(a) of the Lanham Act: Oasis or Illusion?* 9 HASTINGS COMM/ENT L.J. 383 (1987); Kohs, *Paint Your Wagon—Please!: Colorization, Copyright, and the Search for Moral Rights*, 40 FED. COMM. L.J. 1 (1988); Davis, *State Moral Rights Law and the Federal Copyright System*, 4 CARDOZO ARTS & ENT. L.J. 233 (1985).

⁸³ The principle of "national treatment" requires that foreign authors enjoy treatment equal to that of national authors. See, e.g., Berne Convention, art. 5, para. 1 (1971); BERNE GUIDE, *supra* note 78, at 32-33.

⁸⁴ See Shen Speech, *supra* note 26; Gao, *Forthcoming Law*, *supra* note 13.

⁸⁵ "[I]t is unfair that one person be assigned to a position and receive additional payments (remuneration) while another must work harder, yet can only get his salary." C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 115. The problems Zheng mentions are clearly tied to both the absence of labor mobility in China, see Baumgarten, *Copyright Relations*, *supra* note 13, at 423-24, and also extant egalitarian ideology. See *supra* notes 31-34 and accompanying text.

the Berne Convention.⁸⁶

Although subject to change, relevant provisions in the draft law mirror those found in Eastern European copyright laws.⁸⁷ The general approach is to view the author as the original copyright owner who, through legislation, has "assigned" his economic rights to his unit.⁸⁸ The draft effects an interesting balance in that copyright is initially granted to the employer when the work represents the will of the unit, is created under its guidance, and where the unit bears full responsibility for the content of the work. In other cases, the author retains the copyright, but may not use the work in the same way the unit does. If such a work goes unused within two years after its completion, the entire copyright reverts back to the author.

C. *Non-Commercial Copying of Sound Recordings*

The draft states that only "commercial" reproduction of sound recordings constitutes an infringement of a producers' neighboring rights. Home taping and other non-commercial uses of recordings appear to be legitimate. A compelling legal argument against permitting such uses is that it is inconsistent with Article 6 of the Geneva Phonograms Convention,⁸⁹ to which the PRC is expected to accede. Article 6 allows limitations on the rights granted to owners of sound recordings, but only to the extent that such limitations apply to other subject matter protected under copyright. United States copyright industries have pointed out that a "commercial" limitation on other copyrighted works does not appear in either the draft or any other international copyright convention.⁹⁰

⁸⁶ The Preamble to the Convention refers only to "authors," while Article 1 of the UCC refers to "authors and other copyright proprietors in literary, scientific and artistic works, including writings, musicals, dramatic and cinematographic work, and paintings, engravings and sculpture." The Chinese approach to these distinctions shows great sensitivity to the nature of conventions. By contrast, U.S. draft legislation enabling adherence to Berne appears to show little regard for moral rights, retroactivity, self-execution and a number of other key Berne provisions. Arguably, the overall level of protection offered by U.S. copyright law, common law and the American legal system in a holistic sense is high enough to compensate for the absence of seemingly mandatory Berne protections.

⁸⁷ See Boytha, *The Berne Convention and the Socialist Countries with Particular Reference to Hungary*, 11 COLUM. J.L. & ARTS 57 (1986).

⁸⁸ See C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 125-26.

⁸⁹ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, *opened for signature* Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. No. 7808, 888 U.N.T.S. 67.

⁹⁰ Letter from Eric Smith, Esq., General Counsel for the International Intellectual Property Alliance, to the Honorable Ralph Oman, Register of Copyrights, U.S. Copyright Office (Sept. 10, 1987).

One copyright official explained the provision by noting that home taping was virtually unenforceable.⁹¹ However, this argument ignores the theory that legal prohibitions against home taping make a moral point, as well as provide a modicum of deterrence. Moreover, legitimizing home taping in a country like China could have a relatively severe effect on the legitimate market for both Chinese and foreign sound recordings, consequently driving prices significantly higher.

D. *Other Issues Raised by the Draft Law and Accession*

1. Fair Use⁹²

The draft provides for rather broad standards of fair use. Further delineation of these standards will likely come in the form of implementing regulations which will be published either at the time of the copyright law's enactment or shortly thereafter.

2. Compulsory Licensing

The draft includes a vaguely worded clause authorizing a broad range of compulsory licensing. An NCA official stated that the clause would be clarified and that its purpose was to enable the PRC to take advantage of the compulsory licensing provisions for developing nations specified in both the UCC and the Berne Convention.⁹³ Given the presumed failure of compulsory licensing systems to satisfy the educational needs of developing countries,⁹⁴ it is highly possible that the PRC may not ultimately

⁹¹ Shen Interview, *supra* note 26.

⁹² Fair use under United States copyright law is a defense to a finding of infringement. The success of the defense depends on a number of factors, including the commercial or educational purpose for the use, the amount of copyrightable material taken and the effect of this taking on the plaintiff's market for the work. 17 U.S.C. § 107 (1982).

⁹³ UCC arts. *Vbis*, *Vquater* (1971); Berne Convention arts. II-IV, appendix (1971). The UCC provides, for example, that publishers in developing countries may apply to authorities within their countries for non-exclusive, non-transferable licenses to reprint books "for the purpose of teaching, scholarship or research." Berne Convention, appendix, art. IV(4)(d)(iii), *supra* note 12. Licenses can only be granted after the applicant first attempts to secure voluntary licensing, but can be secured after one year for translations and after three years for scientific reprints. The licensor must provide "just compensation" in an amount "consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the . . . countries concerned." UCC, art. *Vier*4(c)(ii) & 5(a) & *Vquater*(1)(a). The original edition of the applied-for work may not have been previously distributed in the country or must be out of print if it has been previously distributed. *Id.* at art. V(2)(b) & *Vier*(6). See generally, BERNE GUIDE, *supra* note 78, at 161-70; Simone, *Taiwan Copyright*, *supra* note 13, at 152-53.

⁹⁴ Compulsory licensing has been adopted by only a handful of developing nations. Its benefit to these countries has been criticized as negligible. See Ndiaye, *The Berne Convention and Developing Countries*, 11 COLUM. J.L. & ARTS 47 (1986). One writer has recommended that because most piracy involves non-educational works, compulsory licensing

enact such a system. The threat of doing so, however, provides the Chinese with additional bargaining power when negotiating with developed world publishers over voluntary licensing.

3. *Neibu* Works

A substantial quantity of foreign works are currently published under the designation of *neibu*; which, in this context, means "for internal distribution." There are various categories of *neibu* material, each corresponding to higher categorical and, eventually, political levels. The lowest level distinguishes between foreigners and Chinese. Foreigners are not permitted to enter the foreign language section of most bookstores to purchase unauthorized *neibu* reprints and are technically prohibited from possessing them. Likewise, the most popular newspaper in China, *Cankao Xiaoxi* (Reference News) publishes unauthorized translations of news reports from foreign papers. This is also *neibu* and is only for the consumption of Party members and intellectuals. Other books are printed in large quantities within the Communist Party (which has over 40 million members).⁹⁵

Although the current draft is silent on the issue, unauthorized *neibu* publishing of foreign translations and reprints might be condoned as a public policy exception under the future law,⁹⁶ or otherwise permitted under an unusually broad interpretation of fair use. Once the copyright law has been passed, some publishers may attempt to avoid licensing procedures and royalty payments by having particular works designated as *neibu*.⁹⁷

should be expanded under future conventions to encompass works such as popular literature and sound recordings. Compulsory licensing would force pirates into legitimacy by taking away the primary incentive to infringe by eliminating the price differential between voluntarily licensed and pirated works. Peters, *Copyright Piracy*, 7 Nw. J. INT'L L. & Bus. 561, 588-93 (1986).

⁹⁵ Piracy occasioned by government or Party sanctioned *neibu* publishing is a direct result of censorship policies. Although *neibu* publishers could attempt to conclude licensing contracts for reprinted and translated foreign works in the future, it is unlikely that they will do so. Ironically, *neibu* publishing is generally the only source for Chinese to obtain otherwise censored information.

A shipment of *neibu* books on Tibet, written by an American, was mistakenly delivered to a bookstore in Lhasa in 1988. Within days, photocopies of the work were seen circulating in the local market. *S. China Morning Post*, Nov. 16, 1988, at 17, col. 1.

⁹⁶ This possibility was acknowledged by Shen Rengan. Shen Interview, *supra* note 26.

⁹⁷ In response to these concerns, Shen Rengan drew parallels between *neibu* publishing and practices in other countries, including unauthorized photocopying and specific exceptions in copyright laws for government-related uses. He further recognized the possibility for abuse of the system, but observed that as China pursues its "Open Door" policy, fewer works will be designated *neibu*.

Interestingly, the Berne Convention appears to sanction the right of signatories to

4. Databases, Directories, Useful Articles, Characters and Other Matter

The draft law is either silent or extremely vague as to whether these and other unspecified works will be eligible for protection. Clarifications are only likely to come through the implementation of regulations, judicial precedents, or from NCA, which has reportedly been designated as the administrative body authorized to interpret the future copyright law.⁹⁸

IV. ADMINISTRATION OF COPYRIGHT

A. *The National Copyright Administration*

Since its inception in 1985, NCA has been at the center of the copyright law drafting process. After the law is enacted, NCA will continue to play a crucial role in copyright management. Separate departments within the organization include those devoted to research, public education, and domestic and international affairs. NCA is primarily responsible for overseeing implementation of the copyright law; but through these departments, it also coordinates policy making in areas including the establishment of collecting societies⁹⁹ and the regulation of book prices and royalties. NCA is also frequently consulted by courts and various mediation bodies handling copyright disputes.¹⁰⁰ Ad hoc opinions offered to tribunals are not legally binding as a matter of law. However, given both the natural deference to the expertise of NCA staff and the organization's position within the central government, its opinions are normally dispositive.

Due to the copyright law's inherent complexity and the desire for uniformity in the disposition of disputes, NCA's future role in developing China's copyright jurisprudence cannot be

exercise powers of both censorship and eminent domain over copyrightable works. Article 17 states:

The provisions of this Convention cannot in any way affect the right of the Government of each Country of the Union to permit, to control, or to prohibit by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

Berne Convention, Art. 17.

⁹⁸ Zheng Interview, *supra* note 53.

⁹⁹ See *infra* note 122 and accompanying text.

¹⁰⁰ NCA has also been known to hear appeals instituted by parties in cases first handled by local courts. See, e.g., appendix at 1986 (Beijing District Court ruling appealed to the NCA).

Strictly speaking, NCA is not designated as a judicial authority or tribunal and, under the General Principles of the Civil Code, there is no legal basis for allowing NCA to directly handle "appeals." In practice, NCA appeals are perhaps more accurately characterized as mediations or unstructured, non-binding arbitrations.

overemphasized. Under the country's civil law system, precedents carry significantly less weight than in common law systems. The decision whether to designate special courts and specially trained judges to handle copyright disputes has not yet been made,¹⁰¹ but a move in that direction would likely increase predictability in the outcome of disputes. Compiling copyright cases into reference books is also currently under consideration, but compilation will not change the lack of precedential effect that these cases have. Moreover, the scarcity of resources in the judicial system makes it unlikely that most courts would have access to such books were they to be published. After the copyright law is enacted, however, NCA will likely be responsible for issuing subsequent implementation regulations and binding "circulars." Its role in supervising and advising courts will similarly be expanded.

NCA's present and future policy making functions will require a high level of coordination with other units. For example, the Film Bureau of the Ministry of Radio, Film and Television is currently drafting a separate film law that will deal with issues related to, but not traditionally thought of as falling under, copyright.¹⁰² It is still unclear whether NCA has the authority to interpret the future film law and influence the decisions of other government organs with respect to copyright-related matters. As is not uncommon in other contexts in China, foreign copyright owners may encounter difficulty in determining which organs have the authority to decide certain questions.

B. *Copyright Dispute Resolution*¹⁰³

Prior to 1984, open disputes over copyright were rare¹⁰⁴ and

¹⁰¹ Some Chinese think that centralizing this adjudication process by, for example, choosing judges to primarily handle intellectual property disputes, will impede the popularization of copyright knowledge.

¹⁰² These issues include censorship, which is clearly beyond the scope of copyright, and remuneration of the various participants in filmmaking, including actors, directors, and technical staff. In the U.S., these remuneration issues are governed primarily by union contracts, not by copyright.

¹⁰³ For an overview and bibliography on Chinese dispute resolution channels and attitudes toward law, see generally Robinson & Doumar, "It is Better to Enter a Tiger's Mouth Than a Court of Law," or *Dispute Resolution Alternatives in U.S.-China Trade*, 5 DICK. J. INT'L L. 247, 248-52 (1987); Nafziger & Ruan, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 619-55 (1987).

¹⁰⁴ This probably reflected the uncertain ideological status of copyright at the time. Debates over the necessity of a copyright law, as well as patent and trademark laws, began in 1977. The publication of the first books and articles on copyright in 1983, however, most likely served as the catalyst for bringing infringements out into the open. See Sidel II, *PRC Copyright Protection*, *supra* note 13, at 498. Courts sometimes withheld

handled on an ad hoc basis by administrative bodies.¹⁰⁵ Since 1984,¹⁰⁶ however, litigation and mediation procedures have increasingly been systematized, and the number of disputes handled has increased dramatically. In the last four years, Chinese courts have reportedly handled at least 200 cases nationwide.¹⁰⁷ A similar number of disputes have been mediated in Beijing alone.¹⁰⁸

In the past few years, NCA has assisted municipal and provincial governments in establishing organs (such as the Beijing Copyright Office) for the principal purpose of providing mediation services for parties in copyright disputes. Over twenty-three offices now exist and the number is growing. In addition, mediations are frequently held under the auspices of other specialized organizations. For example, the National Publishing Administration and the Chinese Writers Association and their subsidiary provincial organs will handle disputes among publishers and writers, respectively. In cases that are politically sensitive or otherwise noteworthy, NCA has been known to mediate in appeals from parties dissatisfied with the initial outcome.¹⁰⁹

All of the above mediation organs use existing regulations and, to some extent, the draft law in their deliberations. However, the primary goal in most of these proceedings is to forge a consensus between the parties on questions of fault and compensation and, if necessary, to propose an appropriate settlement.¹¹⁰ Participation in mediation is supposedly voluntary,¹¹¹ and since the parties are not bound by the mediator's recommended settle-

judgment in copyright disputes on the ground that there was no governing law. Some disputes were settled through appeals to Party officials. *Id.* at 494-95.

¹⁰⁵ See, e.g., *id.* at 496-97. One case involving postmortem royalties from sales of the preeminent author, Lu Xun's, works was reportedly decided by then Party Secretary Hu Yaobang and other senior Party officials. *Id.* at 495-96.

¹⁰⁶ The first reported case handled by a judicial organ was apparently filed in 1984 and decided in 1985. C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 106.

¹⁰⁷ Fazhi Ribao (Legality Daily), Apr. 2, 1988 (article quoting Tang Dehua of the Supreme People's Court).

¹⁰⁸ Mediations administered by the Beijing Copyright Office alone have numbered over eighty. See Fazhi Ribao (Legality Daily), Oct. 10, 1987; Interview with Liu Dong Wei, Vice Director, Beijing Copyright Office in Beijing, (May 23, 1988) [hereinafter Liu Interview]. Copyright mediations handled by the Chinese Writers' Association have numbered over 120. Interview with Zhang Jie, Secretary of the Chinese Writers' Association in Beijing, (June 18, 1988).

¹⁰⁹ See, e.g., appendix.

¹¹⁰ Over half of all mediations handled thus far by the Beijing Copyright Office were settled by the parties without requiring the mediators to declare fault or recommend compensation. Liu Interview, *supra* note 108.

¹¹¹ Internal regulations governing mediations by the Beijing Copyright Office reportedly require Chinese disputants to take up mediation before filing a complaint with a court.

ment they are free to pursue their dispute in a local court.¹¹²

Chinese disputants prefer mediation over litigation. In both traditional and modern contexts, courts are thought to bring embarrassment to the parties and often produce arbitrary results. When considering whether to file suit in Chinese courts, foreign copyright owners should be aware that if they are successful, valuable publicity will be generated and consequently potential infringement will be deterred. While foreigners will probably not be embarrassed by litigating in China, there are other factors that may justify participation in mediation or arbitration proceedings before taking legal action. First, under current regulations, all judges and virtually all lawyers are state employees,¹¹³ thus raising doubts as to their ability to act independently. Second, as in most countries, litigation in China may entail long delays and high costs and the amount in controversy will usually not justify prolonged litigation. Third, instituting suit without first attempting to mediate may turn the Chinese judge against the foreigner since mediation and conciliation are considered "reasonable," and litigation, a last resort. It should be noted, of course, that where important legal issues are raised by a dispute, litigation may be the preferred route since judges are more likely to request guidance from NCA in cases involving foreigners, and since NCA's imprint on a favorable holding could eventually carry precedential weight. It is also notable that courts will generally approach disputes in the manner of a mediation and exert their first efforts toward encouraging settlement between parties.¹¹⁴

V. PRC BOOK PUBLISHING, FILM, SOUND RECORDING, AND COMPUTER SOFTWARE: SOME SALIENT ASPECTS

A. *Book Publishing*

1. Overview

Despite notable increases in imports of foreign publications,¹¹⁵ reprint licensing and other forms of cooperation with

¹¹² In an effort to improve its dispute resolution capabilities, the Beijing Copyright Office has begun administering non-binding arbitration hearings. However, no formal rules have yet been devised to govern these hearings. Liu Interview, *supra* note 108.

¹¹³ Under a 1986 decision by the Supreme People's Court, foreigners (including lawyers), can represent other foreigners in judicial proceedings in China, subject to various restrictions which normally necessitate cooperation with Chinese counsel. There have also been reports that some Chinese lawyers are being permitted to form privately owned firms, freeing them of direct government and Party control.

¹¹⁴ See, e.g., C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 106.

¹¹⁵ From 1977 to 1985, the value of publications imports to China rose from \$10

foreign publishers,¹¹⁶ market opportunities will probably not reflect China's immense population for decades. Per capita income figures demonstrate this fact, but statistics on education are particularly revealing. Although approximately eighty-five percent of the population enjoy some degree of literacy, only eight percent have acquired a high school education, and only one half of one percent have a secondary education.¹¹⁷ Moreover, owing to historical and ideological factors, intellectuals normally earn only average or below-average salaries.¹¹⁸

The market for foreign works in the short term, however, should not be underestimated. Between 1949 and 1987, Chinese publishers distributed 670 million foreign language books, including 18,000 titles.¹¹⁹ And while there are no available statistics on translated books themselves,¹²⁰ China reportedly has 500,000 full-time translators.¹²¹ Moreover, the number of publishing houses has grown from 117 in 1980 to over 500 today.¹²²

In order to assure public access to books, retail book prices are regulated.¹²³ As a result, the retail price of books is so low that, as one Chinese commentator noted, for the price of ten photocopied pages in China, one medium sized book can be

million to over \$60 million. Chan, *Selling Books in China*, PUBLISHERS WEEKLY, Aug. 8, 1986, at 23. Imports since 1985 have not grown appreciably due to restrictions on foreign exchange. Importation and distribution of foreign books was previously controlled by one organization, the China National Publications Import and Export Corporation ("CNPIEC"). In the past few years, however, the number of legitimate importers has increased to more than thirty. Other importers are administered by government agencies such as the State Education Commission, the Ministry of Culture and the State Media and Publication Administration. As a result of competition between these entities, the CNPIEC recently announced an effective 15% cut in the retail price of its imported books. China Daily, May 3, 1988, at 3, col. 5. See generally, Totten, *Selling Books to China*, 13 CHINA BUS. REV., July-Aug. 1986, at 6.

¹¹⁶ In June, 1988, the NCA and other PRC publishing representatives concluded approximately forty reprint licensing contracts with American publishers. The terms of these contracts included 10% royalties to be paid in hard currency.

¹¹⁷ CHINA YEARBOOK, 1987.

¹¹⁸ Half of those polled in a recent survey of university students in Beijing were reported to be living "below the average level of urban consumption expenses in China." China Daily, June 7, 1988, at 3, cols. 1-2. Approximately 85% had monthly incomes of less than 80 RMB.

¹¹⁹ China Daily, Nov. 14, 1988, at 3, col. 2 (quoting Wang Meng, Minister of Culture).

¹²⁰ In 1987, 780 foreign books were translated and in 1988 the number had increased to over 866. S. China Morning Post, Nov. 27, 1988, at 6, col. 1 (the Guide).

¹²¹ Chan, *supra* note 115, at 25.

¹²² China Daily, June 17, 1988, at 4, col. 5. For descriptions of publishing in the PRC, see also PUBLISHERS ASSOCIATION, *supra* note 38, at 3 (noting that over one third of all publishing houses are located in Beijing and that one tenth of all houses are affiliated with universities); China Daily, Nov. 10, 1988, at 1, col. 1 (noting that the number of titles published, i.e., the number of different books published, as compared with the total number of books printed and distributed, rose from 20,000 to 60,000 in 1988).

¹²³ The fixed price for each printed sheet is now 0.075 to 0.23 RMB. PUBLISHERS' ASSOCIATION, *supra* note 38, at 5.

purchased.¹²⁴ This price-control system is perhaps the key barrier to implementing market reforms in Chinese publishing.¹²⁵ Regulations also exist which attempt to control author remuneration¹²⁶ and the price of paper. Continuation of price controls is considered necessary because they are politically popular among readers and because the country's library lending system would be inadequate to satisfy demand in the event that book prices increased. Unfortunately, shortages and profiteering in paper distribution have dramatically raised publishers' expenses.¹²⁷ The official price of paper reportedly increased by seventy-five percent during 1987.¹²⁸ Officials have warned of a critical shortage of textbooks because publishers are apparently shifting production to more profitable works.¹²⁹

Concern within publishing houses over profits and losses has increased in recent years with the implementation of various reforms. In the past, the government maintained tighter control over publishing and treated the industry solely as an educational or ideological tool. Losses among publishing houses, particularly among those publishing specialty books with highly controlled prices and textbooks, were covered as government subsidies. Over the past few years, however, the proliferation of new publishing houses and adoption of the profit motive have led to significant reforms. Although still nominally state-owned, more and more houses are responsible for their own bottom line.

¹²⁴ C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 119 n.56.

¹²⁵ Obviously, the root cause of most of the problems discussed herein is economic underdevelopment. Hesitancy in implementing a full range of market reforms is reasonably based on the fear of aggravating an already difficult situation. Accordingly, few commentators have called for anything more than minor adjustments in price control. *See, e.g.*, Ren Pin, Chuban Gongzuo (Publishing Work), Feb. 1987, at 42; Guangming Ribao (Brightness Daily), June 4, 1986. Reflecting the need for greater use of market mechanisms in the bookselling industry, commentators have also complained about the lack of correspondence between supply and demand for certain works. *Id.* (complaining that bookstores and publishers are out of touch with readers and normally distribute inadequate quantities out of fear of accumulating excess inventories); *see also* China Daily, Apr. 20, 1988, at 4, col. 3 (describing the factors behind losses by Xinhua Bookstores, including the tendency to publish less profitable educational and ideological works over popular works such as "detective novels and kung fu stories"); Renmin Ribao (People's Daily), Oct. 5, 1986; *id.*, Jan. 14, 1988 (criticizing inadequate reprinting by publishing houses).

¹²⁶ *See infra* notes 143-55 and accompanying text.

¹²⁷ China Daily, May 8, 1988, at 1. Due to a lack of foreign exchange, China only imports one percent of its needed pulp. Shortages of paper have an exaggerated effect on publishing because paper prices for newspapers and books are regulated. Consequently, manufacturers have emphasized production of more profitable types of paper, thereby further restricting supplies of paper for books.

¹²⁸ *Id.* It was reported that 40-50% of the cover price of a book represents the cost of paper. Feldman, *The Organization of Publishing in China*, 1986 CHINA Q. 524.

¹²⁹ *Id.* at 523.

The four principal types of publishing enterprises are described below.

a. Non-Profit Houses

These units, including institutional publishers such as university presses, suffer perennial losses and are directly subsidized by the state.¹³⁰ The funds used to subsidize these units are supposedly taken from taxes and other revenues collected by the government from profitable publishing enterprises.¹³¹ It is not known whether the government's revenues from these enterprises are sufficient to cover the total cost of subsidies to unprofitable publishing houses.

b. Responsibility (Chengbao) Houses

These publishers, which reportedly constitute the majority of China's 500-plus houses, are permitted to retain their profits and are taxed like any other enterprise. In principle, publishing houses operating under the responsibility system would be subject to bankruptcy in case of excessive losses, though this would seem unlikely given both the cultural and educational importance of publishing and the economic constraints, including price regulation and paper shortages, under which publishers operate. The PRC recently enacted its first bankruptcy law, but given the bitter debates surrounding its passage and the spare use of its provisions, the threat of bankruptcy—particularly for publishing houses—would appear minimal. Accordingly, financially troubled houses would probably be subsidized before being permitted to fold.¹³²

c. Contract Houses

Under this for-profit arrangement, the government and publishers agree that the latter will publish according to a plan and pay the government a fixed amount of money from revenues. Any remaining funds can then be retained by publishers as profits.¹³³

¹³⁰ See C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 116-17 (noting that non-profit publishers generally issue low-risk works such as textbooks and reference works).

¹³¹ Interview with He Cheng, Copyright Section, Beijing Publishing House, in Beijing (June 26, 1988) [hereinafter He Cheng Interview].

¹³² See Chang, *supra* note 25.

¹³³ He Cheng Interview, *supra* note 131.

d. Commissioning Houses

These publishers, currently few in number, represent the development of socialist China's first vanity press. Authors provide most or all of the capital necessary to publish and the publishers may or may not share in any profits generated. All losses are borne by the author.¹³⁴ Interestingly, author remuneration is not governed by the 1984 rules, but by contractual agreement with the publisher.

The overall health of PRC book publishing is not easy to gauge.¹³⁵ Statistics on the number of publishing houses requiring subsidies, and the overall amount of these subsidies, are unavailable. Yet most printing facilities are said to utilize outdated technology.¹³⁶ Clearly, substantial improvements in printing, paper supplies, author remunerations, and other areas, are ultimately limited by the fact that book prices are controlled. Notwithstanding price controls, the responsibility and contract publishing reforms are designed to provide incentives for the generation of profits.

Greater profit orientation has apparently stimulated expansion in the publication of "vulgar" and "pornographic" works.¹³⁷ Another factor permitting this expansion is the lack of clearly defined censorship standards and loose political supervision of some units,¹³⁸ problems which will probably be addressed by a

¹³⁴ C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 117 (citing the Shanghai Xuelin Publishing House and the Beijing Wenjing Publishing House as the first examples of such publishers); *see also* Renmin Ribao (People's Daily), June 10, 1987 (noting that *dzi fei* publishing is currently limited to works by PRC and overseas Chinese and that the content of such works must be appropriate).

¹³⁵ Although perhaps not reflective of the state of book publishing, it was recently reported that one-tenth of all the social science periodicals in China have folded under economic pressure, while the remaining enterprises have been forced to reduce printing by 10-20% annually. China Daily, June 17, 1988, at 4, col. 2. Regulations issued by the State Administration of Industry and Commerce in early 1988 are designed to increase revenues of newspaper, magazine and other publishing houses by encouraging them to provide research, educational and public relations services, in addition to publishing. *See* Beijing Ribao (Beijing Daily), Mar. 23, 1988 at 3 (regulations effective April 1, 1988).

¹³⁶ Feldman, *supra* note 128, at 522-23.

¹³⁷ *See* China Daily, June 17, 1988, at 4, col. 5. The Chinese press notes that many "vulgar" works are in fact translated foreign novels. *Id.* "Vulgar" works are works which publicize "fighting, sex, murder and feudal superstitions." Xhongguo Xinwen She, Mar. 31, 1986, *reprinted in* FBIS, Apr. 4, 1986 at K-19.

One news report noted the discovery during a campaign against such works of "45 false publishing houses, 34 counterfeit publishing houses, and 64 units usurping the names of nonpublishing units or simply without names." *Id.*

¹³⁸ China Daily, June 17, 1988, at 4, col. 5. Previously, authorities could rely on self-censorship by publishing houses, all of which were directed by Party representatives. The increased emphasis on profits and declines in the ideological sensitivities in houses may politically make publishing less reliable in years ahead.

Publishers stated in interviews that the censorship process was fairly unsysteme-

future publications law.¹³⁹ With increased economic and political independence and increasing competition among the growing number of publishing houses, the incidence of copyright infringement is likely to increase exponentially.¹⁴⁰

Interestingly, some Chinese view copyright as an important tool in controlling the distribution of "illegal" works.¹⁴¹ Copyright protection for foreign works may ultimately provide some deterrence against unauthorized distribution of foreign works; generally, though this deterrence will be limited by the absence of any licenses to actively enforce copyrights in "illegal works." The government will thus be left alone to suppress objectionable pirated works.¹⁴²

2. Author Remuneration Regulations

Regulations on author remuneration limit payments to authors in the vast majority of cases to a small fraction of the ten percent royalty standard in most other countries. The overall system (described below) is similar to that in the Soviet Union. The Soviet system, however, applies not only to Soviet books but to foreign books as well.¹⁴³ Chinese officials have not indicated whether remuneration regulations will be applied to foreigners after passage of the copyright law.¹⁴⁴ If these regulations are applied, however, and foreigners refuse to grant voluntary licenses on this basis, the compulsory licensing provisions of the UCC and Berne Convention would appear to be of little value to the Chinese since they require payments "consistent with standards of royalties normally operating in the case of licenses *freely negoti-*

tized. Publishers are generally autonomous in selecting which books to publish, but are required to submit the titles of books they plan to issue in a given period to higher authorities. No description of the contents of these books need be provided. Of course, methods of indirect censorship cannot be ignored, including the power to discipline individuals after the fact and the power to revoke publishing licenses.

¹³⁹ This law has been frequently discussed in the press as the "media law." It was originally scheduled for enactment together with the copyright law in March, 1988.

¹⁴⁰ Reports on trademark infringement are not encouraging in this regard. One press account observed that government officials and government-owned enterprises were colluding in a staggering number of infringement incidents. *China Daily*, May 15, 1988, at 15.

¹⁴¹ See, e.g., C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 120.

¹⁴² "Following the establishment of all round copyright protection and China's adherence to the international convention[s] . . . [the] phenomenon [of unprotected foreign works being exploited] will shortly disappear." *Id.* at 127.

¹⁴³ The relevant Soviet legislation, which applies to reprinted and translated books, but not to periodicals, is analyzed in detail in L. OWEN, A GUIDE TO THE PASSAGE OF RIGHTS BETWEEN THE UNITED KINGDOM AND THE SOVIET UNION (1983) [hereinafter UK-USSR RIGHTS].

¹⁴⁴ The regulations do apply to foreigners whose works are first published in China. See *supra* notes 63-73 and accompanying text.

ated between persons in the two countries concerned.”¹⁴⁵ Unless the Chinese are willing to risk losing access to voluntary licenses, or otherwise establish remuneration rates for compulsory licenses that violate the conventions, withholding application of the remuneration provisions to convention works would appear to be the only reasonable solution.¹⁴⁶ Perhaps the strongest theoretical argument against application of the regulations from the foreign publisher’s perspective is that the low rates reflect the fact that most authors receive salaries from other sources and are thus similar to “works made for hire.”¹⁴⁷ In contrast, foreign authors rely, to a greater extent, on their royalty income.

The 1984 Remuneration Regulations¹⁴⁸ are not limited in scope to authors of books. Authors of periodical literature, translators,¹⁴⁹ compilers, editors and even proofreaders are covered.¹⁵⁰ Payments are organized as follows: upon first publication, authors receive a “basic fee” calculated according to the length and nature of the work. The recipient is then accorded an additional “print remuneration,” normally ranging from 0.4 to four percent of the basic fee.¹⁵¹ The basic fee is extremely low by western standards and the print remuneration is almost negligible. The maximum for any work is twenty Renminbi (“RMB”) per 1000 words. Even for relatively long and popular works, remuneration would rarely exceed one percent of total revenues.

¹⁴⁵ U.C.C., July 24, 1941, art. *Vier* 5(a), in 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1974) (emphasis added); see *id.* at *Vquater* 1(a).

¹⁴⁶ Following the Soviet example provides one key convenience for the Chinese—it enables them to avoid the necessity of negotiating price. Foreign publishers would also benefit in a small way: low remuneration rates would reduce the incentive among Chinese publishers to pirate works. However, allowing free negotiation of licenses probably translates into higher return for foreign copyright owners. Allowing the same for Chinese authors, would also likely increase earnings and improve the quality of their works.

¹⁴⁷ A “work made for hire” is produced by an employee within the scope of his employment. The copyright of such a work is owned by the employer. 17 U.S.C. § 201(b)(1982). The employee’s compensation for creating the work is his salary, or, in the case of an independent contractor, the contract price.

¹⁴⁸ The 1984 rules are similar to those issued in 1980. For translations of both, see C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 297-302; Sidel II, *supra* note 13, at 505-09 (1980 Regulations). On the regulation of payments through 1977, see *id.*, at 479-89, and Zheng, *Copyright Context*, *supra* note 13, at 157-68.

¹⁴⁹ Translator payments are generally equivalent to two-thirds of that for authors and reflect a high regard for translation activity in China. See, e.g., C. ZHENG *Regulations for Trial Implementation on Remuneration for Bookwriting*, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 297 (art. 3).

¹⁵⁰ *Id.*

¹⁵¹ Academic works with accumulated sales from 10,000 to 20,000 are remunerated at 20% and 10%, respectively. *Id.* at 298-99 (art. 4). Soviet regulations are much more generous, granting from 30% to 60% of the basic fee. The percentage decreases with each successive print run. L. OWEN, UK-USSR RIGHTS, *supra* note 143, at 13.

Payments for later reprints are limited to the print remuneration alone.¹⁵²

The regulations grant publishers the power to negotiate remuneration rates within the specified range, subject to ad hoc approval by higher authorities.¹⁵³ In turn, many publishers reportedly find other methods of compensating authors. For example, an author may receive normal fees for drafting a work and receive additional compensation for nominal editing, proof reading or revisions of a work, even though no additional labor has been expended.¹⁵⁴ However, because of the abundance of unsolicited manuscripts¹⁵⁵ and limited printing budgets, these methods of additional compensation are not widely utilized to attract new talent.

3. Works for Hire

Publishers benefit from limits on remuneration because they reduce costs. Authors, by contrast, appear surprisingly ambivalent about reforming the system. Eliminating the remuneration standards may result in higher royalties for many writers, but many fear that this ultimately undermines the publisher's or other employer's interest in hiring permanent staff and paying them a basic salary.¹⁵⁶ Consequently, both the government and authors—most of whom are salaried employees¹⁵⁷—appear to prefer increasing remunerations under the current system¹⁵⁸ rather than eliminating payment scales in favor of a free market system.¹⁵⁹

¹⁵² The Soviet equivalent of a "basic fee" is only paid for works first published within the USSR. Reprints and translation of foreign works, however, are not considered as first editions and are accordingly restricted to the "print remuneration." *Id.* at 17.

¹⁵³ C. ZHENG, *Regulations for Trial Implementation on Remuneration for Bookwriting*, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 301 (art. 15).

¹⁵⁴ This information is based on interviews with publishers held in Beijing during June, 1988. See also Feldman, *supra* note 128, at 520 (noting one case in which an author was offered one year's "sabbatical" at a holiday resort in order to revise a textbook).

¹⁵⁵ See Feldman, *supra* note 128, at 522. "[T]here is currently an over-abundance of manuscripts chasing too few editors. This partly results from the backlog created by the Cultural Revolution, but it also reflects the current enthusiasm for books as a means of self-improvement and an instrument for carrying out the Four Modernizations." *Id.*

¹⁵⁶ See Shen, *Copyright Overview supra* note 53, at 54.

¹⁵⁷ See Sidel II, *supra* note 13, at 478, n.1; Feldman, *supra* note 128, at 520.

¹⁵⁸ The government has recently announced plans to increase author remunerations by 50% and reduce royalty taxes, presumably only for Chinese authors, by 40%. *China Daily*, Nov. 25, 1988, at 3. Given current economic instability in the country, however, it would appear that these measures are primarily designed to compensate for inflation rather than to increase living standards for authors.

¹⁵⁹ Zheng Chengsi has noted that planned experiments for establishing a system of non-salaried authors who rely wholly on royalties have yet to be realized. C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 115.

The criteria for determining whether the authors or their units receive remunerations are not uniform. Under the current practice, compensation for works created in "cultural" units (e.g., newspapers and publishing houses) is generally restricted to salary and, in some cases, bonuses.¹⁶⁰ However, there are significant exceptions to this rule. For example, authors are often paid according to the remuneration regulations for "special works." These have been defined to include abnormally long or unusual works created by employees during work hours and with permission of their unit.¹⁶¹ Additionally, employees of noncultural units who create works during work hours and with permission of their supervisors are reportedly remunerated according to the regulations.¹⁶² Remuneration in all of the above cases seems to depend largely upon the discretion of the author's supervisors.¹⁶³ Implementing regulations to the future copyright law will likely reduce some of this discretion, although where the law seems to indicate that a given work is a "work for hire," the unit will retain the power to provide extra compensation or grant copyright outright to the author.

Although the current number of non-salaried, part-, and full-time authors who are regularly published is small, with cultural liberalization the number will probably grow rapidly. As this occurs, the tensions between salaried and non-salaried, and remunerated and non-remunerated authorship will become more pronounced¹⁶⁴ perhaps ultimately leading to significant changes in the current system.

B. *Film*

Over twenty-one billion tickets were sold to film viewers in China during 1987. It was reported that 500 million tickets were sold for one box office hit alone.¹⁶⁵ Although cooperation between the Chinese and foreigners is increasing,¹⁶⁶ given the aver-

¹⁶⁰ *Id.* at 110.

¹⁶¹ *Id.* at 111.

¹⁶² *Id.* at 113.

¹⁶³ *Id.* While some famous authors are transferred to cultural units, others remain in their noncultural positions with factories, farms or other productive units, because "an artistic work [such as a novel], can only be conceived where the author is acquainted with and feels for what he writes." *Id.*

¹⁶⁴ *See supra* note 26.

¹⁶⁵ Theiler, *Movie Business*, 14 CHINA BUS. REV., July-Aug., 1987, at 22. Every day over 60 million people attend cinemas. *Id.*

¹⁶⁶ *See supra* note 64-69 and accompanying text (film and video imports and co-production efforts). In 1986, MGM/UA Communications, Paramount, and Universal Pictures signed an agreement with the China Film Corporation to distribute twenty-one

age ticket price of fourteen cents and the limited foreign exchange budgets of Chinese distributors, most American and other foreign film distributors justifiably see their prospects in China in the long term, not the short term.

Perhaps the most important factor inhibiting the distribution of foreign films in China is cultural protectionism. In order to preserve the market for local films and restrict foreign cultural influences, the number of foreign films displayed in theatres and distributed in video format is limited.¹⁶⁷ As in other countries, cultural protectionism has proved unpopular with the public.¹⁶⁸ Dubbed and subtitled versions of American films originally distributed in Hong Kong and Taiwan are now widely available to the Chinese who own VCRs. Meanwhile, it appears that the number of VCRs in China is increasing dramatically. One recent report estimated that one million VCRs would be illegally imported in 1988, up from 300,000 in 1987,¹⁶⁹ while factory capacity for domestically produced VCR tapes increased to eighteen million.¹⁷⁰ Although direct evidence of widespread commercial distribution of unauthorized foreign videos has not yet emerged, these statistics indicate that the increased demand will likely result in increased distribution.¹⁷¹

Since China does not currently adhere to the UCC or Berne Convention, foreign film companies only have recourse if they have already licensed a work in China.¹⁷² Although unauthorized distribution of foreign films violates censorship regulations,¹⁷³ regulatory action in this regard focuses mainly on restricting pornographic films. Accession to one of the conventions will only enhance the problem. Even though foreign copyrights will be

films over three years in exchange for both the right to show advertising during each film plus an unspecified amount of hard currency. Theiler, note 165, at 22.

¹⁶⁷ Film officials deny the existence of a formal quota for foreign films.

¹⁶⁸ A survey of 2000 Chinese movie goers suggests that they are dissatisfied with the the quality of Chinese films and prefer foreign over domestic films. Theiler, *supra* note 165, at 23.

¹⁶⁹ Zhongguo Jixie Bao (China Machinery), Sept. 29, 1988, at 1 (noting that 99% of all anticipated imports will be illegal).

¹⁷⁰ Jiefang Ribao (Liberation Daily), Oct. 5, 1988, at 5.

¹⁷¹ It appears that the distinction between home video and theatrical films is being blurred in the PRC. There are reportedly over 230 licensed "video show businesses" in Beijing, Tainjin and Shanghai alone which present feature films to small groups through the use of VCRs and televisions. The extent to which these establishments show pirated foreign films is unclear. China Daily, Oct. 26, 1988, at 5, col. 1. For display of films primarily in rural areas, the Ministry of Radio, Film and Television has also sanctioned the placement of VCRs upon cars and trucks so that they can then function as portable video theatres.

¹⁷² See *supra* notes 64-69 and accompanying text.

¹⁷³ See *supra* note 27.

protectable, film distributors will still be unable to license their works and consequently will have no incentive to bring suit against either commercial or non-commercial infringers.¹⁷⁴ Furthermore, since most Chinese who own VCRs will continue to have access to pirated cassettes, the purpose behind the licensing restrictions will continue to be frustrated.

Problems related to the lack of foreign exchange to pay for copyright licenses and cultural policies can eventually be ameliorated through economic development and political change. Given the rapid pace of progress on both of these fronts since 1979, worthwhile opportunities for foreign film distributors will probably become a reality sooner than expected. In the meantime, the structure of the film industry in China will soon experience significant market-oriented reforms which are both interesting in themselves and could have profound implications for foreign licensors.

1. Decentralization of Licensing

Distribution of all foreign theatrical films is currently handled by one organization, the China Film Import and Export Corporation. In the past few years, however, licensing of foreign videos has been diversified such that there are now at least three separate enterprises empowered to purchase video licenses.¹⁷⁵ The Film Bureau of the Ministry of Radio, Film and Television is currently considering further diversification in film and video distribution in order to better serve the domestic market. The United States and other foreign film distributors can expect that a proliferation in the number of legitimate Chinese film distributors will result in an escalation in commercial infringement. Both in anticipation of these reforms and because of improvements in the licensing climate, foreign distributors should consider establishing business ties with existing Chinese distributors. After diversification reforms are fully implemented, these distributors will continue to dominate the market and, after PRC accession to one of the conventions, both foreign licensors and their Chinese

¹⁷⁴ Under the copyright provisions in virtually all countries, rights can only be enforced upon the complaint of the copyright owner. Similarly, the PRC's draft law contains no provisions for self-enforcement of rights. For a discussion of criminal copyright infringement in the U.S., see Soffer, *Criminal Copyright Infringement*, 24 AM. CRIM. L. REV. 491 (1987).

¹⁷⁵ These include China Film Import and Export, as well as regional film distributing companies based in Shanghai and Beijing. The latter two are reportedly permitted to distribute films nationwide.

licensees will be better positioned to enforce their rights against infringers among upstart competitors.

2. Increasing Economic Independence

There have been two noteworthy market-oriented reforms in the arts that are designed to promote production, increase efficiency, and reduce reliance on state subsidies. In May, 1988, the government dropped most economic controls over theatre and art troupes.¹⁷⁶ The government also developed rules for independent film producers which allow Chinese individuals to sign contracts with studios, invest capital, and realize profits in filmmaking activity. Both of these reforms are designed to attract greater funds to the arts and increase the quality of productions. They could also foreshadow other reforms in film production and distribution that will increase the capabilities of individual enterprises—including their ability to engage in cooperation with foreign partners.

3. Normalization of Censorship Standards

It has been noted in the Chinese press that censorship in filmmaking lacks both defined standards and a centralized authority. Under current practice, authority is excessively diffused and “virtually every Party or government department, not to mention senior leaders, have a decisive say”¹⁷⁷ in whether a film can be made or distributed. The Film Bureau of the Ministry of Radio, Film and Television is reportedly drafting regulations that will establish censorship procedures, delegate authority, and create specific standards of review.¹⁷⁸ Normalization in film censorship should eventually widen the range of films that Chinese distributors are willing to license by eliminating, or at least ameliorating, the perception that they are politically responsible for the contents of imported works. Unfortunately, it is still unclear

¹⁷⁶ See N.Y. Times, Jan. 10, 1988, § 2 (Arts & Leisure col. 1 at 5); China Daily, May 14, 1988, at 1, col. 1. Other reforms include the following measures: opening up a contract system for performers to permit greater mobility and higher salaries; competition between troupes for access to more profitable venues; greater flexibility in setting box office ticket prices; and allowing the organization of non-governmental troupes and “show business promoters.” *Id.*

¹⁷⁷ China Daily, Apr. 27, 1988, at 1, col. 3.

¹⁷⁸ Censorship regulations are currently being drafted and are expected to be implemented before the end of 1990. The most recent draft contains chapters addressing “moral” and “political” questions, provisions for review of films by committees and arbitration of disputes over committee decisions. China Daily, Dec. 3, 1988, at 4, col. 1. It is unclear whether Party members, acting in their capacity as cadre, will be designated as committee members or whether they will otherwise be granted specific censorship powers under the future regulations.

whether the regulations currently being drafted will be applied to foreign films.

C. *Sound Recordings and Musical Compositions*

The potential market for foreign music appears virtually untapped in the PRC.¹⁷⁹ In most music shops, only the works of a few world-famous performers are carried.¹⁸⁰ As with films and video, foreign exchange and cultural policies appear to be the most critical factors limiting the market for foreign works. The potential market, even in the short term, however, may be quite substantial. A great deal of the popular music heard on radio stations in Beijing, for example, is based on American compositions and would surely be protected under a copyright law.

Recently, the number of record and cassette publishers has increased significantly, reflecting higher demand for phonograms by the Chinese public.¹⁸¹ Many of these publishers are affiliated with book publishers and educational institutions and are registered and approved by local cultural affairs offices, but lack necessary registration with the central government. According to regulations, without registration these publishers are unable to exercise copyrights.¹⁸² Foreign licensors dealing with relatively small or regional publishers should attempt to verify that there has indeed been proper registration by examining the company's business license.

Under current regulations, composers are accorded exclusive rights to the first use of their works. Subsequent uses are subject to compulsory licensing and the composer must be compensated. In practice, however, such compensation is rarely paid and the relevant internal regulations reportedly do not specify rates.¹⁸³ Discussions among NCA and other relevant organiza-

¹⁷⁹ In a 1988 survey of university students in Beijing, 70% reported owning tape recorders and 50% owned radios. *China Daily*, June 7, 1988, at 3, col. 1.

¹⁸⁰ In Beijing, one can easily purchase legitimately licensed tapes by Michael Jackson, Madonna, Simon and Garfunkel, Kitaro and John Denver, but virtually no other non-classical western music. See *China Daily*, Oct. 20, 1988, at 3.

¹⁸¹ There are currently 200 record companies in China and the number of musical cassette tapes rose from approximately 56 to 80 million, or 30%, from 1986 to 1987. *Id.*

¹⁸² Interview with attorney Qu Jingming, Executive Secretary, Preparatory Committee of the Chinese Musical Copyright Association, in Beijing (June 2, 1988) [hereinafter *Qu Interview*].

¹⁸³ *Id.* Composers of popular music are more likely to be compensated for subsequent use of their works; however, the fees paid are normally nominal. Composers of more serious theatrical or orchestral music are almost never paid for subsequent uses. One serious composer stated that even his initial payment was comparable to the amount paid to the person who transcribed the sheet music. Interview with Ma Jianping, Composer in Residence, Beijing Symphony Orchestra, in Beijing (May 28, 1988). As with authors, serious composers such as Ma Jianping are attached to a unit which provides a

tions have been initiated with the goal of establishing a collection society for composers and musicians that would likely establish and collect standard fees on behalf of both Chinese and foreign composers.¹⁸⁴

D. *Computer Software*

1. Overview

There are reportedly at least 10,000 medium-sized and 250,000 microcomputers in China today,¹⁸⁵ and over 20,000 workers engaged at least part-time in software development.¹⁸⁶ Most software development occurs in firms which also produce computer hardware.¹⁸⁷ According to government regulations, bonuses for state employees engaged in software development are limited to 7.5 RMB per month; their basic salaries are also extremely low.¹⁸⁸ The principal explanation for the low wages in this sector is depressed pricing in software, due primarily to the absence of basic protection for software rights.¹⁸⁹

Although there is no copyright or similar protection for domestic software, the government has attempted to prevent the duplication of programs by asking creators to register their works, along with descriptions, in the *Bulletin of Registered Software*.¹⁹⁰ Excessive duplication during the period before a

subsistence salary. They likewise feel the same ambivalence about changes in remuneration method. *Id.*

¹⁸⁴ Qu Interview, *supra* note 182.

¹⁸⁵ China Daily, June 18, 1988, at 1, col. 7. It is likely that the number of installed computers in China is significantly higher. Future computer sales should likewise increase substantially over the next few years. The total number of mini and main frame computers to be installed between 1989 and 1991 is currently estimated by the Ministry of Electronics Industry to be almost 4,000, while the number of micro-computers is estimated at over 300,000. China Trade Report, Jan. 1988, at 5.

The Chinese press frequently reports, however, about the underutilization of computers for productive purposes resulting primarily from the lack of trained personnel. *See, e.g.*, China Daily, Nov. 15, 1988, at 3 (noting that computers are commonly used as fortune-telling devices with the use of software imported from Taiwan and Hong Kong).

¹⁸⁶ Zheng Interview, *supra* note 53. Information on software was also obtained through an interview with Ying Ming, China Software Technology Corporation, in Beijing, (May 14, 1988) [hereinafter Ying Interview].

¹⁸⁷ For a detailed discussion of hardware production up to 1985, *see* Lin Yen-che, *Computer Development in Mainland China*, 23 ISSUES AND STUDIES 51 (1987). From 1983 to 1985, the PRC annually imported approximately \$1 billion in computer equipment. *Id.* at 71.

¹⁸⁸ Due to depressed wages, some 15% of the 20,000 software developers in China have succeeded in becoming quasi-independent contractors. These persons work under the so-called *liu zhi ting xin* system, under which they nominally belong to a unit and contract their services to other units for higher than average remuneration.

¹⁸⁹ *See supra* notes 70-72 and accompanying text for a discussion of the protection of software rights under the PRC patent law.

¹⁹⁰ This magazine also serves as an advertising forum aimed at prospective buyers. It is published by the Registration Center of the Computer Industry Bureau under the

package is listed in the *Bulletin* has, nonetheless, been criticized.¹⁹¹ Over half of the software developed in China is not, however, registered under this system because of the fear of piracy.¹⁹² There appears to be a consensus among computer firms that software should not be given copyright protection because it might limit access to software created by other firms and increase overall costs. Reportedly, the creators of software are strongly in favor of legal protection, but since they are not organized and their views are not represented by their units—which primarily produce hardware—the advocates protecting software are few in number.¹⁹³

2. The *Stone* Case

A recent conflict (still pending at the time of this writing) between the renowned Stone Corporation¹⁹⁴ and a government research institute over ownership rights in a software package demonstrates the realm of potential problems generated by the absence of copyright and software protection laws.¹⁹⁵

The Printing Science and Technology Research Institute filed a complaint in mid-1988 in a Beijing intermediate court against Stone for “infringement of rights” in its typesetting software. The Institute claimed that its former employees, responsible for developing the software in 1986, pirated the Institute’s technology to create a similar package for their new employer, Stone, in 1987. Stone’s product reportedly contained significant improvements. Although no PRC laws or regulations directly determine the outcome of the case, the Institute claimed that its investment of 2.3 million RMB in developing the original typesetting software and the manner in which the technology was transferred to Stone merited some form of compensation.

The case raises many fundamental questions regarding the methods for protecting the software (e.g., copyright, *sui generis*,

Ministry of Electronic Industry. Fourteen registration agencies have been established throughout the country to accept registration forms. C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 176. Another bi-monthly journal, entitled SOFTWARE INDUSTRY, regularly features articles on the legal questions raised by computer software.

¹⁹¹ See *supra* note 190.

¹⁹² C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 183.

¹⁹³ Both Zheng Chengsi and Ying Ming are in favor of granting software protection simultaneously to domestic and foreign works as a means of stimulating Chinese talent. Less clear are the opinions of the law’s drafters on retroactivity.

¹⁹⁴ Stone has been vaunted as a model enterprise in China’s economic reform process. It is extremely large by Chinese standards and is wholly privately-owned. See *Asian Wall St. J.*, June 7, 1988, at 1, col. 4.

¹⁹⁵ See *S. China Morning Post*, June 11, 1988, at 1; see *id.* June 13, 1988, at 1.

contract interpretation, criminal law), the degree of protection, methods for determining substantial similarity, work for hire issues, and questions with respect to labor mobility between public and private enterprises. If, as expected, the case is eventually settled out of court, the issues raised will likely be revived in later conflicts involving other parties. Such cases could accelerate the drafting of a software protection law by emphasizing its necessity.

3. Copyright or *Sui Generis*?

In pondering future protection for software, the Chinese have encountered questions already raised in the United States, Japan and elsewhere over the ideal nature of such protection.¹⁹⁶ Both the United States government and the computer industry have expressed to the PRC their desire that software be protected under the impending copyright law, rather than under a separate *sui generis* law. The most commonly raised argument for doing so is that most countries that have granted protection to software have done so under copyright¹⁹⁷ and that, despite its imperfections,¹⁹⁸ copyright represents the international standard. Meanwhile, the Chinese appear to be committed to a *sui generis* approach.¹⁹⁹ Because the research and educational preparations behind software protection will take longer, officials have frequently commented that attempting to place software under copyright would substantially delay its passage and, consequently, delay enactment of the copyright law and accession to the conventions. This view ignores the option, however, of enacting the copyright law and adding computer software as protectable subject matter at some later date.

¹⁹⁶ See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION (1986); Ishizumi, *Copyright Protection of Computer Programs and Semi-Conductors in Japan*, 15 INT'L BUS. LAW. 207 (1987); Note, *Copyrightability of Object Code and ROM in Japan, Australia and Germany: Surpassing Traditional Copyright Limits*, 6 COMPUTER L.J. 513 (1986).

¹⁹⁷ Virtually all UCC and Berne Convention member states that have reached a conclusion concerning software have chosen copyright over *sui generis* protection. Baumgarten & Meyer, *Program Copyright and Office of Technology Assessment* (pts. 1 & 2), 4 COMPUTER L. 8, 13 (1987) [hereinafter *Program Copyright*]. For a brief analysis of protections offered in over forty countries. see Keplinger, *International Protection for Computer Programs*, 7 LEGAL NOTES & VIEWPOINTS Q. 43 (1987).

¹⁹⁸ The literature criticizing U.S. statutory and case law on software copyright is immense. Perhaps the most eloquent critic is Professor Pamela Samuelson. See Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine Readable Form*, 1984 DUKE L.J. 663. See also Ledsinger, *Copyright Protection of Object Code Computer Programs: Can Courts Determine Copying?*, 9 HASTINGS COMM./ENT. L.J. 255 (1987); Karjala, *Copyright, Computer Software, and the New Protectionism*, 28 JURIMETRICS J. 33 (1987) [hereinafter *New Protectionism*].

¹⁹⁹ C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 179-80; Zheng Interview, *supra* note 53; Ying Interview, *supra* note 186.

The almost universal acceptance by other countries of the copyright approach has been facilitated by the lack of a consensus in identifying any one superior *sui generis* model.²⁰⁰ There have been proposals addressing many of the perceived deficiencies of copyright in diverse ways. While a detailed comparison of *sui generis* approaches to software protection is not within the scope of this article, concerns over the copyright approach in relation to China generally relate to the following three issues.

a. Duration

Given rapid advances in technology, many believe that granting protection under copyright results in excessive duration. It has been suggested that protection be reduced to reflect the "economic life" of software, thereby insuring that afterwards the public has unrestricted access. Accordingly, *sui generis* proposals recommend durations of five,²⁰¹ fifteen,²⁰² and twenty years.²⁰³ The argument has been put forward, however, that, given market realities, the relatively long duration afforded to software under copyright would not substantially restrict access after the economic life of software has expired.

b. Standards for Protection and Infringement²⁰⁴

Basic copyright jurisprudence maintains that only "expressions" and not "ideas" are protectable. Where the number of possible expressions of a given idea are strictly limited, protection is said to be "thin" or non-existent. This is essentially to

²⁰⁰ See generally, Nimmer & Krauthaus, *Classification of Computer Software for Legal Protection: International Perspectives*, 21 INT'L LAW. 733 (1987) [hereinafter *Software Classification*]. For interesting proposals, see Karjala, *New Protectionism*, *supra* note 198; Samuelson, *Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs*, 70 MINN. L. REV. 471 (1985). Japan's Ministry of International Trade and Industry ("MITI") devised a *sui generis* proposal that was rejected by the government after pressure from the U.S. See Llewelyn, *Computers, Software & International Protection*, 11 COLUM. J.L. & ARTS 183, 187-88 (1986); Karjala, *Lessons from the Computer Software Protection Debate in Japan*, 1984 ARIZ. ST. L.J. 53. A WIPO draft treaty advocating a *sui generis* approach was rejected in 1983 because a substantial number of countries opposed it on the grounds that copyright protection was adequate. Other commentators have recommended retaining a legislatively adapted copyright approach. See, e.g., Comment, *Copyright Law—Putting Too Much Tech into Software Copyright Infringement Claims: Whelan Associates v. Jaslow Dental Laboratories*, 12 J. CORP. L. 785 (1987); Note, *Proposed Judicial Guidelines For Deciding Software Infringement Actions*, 32 WAYNE L. REV. 1191 (1986).

²⁰¹ Nimmer & Krauthaus, *Software Classification*, *supra* note 200, at 752 (Canadian proposal from 1984, subsequently rejected in favor of copyright).

²⁰² *Id.* at 751-52 (discussing MITI proposal, and also proposing possible compulsory licensing for additional periods).

²⁰³ *Id.* at 750-51 (discussing WIPO proposal).

²⁰⁴ Critical arguments in this section are borrowed from Karjala, *New Protectionism*, *supra* note 198.

protect monopolization of ideas and fundamentally distinguishes copyright from patent law. In the case of functional works such as software, however, commentators commonly point out that since the aim of such works is efficiency, the number of possible expressions is much smaller than most courts are willing to recognize.²⁰⁵ Determining the degree of protection further requires courts to face intricate technical questions that may lead to seemingly arbitrary decisions. Current judicial understanding of the idea/expression dichotomy, as well as use of the ambiguous “look and feel” test in determining infringement, can arguably be criticized for creating a bias in favor of plaintiffs and, ultimately, for over-protection which begins to resemble that accorded under patent law.

In response to this problem, defenders of the copyright approach²⁰⁶ have observed that the idea/expression doctrine is difficult to apply with respect to most copyrighted subject matter, and that all such decisions are “inevitably ad hoc.”²⁰⁷ Historically, adjustments in statutory copyright for other new types of works required a naturally extended period for evolution of the market as well as the case law. The argument concludes that copyright law should accordingly be trusted to develop with time to fill existing gaps.

c. *Judicial Competence*

Given the difficulty judges in the United States have in understanding software protection issues, Chinese courts will initially find analyzing these disputes even more troubling. However, the technical nature of software is likely to be confounding under either a copyright or a *sui generis* regimen. Furthermore, measures can be taken to simplify administration of software infringement, such as the establishment of specialized courts and active involvement by NCA.

²⁰⁵ See Comment, *Does Form Follow Function? The Idea/Expression Dichotomy in Copyright Protection of Computer Software*, 35 UCLA L. REV. 723 (1988).

²⁰⁶ Raskind, *The Uncertain Case for Special Legislation Protecting Computer Software*, 47 U. PITT. L. REV. 1131 (1986); Baumgarten & Meyer, *Program Copyright*, *supra* note 197. This latter article argues that altering the nature of software protection would upset business expectations, stating that the Copyright Act, its legislative history and case law:

have combined to create a commercial environment in which copyright's availability for software, if not every jot and tittle of its meaning, has come to be understood and relied upon by software authors, publishers and users. . . . [T]he wealth of business expectations, contracts, and the like have come to exist that would be severely jeopardized if software should be declared no longer eligible for copyright.

Id. (pt. 2) at 7.

²⁰⁷ Baumgarten & Meyer, *Program Copyright* (pt. 1), *supra* note 197, at 13.

There are other reasons for China to protect software under copyright. Of the more than forty countries utilizing a copyright regimen, only a few (including the United States, Japan, Great Britain and West Germany) have generated substantial case law regarding software. Decisions in these countries deal with similar issues and generally reach similar results. Accordingly, these cases constitute an increasingly useful guide for other countries in their handling of software infringement disputes. Moreover, ignoring the international standards of protection indicated in these cases would likely cause great confusion in the international markets for software. For example, if PRC courts interpret a future law in a way that grants significantly lower levels of protection than in other nations, Chinese software that incorporates locally unprotected elements taken from internationally protected works will be unexportable.²⁰⁸ Likewise, if the overall level of protection is too low, foreign software owners may continue to be hesitant to sell their works in China.

VI. FOREIGN EXCHANGE ISSUES

A. *Background: Renminbi, Foreign Exchange and the Black Market*²⁰⁹

Like other LDCs, the PRC relies on its limited reserves of foreign exchange for capital investments that will accelerate modernization. To regulate the use of foreign exchange in 1980, the government began issuing two types of currency: RMB and Foreign Exchange Certificates ("FEC"). Both are officially of equal value, but are rarely treated as such. The quantity of FEC in circulation corresponds to the amount of government held foreign exchange.

Regulations governing the use of these currencies have changed considerably over the past few years. Until recently, foreigners were prohibited from using RMB and Chinese from using FEC. To avoid inconveniencing foreign residents and to increase access to imported goods for the benefit of the affluent Chinese population, Chinese and foreigners were permitted to use both currencies. Public demand for imported goods, and thus FEC, has consequently resulted in an ubiquitous black mar-

²⁰⁸ The Chinese are clearly intent on developing their software export potential. *See* China Daily, Dec. 12, 1988, at 1, col. 1.

²⁰⁹ *See generally*, Note, *The Role of the Black Market in China's International Financial System*, 7 NW J. INT'L L. & BUS. 833 (1986) (discussing China's currency system).

ket in which the value of FEC to RMB is approximately 1.6:1.²¹⁰ The government does not conscientiously enforce laws against trading FEC and RMB, partly because it fears this will exacerbate the disparity in value of the two currencies, and partly because the black market is popular with consumers. Furthermore, the government appears to both reinforce—but also stabilize—the de facto disparity in value through its own practices. Nationwide, local governments and state-owned corporations in need of foreign exchange beyond their quota can normally buy FEC—at the black market rate—from banks or from other governments and enterprises. This substantiates reports that black market rates are fairly uniform throughout the country.

B. *Disposition of Renminbi Earned in Licensing*

Currently, the Chinese pay for most voluntary licenses for copyrightable works in hard currency.²¹¹ Government statistics indicate that the country is gradually improving its foreign exchange situation.²¹² However, official government policy is currently unknown regarding the extent to which foreign exchange will be made available for copyright licensing after accession to one of the international copyright conventions.²¹³ For example, the amount of foreign exchange needed for licensing book reprints and translations, for example, will likely be enormous. Obviously, much will depend on the situation at that time.

Most Chinese enterprises that will be licensing foreign copyrights do not earn foreign exchange and will therefore be dependent on government allocations. It is possible that Chinese enterprises which have less formal ties to the government will be able to provide remuneration in hard currency by tapping the

²¹⁰ *Id.* Foreign residents of China commonly utilize the black market despite the illegality of doing so. Those unwilling to engage in black market transactions often complain of discrimination, since their non-discounted purchases of non-imported goods are effectively made with a 60% premium. In any case, Chinese businesses will often give corresponding discounts on purchases made with FEC.

The official exchange rate for RMB and FEC at the time of this writing was 1:3.72, a devaluation of the RMB is expected sometime in 1989 that will change this rate to approximately 1:5.2. The effect of this devaluation on the black market and swap center conversion rates is unclear.

²¹¹ See, e.g., OWEN, *supra* note 13, at 5 (describing payment terms in publishing contracts, including hard currency, RMB, and barter in Chinese books).

²¹² In the first quarter of 1988, foreign currency reserves were listed at \$17 billion, reflecting an increase of \$2 billion over the previous quarter. Meanwhile, foreign debt during the same period increased from \$8.4 to \$9.2 billion. *China Daily*, June 17, 1988, at 2, col. 1.

²¹³ Interviews with current and past NCA officials yielded conflicting opinions on the question. Some officials were certain that reprint and translation copyrights would be remunerated in hard currency; others were equally certain that they would not.

black market. In any case, to the extent that licensees are unable to pay in foreign exchange, foreign licensors should weigh the prospect of accepting payments in RMB, as this would greatly increase the potential market.

Since RMB are neither exportable nor convertible, the advisability of accepting them in the short-term depends on whether licensors can utilize these funds in China. For example, firms planning to establish offices within China may find ready uses for RMB in purchases of domestically manufactured goods. However, under current regulations and practice RMB cannot be used to pay for hotels, airplane tickets, taxis, and in some cases, for the salaries of Chinese employees. From the Chinese perspective, the problem of removing these limitations is that they require the consent of separate administrative organs and enterprises, all of whom are sensitive to the disparity in value between RMB and FEC.

In the short term, licensors may be able to convert RMB into hard currency by resorting to the newly established "foreign exchange adjustment centers" now functioning in over fifty-seven cities.²¹⁴ These markets allow joint venturers to temporarily or permanently trade RMB for FEC or foreign currency as well as allowing foreign currency to be converted into RMB. The exchange rate does not reflect the official rate, but rather the black market rate. It is possible that in the future the relevant authorities will also grant copyright licensors and Chinese licenses access to these markets. If and when this occurs, licensors should be well informed as to the exact value of contracts they enter into for RMB by determining beforehand the going "swap market" rate and other transaction costs involved in such exchanges. Likewise, during the course of negotiations, both the Chinese and foreign sides should develop a consensus over the hard currency value of RMB payments. This will prevent confusion by either side over the nature of the benefits conferred by any given term under the contract.

VII. RECOMMENDATIONS

A. *Strike While the Iron is Hot*

China currently purports to offer reasonable protection for

²¹⁴ See generally Yowell, *Swap Center System to Expand*, CHINA BUS. REV., Sept.-Oct. 1988, at 10; Frisbie, *Balancing Foreign Exchange*, CHINA BUS. REV., Mar.-Apr. 1988, at 24; Foreign Commercial Service, *An Investor's Guide to Foreign Exchange in China* (Apr. 1988) (unpublished memo).

works (excluding software) actually licensed in the country under administrative rules and practices.²¹⁵ Current and impending reforms in the domestic industries are likely to produce greater competition among growing numbers of enterprises. While these enterprises will probably be more politically and economically independent of state control—and thereby present greater opportunities to foreign licensors—the conditions will also be ripe for piracy. Meanwhile, in the absence of any deterrence, the temptation of piracy will be even higher after China's accession to one of the international copyright conventions. Therefore, it is important for copyright owners with a potential stake in China to begin cultivating both business and personal contacts, which are not to be underestimated, at the earliest possible time.²¹⁶

Because of the rigid socialist organization of industries existing before reforms, Chinese licensees still feel that they have a limited interest in protecting their rights against infringers. With heightened competition among enterprises, this interest should increase substantially. As a result, foreign licensors have a valuable opportunity to deter future infringement by both taking advantage of this developing interest and recruiting the active assistance of their licensees. Most licensors will still be forced to rely upon licensees to pursue infringers, given the enormous size of China and the relatively limited economic returns available to licensors in the short-term. By establishing contractual ties now, licensors and licensees can cooperate in preventing widespread piracy from taking root. Licensing contracts should clearly and emphatically specify the responsibilities of licensees to pursue infringers, thereby alerting them to the fact that controlling piracy is significant to both parties.²¹⁷

B. *Prepare for Confusion*

Foreign licensors should be prepared for some confusion

²¹⁵ See *supra* notes 59-78 and accompanying text. Given the emphasis on administrative and other less than formal methods of exercising power in the Chinese legal system generally, the nature and quality of copyright protection for foreign works is not likely to improve drastically after accession to the UCC or Berne Convention.

²¹⁶ In focusing greater attention on the PRC market, extra efforts should be taken to assist the Chinese in selecting works. Providing choices that reflect sensitivity to the cultural, political and financial contexts of the country could greatly increase short- and long-term market prospects.

²¹⁷ Greater foreign licensing will probably lead to the discovery of ambiguities and deficiencies in current regulations. These problems could indirectly accelerate the legislative process behind the draft copyright law by demonstrating the need for solutions. Licensees could be particularly influential in communicating these deficiencies to the appropriate parties.

when trying to determine the nature of their licensees' operations. The copyright industry in China, as in most sectors of the economy, is caught in a transition between rigid state control and various types of market-style reforms. Consequently, some licensees will appear to be relatively independent of any government organ; others will be state-owned but subject to only minimal economic and political control. However, in case of conflicts, government organs will continue to retain substantial power over all enterprises.²¹⁸

Meanwhile, units may or may not be legal persons and may or may not be properly licensed to engage in copyright trade. It is recommended that licensors inspect the business of prospective licensees or otherwise verify the legitimacy of a Chinese enterprise before entering into any contracts.

C. *Extension of the GSP Program to the PRC*

To encourage effective protection of its copyrights, American copyright industries should seriously consider working with Congress to amend GSP legislation to permit participation by the PRC.²¹⁹ This would be consistent with the United States government's apparent foreign policy and trade development goals, and would provide additional ways for the Chinese to acquire the foreign exchange necessary to ensure payment for copyright licenses in hard currency. With the recent graduation of some of the major participants of the program in 1987 (including Taiwan²²⁰), United States domestic industries would not be unduly burdened by PRC inclusion.

The United States government could offer the PRC participation in the program as a *quid pro quo* for China's accession to

²¹⁸ The deference of courts to administrative organs is most clearly manifested in the copyright context by judicial deference to the NCA. In turn, administrative organs appear to show little respect for the courts. For example, Hou Dejian, a Taiwan campus song composer, recently sued to recover contractual royalties, most of which had been forwarded by the defendant to the Ministry of Culture. A summons issued by the court to the Ministry was ignored. *China Daily*, Apr. 29, 1988, at 3, col. 6.

²¹⁹ This could be accomplished by opening the program up to all communist countries, or by making a special exception for the PRC. *See supra* notes 43-48 and accompanying text (on the GSP program). One Chinese commentator noted that the use of trade laws by the United States government to raise intellectual property protection abroad can often benefit rightsholders in other countries more than in the United States. Pressure on South Korea to join the UCC, for example, may have provided greater benefits to Japan. *See Chuban Gongzuo* (Publishing Work), May, 1988, at 108 (stating that in 1984, Japan exported 54% of all books imported by South Korea, compared with 29% for the U.S.).

²²⁰ In 1984, Taiwan was the largest overall beneficiary of the GSP program, exporting \$4 billion of the total \$12 billion in goods imported into the U.S. pursuant to its provisions. *See generally* Simone, *Taiwan Copyright*, *supra* note 13, at 133 n.81.

the UCC, an arrangement with precedent in both the USSR's accession to the UCC and the PRC's acquisition of MFN status.²²¹ Since the financial benefits to the Chinese through participation in the GSP program would likely far outweigh those enjoyed by United States copyright interests, initiation should be tied to a whole range of intellectual property and trade-related demands. Alternatively, the United States and other foreign governments could consider offering narrower trade benefits pursuant to special legislation.²²²

VIII. CONCLUSION

Copyright is on the agenda of legal economic reforms in China. However, enactment of a copyright law and accession to one of the international copyright conventions could take many years. The protection currently offered to foreign licensors is of questionable value, given its ambiguous "administrative" nature. Likewise, Chinese courts may be of only limited practical value for the enforcement of whatever rights are accorded under existing regulations. Additionally, the country's difficult economic situation may deter the granting of voluntary licenses because returns may not cover the transaction costs of many copyright owners.

Still, the rapid changes occurring in both China's legal system and in the markets for copyrightable works cannot be ignored. As reforms take hold, opportunities for licensing by foreign rightsholders, as well as for piracy by more profit-oriented Chinese enterprises, are likely to increase dramatically. In order to maximize the long-term potential of the Chinese market and impede the development of widespread piracy after accession to one of the conventions, it is recommended that licensors take advantage of existing regulations protecting voluntarily licensed works by developing contractual relationships with Chinese counterparts.

Finally, the cultural exchange that will be fostered by increased licensing—in both directions—should not be ignored as an important motive for timely contracts with Chinese counterparts.

²²¹ See *supra* notes 49-51 and accompanying text.

²²² See, e.g., *Piracy Update: Taiwan, D'Amato Aid, New Bill*, PUBLISHER'S WEEKLY, Oct. 4, 1985, at 17 (reporting that in late 1985, one U.S. Senator considered drafting a bill that would have eliminated export quotas on shoes from Taiwan in exchange for more intensive efforts by the Taiwan government to eliminate book piracy).

APPENDIX: CHINESE PRESS REPORTS ON COPYRIGHT
INFRINGEMENT

1985

JIANGSU HIGH COURT. Film adapted from a novel. Plaintiff sued the author of a novel and screen adaptation for credit alternatively as joint author or joint adaptor. The judge encouraged mediation which led to a settlement under which the plaintiff was to be accredited as "joint adaptor" and the defendant as the "main adaptor." Reported in C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 106.

PETITION TO NCA TRANSFERRED DOWN TO THE BEIJING CULTURAL BUREAU. NCA determined that the defendant plagiarized the plaintiff's textbook and issued an injunction "circular" on the distribution of the defendant's work. The Beijing Cultural Bureau (later known as the Beijing Copyright Office) ordered the destruction of the infringing books and required the defendant to pay all of the revenues received to the government, plus a 500 RMB fine. No information on the compensation paid to the plaintiff is available. Reported in C. ZHENG, CHINESE INTELLECTUAL PROPERTY, *supra* note 6, at 107.

1986

SHANGHAI DISTRICT COURT. The defendant-translator of Italo Calvino's "Italian Folk Tales" sub-contracted to the plaintiff (a former student of the defendant's) one-third of the work which the defendant later edited. When the translation was published, the plaintiff's name was not mentioned in the credits. The defendant, who received 10,000 RMB (over \$3,000.00) for the project, paid only 200 yuan to the plaintiff for his contribution. The defendant sued for credit and additional compensation. The court did not require the defendant to give formal credit to the plaintiff, but granted 1800 RMB in additional compensation and ordered the parties to divide the court fees equally. *Legality Daily*, Oct. 24, 1986.

NO ACTION REPORTED. The author submitted a work to a publishing house that was later published without the author's knowledge or consent and with the editor's name as co-author. *Literature News*, Mar. 13, 1986.

UNSPECIFIED DISTRICT COURT. Three co-authors were commissioned to write a book. A contract was signed and the payment was to be divided equally among the three. At the conclusion of the project, the defendant-author underpaid the plaintiff-author,

claiming that the latter did not fulfill his duties under the contract and should thus be denied both the added compensation and any copyright interest in the work. The court held for the plaintiff and the defendant appealed. *Literature News*, Nov. 2, 1986.

ADMINISTRATIVE COMPLAINT. Without compensating the author or acquiring his permission, the author's book was adapted into a screenplay for a television movie. The author complained to the Ministry of Radio, Film and Television that the revised version misrepresented the original work. The Ministry instructed the movie director to cooperate with the author in re-revising the script; the director did not comply. The author considered filing suit with either the court or the copyright office. *Democracy and the Legal System*, November, 1987.

BEIJING DISTRICT COURT RULING APPEALED TO INTERMEDIATE COURT. The defendant-writer commissioned the plaintiff-illustrator to provide 500 pictures for his book. The writer originally sought to take sole credit for the entire work. The plaintiff originally complained to the defendant's work unit, which recommended that the publisher be given sole credit as the author. The plaintiff sued and the court held that the cover should state the author's name, "et al.," while the copyright page should state the name of the defendant as the author and the name of the plaintiff as the illustrator. The appeals court ruled that the cover should list the author-defendant as the "general editor" and the plaintiff as the "general illustrator." Unknown origin.

BEIJING DISTRICT COURT RULING APPEALED TO NCA. A professor's oral lecture tape was recorded and transcribed into a book without his permission, and without compensating or attributing him. The court criticized the publisher's failure to compensate the author, but held that the defendant's actions constituted fair use. An NCA appeal is currently pending. Unknown origin.

1987

NO ACTION REPORTED. A company marketed music cassettes purporting to contain the entire music soundtrack for a television series. The television producer's name was placed on the cassette without acquiring his permission or compensating him. In fact, the cassette contained only one out of thirteen songs actually included in the series soundtrack. *Beijing Daily*, Feb. 6, 1987.

NO ACTION REPORTED. The translation of a French book was re-

printed without authorization and in a version apparently issued by a famous publisher. The actual publisher is unknown and is assumed to be untraceable. *Brightness Daily*, May 5, 1987.

BEIJING COPYRIGHT OFFICE. A teacher revised a two volume text (the copyright of which belonged to his school) into three volumes and published it without permission. The teacher was fined 150 RMB and was ordered to pay the school seventy percent of the revenues he received and to pay the government thirty percent, ostensibly as a fine. *Legality Daily*, Aug. 21, 1987.

BEIJING COPYRIGHT OFFICE MEDIATION. One joint author of a compiled work authorized the publication of the whole work without the other author's consent and without recognizing him as a joint author. The copyright office recommended that the defendant apologize and pay the plaintiff 1000 RMB in compensation for lost royalties, half of the future royalties, and to pay the other half of the future royalties to the government. *Legality Daily*, Aug. 21, 1987.

SHANGHAI DISTRICT COURT RULING APPEALED TO THE INTERMEDIATE COURT. The plaintiff and the defendant agreed to jointly adapt the plaintiff's play into a screenplay. The defendant secretly adapted the play and negotiated a movie contract for it. The plaintiff sued in District Court, which ordered the defendant to pay him 400 RMB out of his total remuneration of 1500 RMB. The Intermediate Court upheld the District Court ruling. *Cultural Times*, Sept. 27, 1987.

1988

SHANGHAI DISTRICT COURT. The plaintiff published a book on integrated circuits. The defendant published a second work on the same subject, but incorporated a substantial number of the plaintiff's citations. The court found the defendant's actions to constitute fair use. *Legality Daily*, Jan. 14, 1988.

GUANGZHOU DISTRICT COURT. The plaintiffs wrote two separate screenplays on the same subject. The defendant's film studio produced a third screenplay based on the plaintiffs' works. The court held that the plaintiffs shared the copyright (ostensibly with the studio) in the third screenplay. *Legality Daily*, Jan. 14, 1988.

NO ACTION REPORTED. In a newspaper editorial, an author complained that his work was reprinted by a known publishing house without his permission. The author requested complimentary copies of the work and his request was denied. He implored au-

thors not to act as "Hao Xiansheng" (Mr. Anything-you-say-goes). Press and Publishing Journal, Jan. 20, 1988.

APPEAL TO BEIJING COPYRIGHT OFFICE FROM ITS PREVIOUS RULING. The author spent forty years producing a book which was subsequently reprinted without his authorization and without compensating him. The Office held that the infringer should compensate the author, but also be permitted to continue distributing the work. The author appealed, and the Office revised its holding, recommending 33 percent higher compensation and permitting the infringer to continue its distribution for one year. April 16, 1988.

BEIJING COPYRIGHT OFFICE. Radio broadcasts were transcribed and edited into a book. The authors contracted to have the book published in 1984. In 1985, the work was still not published and the original manuscript was eaten by mice. The office proposed that the publishers make a public apology, pay punitive damages of 1000 RMB, distribute the work paying normal remuneration, or if the work would not be published, pay the authors thirty percent to fifty percent of the total expected royalties the book would have earned had it been published. April 16, 1988.

BEIJING COPYRIGHT OFFICE. A prizewinning novel was adapted without permission into a puppet show that was later televised and published as a picture story book. The infringing works had different titles and did not recognize the novelist's contribution in the credits. The novelist brought a mediation against the story book's publisher and the Office recommended: (1) deletion of the publisher's name as the book's author; (2) self-criticism and public apology; (3) compensation; (4) that the publisher continue publishing the picture book; (5) that the publisher issue reprints of the original novel. April 16, 1988.

BEIJING COPYRIGHT OFFICE. A playwright adapted traditional plays that were in the public domain into a new, protectable work. Without permission, a second playwright began revising this work for a forthcoming production. The Office determined that both parties should share the interest in the second work and recommended that both parties collaborate in re-revising the work before it is staged. April 16, 1988.

