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Charles E. Miller

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THE DEVELOPMENT OF CHINA'S INTELLECTUAL PROPERTY LAW*

CHARLES E. MILLER**

I. INTRODUCTION

The relevance of intellectual property to the People's Republic of China is becoming increasingly appreciated by lawyers and their clients. It may be said that information is the basic subject matter of intellectual property. Intellectual property law establishes criteria for the granting of legal rights in certain categories of information. These categories include marks (including trademarks, service marks and trade names), patents, copyrights, and trade secrets (including all forms of confidential research, development or commercial information). Only two such species of intellectual property are fully recognized in China at the present time: trademarks and patents.

II. TRADEMARKS IN CHINA

A trademark can be a brand, name, signature, word, letter, numeral, or any combination of them which is used or intended to be used in relation to goods for the purpose of associating them with a particular trader in the course of his business. The exclusive right to the trademark is conferred upon the proprietor by virtue of his having registered it with the government. (A "trademark" is not to be confused with a "service mark" which identifies the supplier of the service.)

A. *Historical Background*

The modern history of trademark legislation in China began in 1950 with the Provisional Regulations Governing Trademarks.¹ This largely Soviet-inspired legislation remained in force until 1963 when the Regulations Governing the Control of Trademarks were promul-

* This article was originally delivered as a speech at the Ernst C. Stiefel Symposium on China in April 1989, prior to the incidents that occurred in Tiananmen Square in June 1989. Thus, the views expressed in this article do not reflect any changes that may have occurred in China as a result of the June events.

** Partner, Pennie & Edmonds, New York, New York.

1. M. PENDLETON, *INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 88 (1986).

gated.² Under these regulations, foreigners could register trademarks in China.³ Those regulations have now been replaced by the current Trademark Law of 1982, which was adopted by the Standing Committee of the National People's Congress on August 23, 1982, and became effective March 1, 1983.⁴ The Implementing Regulations (the "Trademark Regulations") were promulgated by the State Council on March 10, 1983.⁵

The Trademark Law is comprised of forty-three articles, divided into eight chapters. Chapter I contains general provisions setting forth the rights afforded by a registered trademark, identifying the kinds of trademarks which are inherently unacceptable for registration, the rights of a foreign applicant, and the rights and duties of a proprietor of a registered trademark.⁶ Chapter II deals with trademark registration applications.⁷ Chapter III sets forth the procedures for the examination and approval of trademark registration applications.⁸ Chapter IV is concerned with trademark renewals, assignments, and licensing.⁹ Chapter V deals with the adjudication of trademark disputes.¹⁰ Chapter VI defines the administrative controls which may be exercised by the Trademark Office to rectify or remedy any defect in a registration certificate.¹¹ Chapter VII defines the exclusive rights that are given to the owner of a registered trademark, and the remedies available for infringement.¹² Chapter VIII concerns itself with, *inter alia*, enactment and transitional provisions.¹³

B. *The Value of Chinese Trademarks*

The Chinese Trademark Law of 1982 was enacted for the purposes of improving the administration of

2. *Id.* at 8.

3. *Id.* at 9.

4. Trademark Law of the People's Republic of China [hereinafter PRC Trademark Law], translated in LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982, at 350 (1987).

5. Implementing Regulations under the Trade Mark Law of the People's Republic of China [hereinafter PRC Trademark Regulations], translated in M. PENDLETON, *supra* note 1, at 61.

6. PRC Trademark Law, *supra* note 4, arts. 1-10.

7. *Id.* arts 11-15.

8. *Id.* arts. 16-22.

9. *Id.* arts. 23-26.

10. *Id.* arts. 27-29.

11. *Id.* arts. 30-36.

12. *Id.* arts. 37-40.

13. *Id.* arts. 41-43.

trademarks, of protecting the exclusive right to use a trademark, and of encouraging producers to guarantee the quality of their goods and maintain the reputation of their trademarks, with a view to protecting consumer interests and to promoting the development of a socialist commodity economy.¹⁴

The Trademark Regulations and subsequent experience have made it clear that China does not recognize a right to a trademark or brand name unless a claim to that right has been registered. It is therefore important to obtain a Chinese registered trademark regardless of any intention to trade in China, in order to obtain protection from enterprises who might otherwise seek to imitate such trademarks in China and sell the relevant goods in competition in various markets. For example, there would be nothing unlawful *per se*, in a Chinese factory using the name "Gucci" for handbags, "Dunhill" for cigarette lighters, "Cartier" for watches, "Sony" for television sets, and so on, unless those names are registered in China.

One of the perceived shortcomings of the 1982 Trademark Law is that it fails to recognize service marks and business or trade names. For example, there appears to be no way of protecting service marks such as the "Sheraton Hotel Group," the "Holiday Inn Group," the "Chase Manhattan Bank," "Disneyland," and the like from deliberate imitation in China regarding the services these companies provide as opposed to the goods they sell.

C. Registrable Trademarks

Article 5 of the 1982 Trademark Law provides that certain categories of goods must bear registered trademarks.¹⁵ For instance, Trademark Regulation 4 provides that all pharmaceutical products must bear trademarks.¹⁶

Other trademarks are registrable if they have notable characteristics and are distinctive. This aspect of the law follows the international norm of requiring a measure of distinctiveness in order for the mark to be registrable. Although the Trademark Law does not exclude surnames or geographical names *per se*, the practice of the Chinese Trademark Office has been to reject trademark registration applications for well-known surnames or geographical names on the basis that they may not be distinctive.

The Trademark Law prohibits registration for the following types

14. *Id.* art. 1.

15. *Id.* art. 5.

16. PRC Trademark Regulations, *supra* note 5, regulation 4.

of trademarks:

- (1) Designs identical or similar to national flags;
- (2) Words or designs indicating the quality, main ingredients, uses, and other characteristics of the goods;
- (3) Names which are descriptive in relation to the goods;
- (4) Names which are deceptive in relation to the goods;
- (5) Trademarks which are detrimental to socialist morality;
- (6) Trademarks which are likely to have any other harmful effect.¹⁷

The trademark laws of most other countries have similar provisions.

Recent examples of marks rejected as being indistinctive include the shape of the "Coca-Cola" bottle and the mark "Vita-Soy," in connection with beverages. The shape of the "Coca-Cola" bottle was apparently rejected as not being regarded as a trademark. The shape of the bottle would, however, appear to be *prima facie* protectable as a design registration under the current Chinese Patent Law.¹⁸ In another recent example, "Vita-Soy" was apparently rejected as indistinctive, "Vita" being said to be descriptive of vitamins and "Soy," said to be descriptive of soybeans. Both soybean milk and vitamins were contained in some of the "Vita-Soy" beverages. (Interestingly, "Mickey Mouse" as a shape has been registered as a trademark in China).

D. Applications for Registration

An application to register a trademark in China consists of a power of attorney in favor of an authorized Chinese agency or representative, accompanied by a specification of the goods stating the class(es) in which registration is sought.¹⁹

If the Chinese Trademark Office (which is part of the Industry and Commerce Administration Bureau) is not satisfied with the ability of a mark to distinguish the goods in question, it will inform the applicant through the authorized agency.²⁰ Arguments can then be submitted to the Trademark Office through the agency in a manner akin to international trademark practice. Experience has shown that the Trademark Office is open to persuasion on the basis of this kind of argument.

If an application is rejected by the Trademark Office, the applicant may apply within fifteen days of receipt of the Notice of Rejection

17. PRC Trademark Law, *supra* note 4, art. 8.

18. See *infra* note 56 and accompanying text.

19. PRC Trademark Law, *supra*, note 4, art. 11.

20. *Id.* art. 21.

for a re-examination, whereupon the Trademark Review and Adjudication Board of the Office will reconsider the application.²¹ Its decision is final. A trademark which is accepted for registration will be published in the Chinese Trademark Gazette.²² Following similar practices in other countries, third parties may oppose the registration of the mark if they lodge their notice of opposition within three months from the date of publication of the mark in the Gazette.²³ Opposition is heard by the Trademark Office. There is a right of final appeal to the Trademark Review and Adjudication Board. A trademark registration remains valid for ten years and may be renewed for further periods of ten years upon payment of a fee.²⁴

As in many other countries, the Chinese Trademark Law provides for cancellation of a trademark which has not been used in China for three years.²⁵ This would seem to present a problem for foreign trademark owners who do not trade in China but have registered there to prevent misappropriation of their marks. In practice, however, this can be overcome by advertising the trademark in certain magazines such as *China Patent and Trademark*, once every three years. Such advertising will be deemed equivalent to use of the mark in China.

E. Paris Convention Priority

In March 1985, China became a member of the International Convention of 1883 for the Protection of Industrial Property (the Paris Convention).²⁶ In accordance with China's Provisional Regulations on Claims to the Right of Priority with respect to Applications for the Registration of Trademarks (March 15, 1985), a person who has applied for registration of a trademark in a "Convention country" is entitled to be accorded the date of that application (the priority date) when filing a counterpart application in China, provided the Chinese application is filed within six months of the date of first application in a Convention country.²⁷

21. *Id.*

22. *Id.* art. 16.

23. *Id.* art. 19.

24. *Id.* arts. 23-24.

25. *Id.* art. 24.

26. M. PENDLETON, *supra* note 1, at 24.

27. Provisional Regulations on Claims of the Right of Priority with Respect to Applications For the Registration of Trademarks, translated in COMMERCIAL, BUSINESS AND TRADE LAWS: PEOPLE'S REPUBLIC OF CHINA 51 (1987) [hereinafter COMMERCIAL, BUSINESS AND TRADE LAWS].

F. *Infringement of a Trademark*

Rights under a trademark registration can be infringed by any of the following acts:

- (1) Using, without permission of the owner of a registered trademark, a trademark similar to, or resembling, the registered trademark on an article of the same or similar kind as the one for which the trademark is registered;²⁸
- (2) Manufacturing or selling labels bearing a trademark similar to, or resembling, the registered trademark of another person;²⁹
- (3) Causing 'prejudice' to another person's exclusive rights to use his registered trademark.³⁰ The concept of 'prejudice' is undefined but, potentially, is extremely broad; or
- (4) Passing off another person's registered trademark.³¹

The foregoing acts are similar to those which are proscribed under the trademark laws in many other countries.

G. *Remedies*

A person whose rights in a registered trademark have been infringed may pursue two avenues:

- (1) Making a request for assistance to the administrative agency in charge of industry and commerce where the infringer resides. This agency can order the infringer to cease the infringing act immediately and to compensate the person whose rights have been infringed. The agency may also fine the infringer (there is a right of appeal to a peoples' court); or
- (2) Filing a lawsuit directly with a local peoples' court against the party who has infringed the trademark rights.³²

H. *Assignment and Licensing of Trademarks*

In addition to being able to assign his trademark rights outright,³³ a registered trademark owner may also license another person or com-

28. PRC Trademark Law, *supra* note 4, art. 38.

29. *Id.*

30. *Id.*

31. *Id.* art. 40.

32. *Id.* art 39.

33. *Id.* art 25.

pany to use the trademark for a specified period of time.³⁴ Where, however, the owner of a registered trademark licenses another person to use his trademark, he is obliged to accept some responsibility for the quality of the relevant goods produced by the licensee.³⁵ The licensing of a trademark is done by means of a licensing contract which must be filed with the Trademark Office.³⁶

I. Consumer Protection and Quality Control

The Trademark Law and the Trademark Regulations place particular emphasis on the use of the trademark system as a means of quality control and consumer protection. This goal is evidenced by the following:

- (1) Trademark owners are liable for the quality of the goods bearing their trademarks.³⁷
- (2) Trademarks that are "exaggerated and deceptive" are unregistrable.³⁸ "Exaggerated and deceptive" has not been defined.
- (3) Where a registered trademark is used, it must carry the inscription (Registered Trademark), or the sign ®.³⁹
- (4) Fines of up to 2000 Yuan can be imposed and provision can be made for revocation of a registered trademark if it is applied in such a way as to deceive consumers regarding the quality of the product.⁴⁰

Protecting consumers against poor quality goods labelled with trademarks is the responsibility of the State Administration for Industry and Commerce (in Beijing) and the local administrative agency in charge of industry and commerce.⁴¹

III. PATENTS IN CHINA

The Standing Committee of the National People's Congress promulgated the Patent Law on March 12, 1984.⁴² The law came into

34. *Id.* art. 26.

35. *Id.*

36. *Id.*

37. *Id.* art 6.

38. *Id.* art. 8.

39. PRC Trademark Regulations, *supra* note 5, regulation 8.

40. PRC Trademark Law, *supra* note 4, art. 31; PRC Trademark Regulations, *supra* note 5, regulation 21.

41. PRC Trademark Regulations, *supra* note 5, regulation 19.

42. Patent Law of The People's Republic of China, *official translation reprinted in 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 189 (1984) [hereinafter*

effect on April 1, 1985.⁴³ Pursuant to Article 68 of the Patent Law, the Implementing Regulations (the "Patent Regulations") were approved by the State Council and published by the Patent Office on January 19, 1985.⁴⁴ Article 95 of the Patent Regulations provides that the Patent Office is responsible for interpreting the Regulations.⁴⁵

A. *Historical Background*

The year 1950 was the starting point for the history of contemporary patent law in China. This year marked the passing of the Provisional Regulations on the Protection of the Invention Right and the Patent Right.⁴⁶ This legislation conferred a true patent right as understood in international practice. In 1954, however, it was replaced with the Provisional Regulations on Awards and Inventions, Technical Improvements, and Rationalization Proposals Relating to Production.⁴⁷ Both pieces of legislation were based on earlier Soviet codes. In 1963, this legislation was replaced by the new Regulations on Awards for Technical Improvements.⁴⁸ These laws were later amended in 1978. The 1963 Act and Regulations remain in force and coexist with the 1984 Patent Law.

The Chinese Patent Law, like the patent systems of other countries (except the United States) is a "first to file" system, in which priority of invention is accorded to the inventor who is the earliest applicant.⁴⁹ The date of an inventor's application establishes his priority date. This is unlike the United States patent system which is a "first to invent" system under which priority is accorded to the earliest inventor.⁵⁰

B. *Scope of the Present Patent Law*

The Patent Law of 1984 recognizes three types of patent property: patents of invention, utility models, and design registrations.⁵¹ Each has specific requirements for the granting of rights. They are cumula-

PRC Patent Law].

43. *Id.*

44. Implementing Regulations of the Patent Law of the People's Republic of China, translated in *Commercial Business and Trade Laws*, *supra* note 27, at 75 [hereinafter PRC Patent Regulations].

45. *Id.* art. 95.

46. M. PENDLETON, *supra* note 1, at 18.

47. *Id.*

48. *Id.*

49. PRC Patent Law, *supra* note 42, art. 9.

50. 35 U.S.C. § 102(g), § 135.

51. PRC Patent Law, *supra* note 42, art. 9.

tively referred to in the Patent Law as "inventions-creations."⁵² The "inventor" or "creator" is defined in Article 11 of the Patent Regulations.⁵³

Patents of invention concern any new technical solution relating to a product or process.⁵⁴ They are granted for fifteen years from the date of filing of the patent application.⁵⁵ A "utility model" means any new technical solution relating to the shape and/or the structure of a product which is fit for practical use.⁵⁶ Patents for utility models are granted for five years from the date of filing, extendable to eight years.⁵⁷ A design registration is for any new design of the shape, pattern, and/or color of a product which has aesthetic appeal and is capable of industrial application.⁵⁸ Design registrations are granted for five years from the date of filing.⁵⁹

C. Patentable Subject Matter

In a manner akin to the patent laws of many countries, the Chinese Patent Law seeks to define what is patentable by stating what is not. Patents will not be granted for the following classes of invention-creations:

- (1) Scientific discoveries;
- (2) Rules and methods for mental activities;
- (3) Methods for the diagnosis or for the treatment of diseases;
- (4) Food, beverages and flavorings (process patents, however, may be granted);
- (5) Products and substances obtained by means of chemical reactions (process patents, however, may be granted). Substances obtained by means of a chemical reaction do not include substances obtained by mixing, such as alloys, which are thus patentable. Pharmaceutical products, including any compound or mixture used for the diagnosis or treatment of humans or animals, are not patentable. Patents, however, on hygienic materials, sterilizing agents, cosmetics or medical and dental equipment are available.

52. *Id.*

53. PRC Patent Regulations, *supra* note 44, art. 11.

54. *Id.* art 2.

55. PRC Patent Law, *supra* note 42, art. 45.

56. PRC Patent Regulations, *supra* note 44, art. 2.

57. PRC Patent Law, *supra* note 42, art. 45.

58. PRC Patent Regulations, *supra* note 44, art. 2.

59. PRC Patent Law, *supra* note 42, art. 45.

- (6) Animal and plant varieties (process patents, however, may be granted);
- (7) Substances obtained by means of nuclear transformation; and
- (8) Computer software, unless claimed in association with an apparatus.⁶⁰

D. Scope of the Patent Grant

1. Interpretation of a Patent

The extent of protection of a patent of invention or a utility model is determined by reference to the claims in the patent specification.⁶¹ The description and the appended drawing may be used in aid of that interpretation, but are not controlling.⁶² At present, China's patent law has not yet developed a "doctrine of equivalents" which exists in other countries whose patent systems are older and more developed.

2. The Definition of Infringement

Patent infringement is defined as the exploiting, making, using, or selling of a patented product or process for production or business purposes without the consent of the patentee.⁶³ This definition applies to patents of invention and utility models, but not to design registrations.

Infringement proceedings may be brought either in a peoples' court or taken to the competent administrative authority (from which an appeal lies to a peoples' court).⁶⁴ The competent administrative authority is defined in Article 76 of the Patent Regulations.⁶⁵ Both peoples' courts and administrative authorities have power to issue injunctions and grant compensation. Remedies are available for infringing activities prior to grant, but only after the publication of the application.⁶⁶

The time limit for appealing to a people's court from a decision of the administrative authority on a question of infringement is three months from the date of notification of the administrative authority's decision.⁶⁷ The time for commencing infringement proceedings is two

60. *Id.* art. 25.

61. *Id.* art. 59.

62. *Id.* art. 60.

63. PRC Patent Law, *supra* note 42, art. 60.

64. *Id.* art. 60.

65. PRC Patent Regulations, *supra* note 44, art 76.

66. *Id.* art. 77.

67. PRC Patent Law, *supra* note 42, art. 60.

years from the date of actual or constructive knowledge of the infringing activity.⁶⁸ Article 62 deems the following acts not to be infringements:

- (1) On first sale, a patentee loses all rights to control the patented product or process, *i.e.*, the patent rights are exhausted;
- (2) Where any person uses or sells a patented product not knowing that it was made and sold without the authorization of the patentee; (It is this point where Chinese patent law departs markedly from the laws in other countries which do not require intent in order to find infringement);
- (3) Where the subject matter of a patent was made in China by the accused infringer before the date of filing the patent application;
- (4) Subject matter which is part of an aircraft or maritime vessel temporarily passing through Chinese territory; and
- (5) Use purely for scientific research.⁶⁹

Where a party passes off (palms off) a patented product, it shall be deemed an infringement and a stop order or compensation or both may be ordered by a peoples' court or competent administrative authority.⁷⁰ If the circumstances are serious, the passing off may amount to a criminal offense under Article 127 of the Criminal Law.⁷¹

E. Priority of Invention

1. First to File System

Priority under the Chinese Patent Law is determined on the basis of "first to file"⁷² and is therefore similar to the provisions of the European Patent Convention rather than the United States system. The Chinese Government apparently regarded the former system as preferable because it entails less complicated matters of proof.

2. Paris Convention Priority

China's accession to the Paris Convention took effect on March 29, 1985.⁷³ Articles 18 and 29 provide for recognition of priority of foreign

68. *Id.* art. 61.

69. *Id.* art. 62.

70. *Id.* art. 63.

71. *Id.*

72. *Id.* art. 9.

73. *See supra* note 26.

applications pursuant to the Paris Convention or any international agreement on the basis of reciprocity.⁷⁴ The period for claiming priority in China is twelve months from the date of first filing in a Convention country in the case of patents of inventions and patents for utility models, and six months in the case of design registrations.⁷⁵ A declaration stating that an application has been made in a Convention country must be filed with the initial application. A certified copy of the application must be filed within three months thereafter; otherwise the request for priority will not be recognized.⁷⁶

Any document sent to the Patent Office by mail within China will be deemed to be filed on the date indicated by the postmark.⁷⁷ Where the postmark is not legible, and in the absence of proof to the contrary, the document shall be deemed to be filed on the date of actual receipt by the Patent Office.⁷⁸ Documents posted in the Shenzhen Special Economic Zone (near Hong Kong) qualify for the above privileges. If two parties file applications on the same priority date for an identical invention-creation, Article 12 of the Patent Regulations provides that the applicants should consult among themselves to decide the issue of priority.⁷⁹ The foreign filing number of a patent for invention which claims priority must be provided within fifteen months after the date of filing in the foreign country.⁸⁰ If the application for a patent of invention, utility model or design registration refers to drawings and those drawings are missing from the application, the priority date will be the date on which the drawings are provided.⁸¹ Where an application relates to more than one invention and has to be subsequently divided under the provisions of Article 42 of the Patent Regulations, the initial priority date may still be preserved if the two or more newly divided applications do not go beyond the scope of the disclosure in the initial application.⁸²

74. PRC Patent Law, *supra* note 42, arts. 18, 29.

75. *Id.* art. 29.

76. *Id.* art. 30.

77. PRC Patent Regulations, *supra* note 44, art. 5.

78. *Id.*

79. *Id.* art. 12.

80. *Id.* art. 32.

81. *Id.* art. 41.

82. *Id.* art. 42.

F. Substantive Requirements of Novelty, Inventiveness, and Practical Application

To be patentable, inventions and utility models must possess novelty, inventiveness, and practical applicability.⁸³ Novelty means that, before the date of filing, there has been no identical invention or utility model disclosed to the public anywhere in the world, or used by or made known to the public in China.⁸⁴ Furthermore, a prior patent application in China on the same invention or utility model, which is published after the filing date of the subject application will defeat novelty.⁸⁵ Foreign patent holders who are precluded from applying for a patent of invention or utility model because of lack of novelty may still be entitled to a design registration, assuming the patent has an outward shape or appearance which has some aesthetic appeal.⁸⁶

The novelty of an application is not affected even if, within six months prior to the date of filing of a patent for invention or utility model, any of the following occurred:

- (1) It was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;⁸⁷ or
- (2) The work was first made public at an academic or technology meeting organized by a competent department of the State Council, or by a national academic or technology association;⁸⁸ or
- (3) The work was disclosed by any person without the consent of the applicant (in breach of confidence).⁸⁹

The occurrence of events described under paragraphs (1) or (2) must be declared when filing the application, and a certificate from the relevant entity must be filed within two months of the date of filing.⁹⁰

Inventiveness means that, as compared with the technology existing at the date of filing, the invention has prominent substantive features and represents notable progress, and that, in the case of a utility model, it has substantive features and represents progress of a technological nature.⁹¹ The requirement is analogous to that of "inventive step" or "non-obviousness" as defined in patent laws of other coun-

83. PRC Patent Law, *supra* note 42, art. 22.

84. *Id.*

85. *Id.*

86. *Id.* art. 23.

87. *Id.* art. 24.

88. PRC Patent Regulations, *supra* note 44, art. 30.

89. PRC Patent Law, *supra* note 42, art. 24.

90. PRC Patent Regulations, *supra* note 44, art. 31.

91. PRC Patent Law, *supra* note 42, art. 22.

tries. Practical application means that the invention or utility model can be made or used and can produce effective and useful results.⁹²

IV. THE DEVELOPMENT OF OTHER SPECIES OF INTELLECTUAL PROPERTY IN CHINA: COPYRIGHT

China had a copyright law from 1928 to 1949. There is currently no copyright law as such in China. Still, copyright as a concept does exist to some extent in China, but is essentially founded on contractual relationships, provisions of certain Chinese labor laws, and administrative practices which have some characteristics of a copyright-type regime. "Copyright," however, has a very precise meaning in international usage, particularly as embodied in the two major international conventions on copyright: the Berne⁹³ and Universal Copyright Conventions.⁹⁴ Against the background of this meaning of copyright, it is clear that China has no "copyright law" as most people in other countries understand the term.

Under the terms of the 1979 United States-China Trade Agreement,⁹⁵ the signatories agreed to mutual recognition of their respective copyrights. (In 1980, China joined the World Intellectual Property Organization ("WIPO"), the administrator of the Berne Copyright Convention).⁹⁶ A study group in China has for some time been looking at the feasibility of a copyright law, and China has already set up a Copyright Office, and a draft copyright law is now under consideration. This is a difficult problem for China. When we speak of copyright, we are not simply referring to the exclusive rights to a best seller or piece of popular music. Copyright also extends to technical literature, industrial drawings, and computer programs, and China is heavily dependent on these for its modernization. At present, these materials may be freely copied and used in China. Once a copyright law is established, foreign publishers might demand a royalty on each work used, or perhaps even withhold permission to publish their works in China. Another concern to China, as it must be to many developing countries, is that a copyright law may result in a net outflow of capital to foreigners. In developed countries, this capital outflow is offset or diminished by royalties accruing to its own nationals for their copyright works used

92. *Id.*

93. Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works (Berne Convention), *translated in* Copyright Laws and Treaties of the World (BNA), Berne Copyright Union, at A-1 (Apr. 1987).

94. 6 U.S.T. 2731, T.I.A.S. No. 7868.

95. 20 U.S.T. 4473, T.I.A.S. No. 9470.

96. M. PENDLETON, *supra* note 1, at 39.

overseas.

Historically, many Western copyright laws, particularly the copyright laws of the United States and the British Commonwealth, are not principally concerned with authors' "moral rights." On the contrary, the real focus of attention in such laws is the entrepreneur who invests the effort and money in exploiting and publishing the work. The percentage of royalties paid to an author or composer of a book or record, or the director of a film are almost insignificant, in relative terms, to what accrues to the entrepreneur. This difference is reflected in the focus of protection in Western copyright laws. Because of these and other factors, the question of whether to adopt a copyright law cannot be reduced to the simple moral precept that a person's work ought to be protected.

The question of copyright law in China cannot simply be reduced to a "yes" or "no" proposition. There are two international conventions on copyright. The Berne Convention has stringent requirements in comparison with the more recent Universal Copyright Convention. Outside the conventions, it would still be possible to have a domestic copyright law which extends to foreigners on the basis of reciprocal treatment, as is the case with the 1984 Patent Law, though without subscribing to the requirements of the conventions. Further, it would be possible to have a separate regime for technical literature. There is also the option of a copyright system being based on first creation or registration. In a country as vast as China, the benefits of a registration system are obvious.

