

Comments

Some Opinions On Copyright in the People's Republic of China

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This comment will provide my personal observations on the likely content of the law on copyrights that China intends to promulgate. My observations represent only my own opinions and should not be taken as Chinese government policy. The Chinese government established a State Copyright Bureau (*Guojia Banquan Ju*) in 1985. One of its senior officials formally declared at that time that it would be "not long" before the copyright law was promulgated. After the copyright law is promulgated, China will join one or more of the international copyright organizations as soon as the conditions are ripe.

THE TERMINOLOGY OF COPYRIGHT: *Banquan* or *Zhuzuoquan*?

Certain aspects of the copyright law drafting work may be of special interest to American observers. The first issue, which has been raised in several articles about Chinese copyright law published outside China, relates to the translation and use of copyright terminology in China. Several commentators abroad have noted the use of two different Chinese terms, *banquan* and *zhuzuoquan*, to express the term "copyright," and have raised the question of which term will be employed in future Chinese copyright law and practice. In my opinion it seems possible that the term employed may be *zhuzuoquan*

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(“rights in the work”) and that the copyright law may be termed the *zhuzuoquanfa*. It may be of interest to note that the Chinese Inheritance Law, promulgated in late March, 1985, provides in Article 2 that patents and copyrights may be inherited. During the final stages of consideration of the Inheritance Law, the eminent Chinese jurist Zhang Youyu suggested that the Chinese term for “copyright” in Article 2 be changed from *banquan* to *zhuzuoquan*.

There remains, however, an apparent problem with using the term *zhuzuoquan* and naming the copyright law *zhuzuoquanfa* — the State Copyright Bureau itself utilizes the term *banquan* rather than the term *zhuzuoquan*. However, according to Article 94 of the Civil Code General Rules of the People’s Republic of China, which was promulgated on April 12, 1986, and entered into force on January 1, 1987, the terms *zhuzuoquan* and *banquan* have the same meaning. Therefore, in the long run, the issue of which Chinese term will be used to express the notion of copyright may not be as important as some commentators outside China have contended; it is, I think, fundamentally a question of terminology rather than of substance.

AUTHORS’ RIGHTS IN THE FUTURE CHINESE COPYRIGHT LAW

The second issue I would like to discuss is the content of the forthcoming Chinese copyright law. All Chinese citizens will enjoy protection of their works regardless of whether or not the works are published, or where they are published. The protected works will include literary, oral, musical, dramatic and choreographic works; fine art, photography, cinema and illustrations; and maps, plans and models relating to geography, topography, architecture and science.

One question which has arisen is what types of authors’ rights should be provided for in the copyright law. In my own personal opinion, at least the following authors’ rights should be included in the copyright law. First is the right to publish a work in the author’s own name, under a pseudonym, or anonymously. Second is the right to the integrity of a work, or, as one scholar has translated the Chinese term, the “completeness” of a work. The problem with this issue is in defining the meaning of the “integrity” of a work. In my view, there are two aspects to the right to integrity in the Chinese context: the first is that the content of a work may not be changed by others; the second is that the point of view expressed in a work may not be changed by the publisher.

The third of the authors’ rights which in my view will possibly be included in the Chinese copyright law is the right of the author to revise the contents of and opinions expressed in his or her work. No

one but the author should have such a right to revise a work. Fourth is the right to "retrieve" (*shouhui*) a work because it is out of date or because the author's opinions have changed. In certain situations, an author who exercises such a right to retrieve might have to pay reasonable compensation to the publisher of the work. Each of the first four authors' rights are similar to aspects of French *droit moral*, or moral rights. In some European countries these moral rights are not specifically incorporated into a copyright law *per se*, but in my view they should be so incorporated into our copyright law. Fifth is the right of the author to use a work in other publications, to reproduce a work, or to exhibit or translate a work. Finally, the sixth authors' right which should be incorporated into the Chinese copyright law is the generally recognized economic right of the author to receive royalties for the publication of his or her work.

FAIR USE PROVISIONS AND LIMITATIONS ON COPYRIGHTABILITY

A third major concern in the drafting of the copyright law is the problem of fair use and limitations on copyrightability. At issue is the balancing of the need to protect authors' rights against the need to ensure the widest dissemination of published works. An author's rights in this regard are generally defined by the principles of "fair use" of an author's work by others and limitations on copyrightability. My comments thus focus on the scope of fair use and limitations on copyrightability in the forthcoming Chinese copyright law.

First, there are certain internationally recognized components of fair use which should be incorporated into the Chinese copyright law. One of these is the use of an author's work for personal and private use such as study and research. Another is the use of quotations from an author's work in reviews and reports. The quotations used must be of reasonable length. The third such component of fair use is use of a work or excerpts therefrom in newspapers or on television or the radio. Any such use, however, must be informational rather than commercial. The question still remains as to whether private use of an author's work by a work unit rather than by an individual should be included as fair use in the Chinese copyright law. The law may include such a provision, but it must be considered very carefully.

There are, however, certain conditions which differentiate China from other countries and suggest further fair use provisions that should be included in the copyright law. Some insist that one of these is a fair use provision for translations from the Han language into China's minority languages. The rationale for this fair use stipulation is that it would be consistent with China's policy of developing minor-

ity language, economy and culture. To this end we must provide information cheaply and conveniently to China's many minorities; thus the fair use right of translation from the Han language to minority languages. I would note, however, that this fair use provision would not work in the opposite direction: royalties would have to be paid to authors for translation of their works from minority languages into the the Han language. There are some, however, who believe that as more and more works are published in the Han language by overseas Chinese, or co-published with foreign publishing houses, it would infringe the copyrights of foreigners or overseas Chinese if the forthcoming law had a fair use provision for translation from the Han language into Chinese minority languages. Thus, they contend it would be desirable to strike this fair use provision from the draft of the Chinese copyright law.

Another fair use provision to be incorporated into the Chinese copyright law may be more familiar to American observers. This is the fair use exception for translation and conversion of an author's work into Braille so that it can be read by the blind. Such a fair use provision is in no way harmful to an author's rights.

Fair use is a complicated problem in China, as it is in other countries. The specific provisions and scope of fair use limitations on copyright have not yet been fully defined in the drafting of the Chinese copyright law, and it may be that instead of including some of the above-mentioned uses of an author's work in the fair use provisions of the copyright law, some may be included as limitations on the scope of copyrightability itself rather than as fair use exceptions to materials already defined as, or assumed to be, copyrightable.

PROTECTION OF FOREIGN COPYRIGHTS

It is possible that foreign works that are published initially in China will have copyright protection in China. Those foreign works published initially outside of China and those that have not yet been published will enjoy copyright protection in accordance with such agreements or treaties as have been concluded or accepted by China and the foreign author's country of citizenship. In my opinion, the Chinese copyright law may include a special article similar to Article 6 of the Foreign Economic Contract Law of the People's Republic of China. Article 6 of the Foreign Economic Contract Law stipulates that the provisions of international treaties apply in China if a conflict exists between a treaty and Chinese law, unless China has issued a reservation to that provision of the treaty which conflicts with Chinese law.

DURATION OF COPYRIGHT

The duration of copyright is the core of copyright protection and is still under discussion among the drafters of the Chinese copyright law. The Berne Convention fixes the duration of a copyright at life plus fifty years and the Universal Copyright Convention fixes duration at life plus twenty-five years or not less than life plus twenty-five years. Life plus fifty years would originally have meant that the copyright would span three generations. Today, however, fixing copyright at life plus fifty years would mean protection for fewer than three generations. The duration of a Chinese copyright is a matter that must be fully discussed in China, but my own personal view is that a Chinese copyright should last for more than twenty-five years after the death of the author. Fifty years after the death of the author might be a reasonable duration, but I stress that these are my personal views and that this duration may not be the one adopted in the forthcoming Chinese copyright law. The Chinese copyright law may also provide for special, shorter durations for such works as photography and applied art, but such specific shorter durations have not yet been determined.

THE PROBLEM OF LEGAL PROTECTION OF COMPUTER SOFTWARE

The legal protection of computer software is now under vigorous discussion in China. Late in August, 1985, a meeting was held in Beijing to discuss the legal protection of computer software. At that meeting almost everyone in attendance agreed that China must protect software by law or regulation. But there was vigorous discussion on whether computer software should be protected by the copyright law or through *sui generis* legislation. At a conference on computer software convened by the World Intellectual Property Organization in Geneva in March, 1985, most countries expressed a preference for copyright protection, but some did not. There are certainly problems in providing copyright protection for computer software. Copyright is an ancient system and may not be suitable in the context of computer software. It is clear that new forms of protection are needed in the area of computer software.

In China, we have not yet decided what form should be utilized to protect computer software, but many participants at the August, 1985 meeting on computer software were in favor of utilizing *sui generis* legislation. The August, 1985 meeting also named an expert group to participate in the preparation of a law or regulation for the legal protection of computer programs. I can say, however, that a

decision as to the use of *sui generis* legislation to protect computer software will not delay promulgation of the copyright law.