12-1-1989

Introduction: Technological Transfer and Protection of Intellectual Property in China

Lionel S. Sobel

Panel 4: Technological Transfer and Protection of Intellectual Property in China

Introduction

LIONEL S. SOBEL*

From an American perspective, the protection of intellectual property in the People's Republic of China is a fascinating subject on two levels. First, and of immediate importance, are the practical questions. To what extent are American patents, trademarks and copyrights protected in China, and how is that protection claimed? Second, and of long range interest, are more theoretical issues. What insights into our own intellectual property laws can Americans gain by studying China's approach to common problems?

I. PRACTICAL ISSUES

Our practical interest in Chinese intellectual property law stems from two fairly recent developments. The first of these is America's international trade deficit, and the deficit's consequences with respect to virtually every aspect of our domestic economy.[1] For years, the size of America's population and its relative wealth made this country not only a sufficient market for virtually all United States manufacturers, but a key market for many foreign manufacturers as well. The deficit, however, has reoriented our thinking, making export an almost patriotic activity. China has been alluring as a potential export market. Though not wealthy by Western standards, its population is the world's largest, and even small per-capita sales can amount to significant business. Moreover, it seems likely that American trade with China will be greatest in products based on technological and artistic innovation, or, in other words, products whose economic foundations rest on intellectual property protection.

* Professor, Loyola Law School, Los Angeles, California. J.D., UCLA School of Law, 1969; B.A., University of California, Berkeley, 1966.

1. *See generally* B. FRIEDMAN, DAY OF RECKONING: THE CONSEQUENCES OF AMERICAN ECONOMIC POLICY UNDER REAGAN AND AFTER (1988).

The second development that triggered our interest in Chinese intellectual property law was political. Until a decade ago, Sino-American relations were virtually non-existent, and the thought of doing business with or in China would have been pointless. Political reform in China in the late 1970s opened doors on both sides of the Pacific,[2] making trade between China and the United States a reality. Indeed, as Theodore Wu reports in his own contribution to this Conference, American investment in China now exceeds $10 billion.[3]

Americans cannot ignore the fact that this Conference was held in March of 1989, before the June massacre in Tiananmen Square. The events of that night in Beijing have affected relations between China and the United States, and may also affect the nature and extent of business trade between them. Nonetheless, the political state of affairs that exists in China as this Conference is readied for press will not last forever. And in any event, in 1997, Hong Kong, another of America's major trading partners, will become part of China once again, thus giving Americans further reason to be interested in the content of Chinese law.

Chinese intellectual property law is of fundamental importance to most Americans doing business in China, but it is not the only thing Americans need to know. In order for Americans to do business with the Chinese, they should be advised on China's language, culture, and business traditions, which are different than those of the United States. Intellectual property law may be next in order of importance for American companies that make or sell products that can be duplicated easily. Unless the law provides protection against unauthorized copying, these products will be duplicated. Whether, how, and to what extent such protection is provided will influence where such products are made, how they are distributed, and at what prices they are sold. In other words, key elements of American companies' business plans for doing business in China are affected by the content of Chinese law.

One example of the way in which Chinese law influences the business practices of Americans (and other foreigners) is explained by Professor Yuanyuan Shen in her contribution to this Conference on Chinese copyright law.[4] Since China does not have a separate copy-

2. Wu, *Practical Aspects of Technological Transfer in China*, 12 LOY. L.A. INT'L & COMP. L.J. 86 (1989).

3. *Id.*

4. Shen, *China's Protection of Foreign Books, Video Tapes and Sound Recordings*, 12 LOY. L.A. INT'L & COMP. L.J. 78 (1989).

right statute, it is commonly believed (outside of China) that China has no copyright law at all. As Professor Shen explains, this is not so; copyright principles are found in China's Constitution, Civil Law, and regulations. Chinese law even extends copyright protection to foreigners, provided their works are first published in China. As a business matter, first publication in China may not be practical for foreigners. But some copyright protection may nevertheless be available to those foreigners who enter into licensing contracts (even for their previously published works) with Chinese publishers. Further, copyright-like protection is available for foreign movies and recordings by obtaining administrative censorship approval for their distribution in China. Thus, the business practices of well-advised American companies should include entering into licensing contracts with Chinese publishers and seeking administrative approval from China's censors to obtain copyright-like protection.

II. THEORETICAL ISSUES

Chinese intellectual property law also interests Americans for more theoretical and long range reasons. The United States soon will mark the bicentennial of its copyright and patent statutes. Two hundred years of experience has taught this country a lot about intellectual property protection. China, by contrast, has very little experience with intellectual property law. Zhou Chuanjie points out in his contribution to this Conference[5] that China's Patent Law is only four years old, and its Trademark Law only five.

The Chinese recognize the value of experience, and China has sent delegations to the United States (and other countries) to study our intellectual property regimes. The result is that American patent and trademark lawyers will find much that is familiar in Chinese patent and trademark law.[6] Indeed, the similarities are remarkable, given the significant differences that exist between the two countries' languages, cultures, histories, and political and economic systems.

There are some differences, of course. The question for Americans to contemplate is whether, despite our two hundred years of experience, we have anything to learn from a country with relatively no intellectual property experience. The answer, I think, is yes; and the reason we have something to learn is precisely because the American

5. Chuanjie, *Protection of Intellectual Property Rights in China*, 12 LOY. L.A. INT'L & COMP. L.J. 68 (1989).

6. *See, e.g.*, Chuanjie, *supra* note 5.

approach to intellectual property issues is caught in its two-hundred-year history, while China has been free to write on a clean slate.

One example of an issue about which Americans might learn from the Chinese is the issue of how best to protect computer program software. As a theoretical matter, software can be protected by patent law, copyright law, or a separate law addressed specifically to software. Here in the United States, we wrestled with this question, and finally decided to provide protection for software in our Copyright Act. The Copyright Act still bears evidence of our initial uncertainty, because computer programs are *not* listed in section 102 of the Act[7] among the identified types of works that are eligible for copyright protection. Literary, musical and dramatic works are specifically mentioned, as are pantomimes, choreography, art works, motion pictures, and recordings. Software, however, is neither there nor alluded to.

Thus, in order to confirm that computer programs are protected by copyright, it is necessary to refer to the Copyright Act's unique definition of "literary works"—a phrase which ordinarily would not suggest computer programs.[8] In the definitions section of the Copyright Act, the legal archaeologist will find that "literary works" include "works . . . expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the material objects . . . [including] tapes, disks, or cards, in which they are embodied."[9] Those already familiar with the nature of computer programs will recognize that this definition of "literary works" could include software. Once raised, the suspicion that copyrights protect computer programs is confirmed by another section of the Act which provides that despite a copyright owner's exclusive right to reproduce the copyrighted work, "[i]t is not an infringement for the owner of a copy of a computer program to make . . . another copy . . . of that program" under specified circumstances.[10] From this statement of the Act, it is reasonable to conclude that copyrights protect software because otherwise it would have been unnecessary for the Copyright Act to specify that certain copying "is not an infringement." By today, of course, it

7. Copyright Act of 1976, 17 U.S.C. § 102 (1976).

8. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (Pocket-Size Edition 1977), which defines "literary" to mean "of or dealing with . . . writings in prose or verse of an imaginative character . . . having permanent value, [and] excellence of form."

9. 17 U.S.C. § 101 (1976).

10. 17 U.S.C. § 117 (1976).

is quite clear that software *is* protected by copyright in the United States, despite the circuitous route the Copyright Act takes to reach that result.[11]

What is less clear, to me at least, and admittedly with the benefit of hindsight, is whether or not the Copyright Act was the best place to put protection for computer programs. I am a firm believer in the moral wisdom and practical necessity of protecting software in some fashion. But should computer programs be protected by the same statute, and thus in virtually the same way, as "real" literature,[12] art, music and drama? Computer programs are fundamentally different from these other types of works, in a way that has legal implications.

Software is utilitarian; it is designed to perform specific and usually very practical tasks on particular machines, which are operated by people who have a certain level of training and very definite expectations. This means that the essential specifications largely dictate the content of computer programs. Software contains little if anything in the way of self-expression. Literature, art, music and drama, on the other hand, are largely self-expression. While the quality of such works may be measured by the extent to which they inspire, enlighten, or entertain their audiences, little, if anything, about their content is dictated; there are no specifications that such works are expected to satisfy.

There appears to be a problem developing with the protection of software by copyright. In deciding software infringement lawsuits, courts are required to apply legal principles that were developed with literature, art, music and drama in mind. Some of these principles simply do not apply to software, but courts are forcing them on software cases anyway and badly distorting the principles in the process.

One example is the dichotomy between "ideas" and "expression" which is a fundamental principle in literature and drama copyright cases; it is the principle that divides elaborated and protected elements of such works from their unprotectable cores.[13] This dichotomy plays no useful role in a software infringement case, because software does

11. *See, e.g.*, Williams Electronics v. Artic International, 685 F.2d 870 (3d Cir. 1983); Apple Computer, Inc. v. Franklin Computer, Corp., 714 F.2d 1240 (3d Cir. 1983); 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 2.04[C] (1989).

12. *See supra* note 8 for examples of various "real" literature forms.

13. 17 U.S.C. § 102(a); 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.03[A][1] (1989). *See also* Libbot, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735 (1967); Note, *All Puff and No Stuff:*

not embody an "idea," at least not in the traditional copyright sense. Yet, in the process of deciding software cases, while adhering to principles laid down in literature and drama cases, courts apparently feel compelled to find and describe software "ideas" in order to distinguish them from software "expression."[14] The result is mechanical and formalistic,[15] and threatens to damage the value of the idea/expression dichotomy, even for future literature and drama cases.

Further examples could be cited of the inherent differences between software infringement cases, on the one hand, and literature, art, music and drama infringement cases, on the other.[16] Doing so would be beyond the scope of this Introduction to Chinese intellectual property law. But the point that is relevant to this Introduction is whether software protection should have been put somewhere other than in the Copyright Act, and what might Americans learn from the Chinese about this?

China is today (or at least it was until the Tiananmen Square massacre in June 1989) hard at work on the development of what will be its first copyright statute. Unencumbered by two hundred years of copyright and patent history, China has been able to take into account the characteristics of computer programs that make them different from literature, art, music and drama. China also has been able to consider, with more intellectual freedom than Americans enjoyed, whether software protection should be joined together with protection for these other kinds of works, or whether software should have its own statute tailored to its unique characteristics. As noted by Mr. Chuanjie,[17] an early draft of a proposed Chinese Copyright Law included provisions for software protection, following the lead of the United States and other countries that have protected software by copyright. Thereafter, however, China opted in favor of a separate law devoted to software in particular, on the grounds that copyright

---

Avoiding the Idea/Expression Dichotomy, 9 Loy. L.A. Ent. L.J. 337 (1989) (authored by Karen Poston).

14. *See, e.g.*, Whelan Associates v. Jaslow Dental Laboratory, 797 F.2d 1222 (3d Cir. 1986); Plains Cotton Cooperative Ass'n v. Goodpasture Computer Service Inc., 807 F.2d 1256 (5th Cir. 1987).

15. *Cf.* Jones (Note), *Whelan Associates v. Jaslow Dental Laboratory: Copyright Protection for the Structure and Sequence of Computer Programs*, 21 LOY. L.A.L. REV. 255, 296-300 (1987).

16. *See, e.g.*, Nimmer, Bernacchi & Frischling, *A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases*, 20 ARIZ. ST. L.J. 625 (1988).

17. Chuanjie, *supra* note 5.

law (as applied to other kinds of works) would not provide sufficient protection for computer programs. The Chinese lawmakers reasoned that the duration of copyright protection provided to other kinds of works would be excessive if provided to software.

China's decision to provide protection for software that is separate from the copyright protection provided to literature, art, music and drama, seems to be correct in substance and based on the right reasons. China's approach—if actually enacted—would seem to provide greater and more carefully crafted protection both for software and for other kinds of works. Moreover, principles developed in resolving disputes involving software in particular would not seep into and infect cases involving literature, art, music or drama—or vice versa—unless those principles actually made sense across the border. The logic and integrity of the two bodies of law would thereby be preserved.

There is precedent in the United States for a free-standing statute protecting one variety of intellectual property in particular. When Congress decided to protect computer chip designs, it also had to decide how to do so. Since copyright protection for a work of pure utility (such as a computer chip) would violate a fundamental principle of existing copyright law,[18] Congress enacted the Semiconductor Chip Protection Act of 1984. The new Chip Protection Act occupies the same volume of the United States Code as the Copyright Act,[19] and has many similar principles,[20] but is otherwise an entirely independent statute.

Perhaps by considering the wisdom of Chinese copyright law—even though it is only in its embryonic stage—the United States may see the advantages of separating software protection from copyright protection for other types of works. Should this happen, a symbolic circle will be closed. For in the beginning, China studied the copyright laws of the United States, and was influenced by what it saw. But, China did not adopt United States laws, chapter-and-verse; it

18. *See* 17 U.S.C. § 101 (defining "pictorial, graphic, and sculptural works" and "useful articles" in a manner indicating that copyright protection is not available to works "having an intrinsic utilitarian function" whose designs do not have artistic features that can be separated from their "mechanical or utilitarian aspects"); Brandir International v. Cascade Pacific Lumber, 834 F.2d 1142 (2d Cir. 1987); Kieselstein-Cord v. Accessories by Pearl, 632 F.2d 989 (2d Cir. 1980); Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978); Baker v. Seldon, 101 U.S. 99 (1879).

19. 17 U.S.C. §§ 901-905 (1984).

20. 3 Nimmer, *supra* note 13, §§ 18.01-18.12 (1989).

exercised its own judgment and will undoubtedly continue to enact only those provisions that seem wise. If the United States is influenced in turn by what China does, each country may enjoy the best of what the other's law has to offer. The articles that follow in this Conference are a valuable contribution to that possibility, for they tell us much about what China has done, and is doing, about the law of intellectual property.

Protection of Intellectual Property Rights in China

ZHOU CHUANJIE*

In the past several years, China has made great progress in developing its intellectual property protection system. China passed a new trademark law in 1982 which became effective in March, 1983. Thereafter, China enacted its first patent law in 1984, which came into force in April, 1985. China is currently drafting a copyright law, which is expected to be promulgated soon.

I. PATENT

The 1984 Chinese Patent Law has been in effect for over four years. During that time, China has worked diligently to implement the Law and has achieved encouraging results. Up to mid-August of this year, the Chinese Patent Office has received a total of over 108,000 patent applications, 22,000 of which were filed by foreigners. Thus far, the Chinese Patent Office has granted about 27,000 patents, including 1,800 granted to foreign applicants. Eighty-three percent of these patents were utility model patents. During the past four years, China experienced a steady increase in patent applications, receiving 14,000 applications in 1985, 18,000 in 1986, 26,000 in 1987, and 33,000 in 1988.

Article 11 of the Chinese Patent Law provides that after the grant of a patent for an invention or a utility model, no entity or individual may, without the authorization of the patentee, exploit the patent by making, using, or selling the patented product or by using the

* Attorney at Law (PRC), China Patent & Technology Trade (USA) Ltd., New York, New York.