

# LAWS OF THE PEOPLE'S REPUBLIC OF CHINA ON INDUSTRIAL AND INTELLECTUAL PROPERTY\*

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## INTRODUCTION

The recent growth in trade between the People's Republic of China and the Western nations has focused attention on the need to better understand China's social system in order to avoid some of the problems caused when trade occurs between radically different cultures. One potential problem area for Sino-Western traders is the paucity of protection China affords inventions, trademarks, and literary and artistic creations. As discussed below, China does not now grant patent, copyright, or trademark protection comparable to that existing in Western nations. Nevertheless, China remains a constantly fluctuating society, and it is possible that its protection for industrial and intellectual property will be increased in the future.

This paper presents an analysis of the attitude within China toward industrial and intellectual property. We begin with a brief discussion of the theoretical basis for China's position, as found in the writings of Karl Marx. Then the evolution of Chinese legislation on patents, trademarks, and copyright is examined, with emphasis upon the manner in which China's anti-elitist ideology has been given more and more explicit expression in this legislation over the years. An attempt is also made to identify potential problems Western traders will face in each area, and to present suggestions by Chinese observers for minimizing those problems.

## I

### THE INFLUENCE OF KARL MARX

Classic Western thought and communist thought proceed from diametrically opposed fundamental assumptions. A basic concept of Western society is that in the pursuit of their personal welfare the individuals comprising the society will secure the maximum welfare of the society as a whole. Communist theorists postulate that the maximum welfare of the individual lies in, and in the long run is indistinguishable from, the realization of the maximum welfare of the society. To oversimplify, the Western position can be reduced to a priority of individual interests over those of society, while the communist position postulates priority of the societal interests over those of individuals.

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Karl Marx went considerably beyond the crude conception of communist thought stated above. Marx recognized that theories which postulate the priority of either the societal or the individual interests are based upon the prior assumption of there being a dichotomy between the individual and the society.<sup>1</sup> Marx rejected this dichotomy and offered instead a conception of man as a being essentially formed by, and inextricably a part of, the society in which he exists. He attacked every appearance of the individual's tendency to accept this dichotomy and to set himself apart from, and ultimately above, others in society. Marx saw that historically some individuals, on the basis of their function in the societal division of labor, began to dominate others. After a long period of acceptance by the dominated, this relationship came to be regarded as a privilege and then as a right of the dominating individuals. The extreme manifestation of this relationship was the capitalist who appropriated all societal wealth and power, reducing the worker to an intolerable condition. Marx believed revolution would occur when the workers of the world were forced by their misery to realize that the position of the capitalist rested upon force and not upon right, privilege, greater personal worth, the will of God, the laws of nature, superior achievement, or contribution to society. In freeing themselves from bourgeois domination, the workers would also free man forever from artificial inequalities based upon domination by force and buttressed by religion, law, philosophy, and politics. Each person in the higher phase of communist society would realize and act in accordance with his or her social essence. Belief in the dichotomy between the individual and society would disappear. Emphasis upon individual differences would be supplanted by awareness of common humanity.<sup>2</sup>

China, under the leadership of Mao Tse-tung, is committed to the development of the society without the artificial inequalities that Marx envisioned. The anti-elitist ideology has been a major factor in shaping the P.R.C.'s legislation regarding industrial and intellectual property.

## II

### PATENT LAW

Patent law is in many ways a quintessential expression of the assumptions and values of Western society. As such, it is highly objectionable to communist theory. The basic conflict between patent law and Marx's thought is found in

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<sup>1</sup> Marx's denial of the existence of a dichotomy between the individual and society is seen clearly in the passage from his 1844 manuscript quoted in the text at p. 276.

<sup>2</sup> One of Marx's infrequent descriptions of the nature of communist society appears in the *Critique of the Gotha Program*:

In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, have vanished; after labour has become not only a means of life but life's primary want; after the productive forces have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly—only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: "From each according to his ability, to each according to his needs."

S. AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 233-34 (1968).

the following passage from his 1844 manuscripts:

Even when I carry out scientific work, etc., an activity which I can seldom conduct in direct association with other men, I perform a *social*, because *human*, act. It is not only the material of my activity—such as the language itself which the thinker uses—which is given to me as a social product. My own existence is a social activity. For this reason, what I myself produce, I produce for society, and with the consciousness of acting as a social being.<sup>3</sup>

In this passage the young Marx appears to have derived social ownership of the products of an individual's labor from the conception of the individual himself as a social product, formed by the society in which he lives.

Western patent law approaches inventions and the inventor in a technical manner. It conceives of an invention as a creation which transcends the prior art of the relevant field of human knowledge. An invention is only an invention to the extent that it transcends, that is, is independent of, the prior art. Western patent law assumes that the independence of the invention from the prior art of the specific field implies the independence of the inventor from the prior art of the society as a whole. Marx would argue, however, that while an invention may be independent from the prior art, the inventor himself is not and cannot be anything but a product of his society. A Marxist would view Western patent law as focusing on only the technical achievement of the inventor, rather than taking into account the whole context of the inventor's life and relationship to society. As a result of its narrow focus, Western patent law gives the inventor special rights based on his technical achievement, thus reinforcing the notion of independence of an individual from his society.

This concept of right, as noted above, was the object of some of Marx's most trenchant attacks. Western patent law expresses the concept in two ways. First it assumes the prior existence of a right to use the invention for commercial purposes, a right which exists in the case of most inventions in a market economy. Second, assuming the existence of the right to use the invention, the issuance of a patent recognizes the patent owner's right to exclude all others from the use of the invention for a specified period. During the term of the patent, its owner has a proprietary monopoly over the invention. This proprietary monopoly has been characterized in Western thought both as the natural right of the inventor over his creation and as a privilege extended to him by the government in order to stimulate inventive activity. From the point of view of Marx, it is irrelevant whether the patent holder enjoys his proprietary monopoly as a matter of natural right or as a matter of privilege, since Marx in general equated "right" with "privilege maintained by force." In addition, neither Western characterization recognizes the invention as social property in the Marxist sense.

Theoretically, the profit which the patent holder may realize by virtue of his monopoly over the invention has two basic functions. First, it serves as a reward, as opposed to compensation, for what is regarded as an extraordinary achievement and an extraordinary contribution to society. Second, it is designed to serve as an incentive to potential inventors in the society. The basic assumption of Western society—that individuals will realize the maximum welfare

<sup>3</sup> K. MARX, *EARLY WRITINGS* 157 (T. Bottomore transl. & ed. 1963).

of the society through the pursuit of their own individual interests—is thus expressed in patent law in the granting of a proprietary monopoly to the individual inventor as an inducement to others to engage in inventive activity of value to the society.

The concepts expressed in the passage from Marx quoted above provide the foundation of a Marxist critique of the first function of patent protection. Marx would appear to argue that neither the scientist nor, by extension, the inventor has a right to an extraordinary reward for his creation. It may be true that the inventor has transcended the prior art in a specific field of human knowledge, but he has not thereby transcended the “prior art” of the society as a whole. The inventor merits special rights over the product of his labor no more than does any other worker. If he has made an extraordinary contribution to society, it is because he has been given more by, and taken more from, society than others. He is indebted to society not only for his knowledge of the prior art of his field, but also for his very existence as a human personality capable of invention.

The second function of patent protection—serving as an incentive to potential inventors—is similarly incompatible with Marx’s thought as presented above, and with communist thought in general, because the incentive offered is a monopoly which increases the private profits realized from the invention rather than the benefits to society in general. Due to the close connection of patent law to the whole capitalist system, it is impossible to separate a communist critique of patent law from communist criticism of the capitalist system in general. One can, however, relate the two in terms of Marx’s basic opposition to any person having extraordinary rights or an extraordinary material position in society, whether the person be an inventor, a capitalist, or a member of any other category of persons.

The communist legislator thus faces a dilemma in devising legislation for the encouragement of invention. On the one hand, extension of a patent right involves ideological heresy. On the other, communist legislators—as we shall see—have continued to believe that people need incentives to invent and that money is the best incentive, Marx himself having remained conspicuously silent on the means of motivating men to extraordinary achievement in a communist society, or, probably more to the point, a society in the stage of transition to communism.

The solution the first communist state, the Soviet Union, adopted was to offer the inventor the choice between a patent, which conferred the right to exclude others from the use of the invention, and a certificate of authorship, which vested ownership of the invention in the state, but entitled the inventor to various privileges and to remuneration based upon the economic benefits realized by the state through use of the invention.<sup>4</sup> The patent right, as conceived in the West, is dependent upon the existence of a right to use the invention for commercial purposes. Because such a right exists only in limited circumstances or does not exist at all in a socialist economy, the Soviet inventor’s choice

<sup>4</sup> For a treatment of the evolution of Soviet Law on inventions, see I. V. GSOVSKI, *SOVIET CIVIL LAW: PRIVATE RIGHTS AND THEIR BACKGROUND UNDER THE SOVIET REGIME* 592 (1948); Federico, *Soviet Law on Inventions and Patents*, 43 J. PAT. OFF. SOC’Y 5, 11 (1961).

between a patent and a certificate of authorship was in most cases illusory. Furthermore, inventions created in the course of the inventor's discharge of his official duties or under state commission were eligible for only the certificate of authorship. This provision excluded many, if not most, inventions from eligibility for a patent.

The People's Republic of China, like other communist states, patterned its earliest patent legislation on the Soviet model,<sup>5</sup> modifying it only to allow for the fact that the Chinese economy was at the time behind the Soviet Union in the degree of socialization. The first laws of the People's Republic of China in this area were the Provisional Regulations on the Protection of the Invention Right and the Patent Right,<sup>6</sup> instituted on August 11, 1950, and the Provisional Regulations on Awards for Inventions, Technical Improvements, and Rationalization Proposals Relating to Production of May 6, 1954.<sup>7</sup>

The definition of "invention," both for the patent and the certificate of authorship, was found in article 3 of the 1950 document. In terms characteristic of utilitarian-oriented socialist economies, it was stated that "invention" refers to "creating in production a new production method which can raise utility value." There was no statement as to what tests were to be used in ascertaining either novelty or utility. Certain categories of inventions were excluded from eligibility for a patent. The 1950 provisional regulations stipulated that only certificates of authorship could be issued for (1) inventions involving secrets related to national defense, military technology, or military manufacturing enterprises, and (2) inventions affecting the welfare of the great majority of the people, such as pharmaceuticals and new agricultural species. In addition, article 8 of these regulations specified that only certificates of authorship would be given:

[i]f work on the invention was performed within the scope of the inventor's official capacity in a state factory, mine, scientific research institute, technological bureau, laboratory or other research institution [or] if a state organ, enterprise, or social organization had entrusted the inventor with and had compensated him for work done on the invention.

The rights of the patentee, as set forth in article 7 of the 1950 provisional regulations were as follows:

- (1) He may use his own capital or form a corporation to operate an enterprise using his invention for production;
- (2) he may assign the patent to another person or license it to any organization or individual;
- (3) without the patentee's permission, another person may not use his invention;

<sup>5</sup> Statute of Mar. 5, 1941, Concerning Inventions and Technical Improvements, [1941] Sob. Post. i Rasp. Prav. S.S.S.R. Text No. 150 (Soviet Council of People's Commissars); Instructions of Nov. 27, 1942, Regarding Remuneration for Inventions, Technical Improvements, and Suggestions for Rationalization of Procedures, [1942] Sob. Post. i Rasp. Prav. S.S.S.R. Text No. 178 (Soviet Council of People's Commissars). English translations of these laws are given in 2 V. GSOVSKI, *supra* note 4, at 361.

<sup>6</sup> 1 CHUNG YANG JEN MIN CHENG FU FA LING HUI PIEN (COLLECTION OF LAWS AND DECREES OF THE CENTRAL PEOPLE'S GOVERNMENT) 359 (1952) [hereinafter cited as FLHP].

<sup>7</sup> 5 FLHP 53 (1955). An English translation can be found in FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 523 (A. Blaustein ed. 1962).

violators should make up the patentee's losses according to law;

(4) he may bequeath the patent right, and his heirs will enjoy the same rights as he;  
 (5) during the term of the patent, the patentee (or his heirs), if he has neither assigned nor licensed the patent, may request the central principal organ [the Central Bureau of Technological Management of the Finance and Economic Committee of the Government Administration Council] to convert the patent right into an invention right.

Article 9 provided that both patents and certificates of authorship were to have terms of from three to fifteen years, with the actual term left to administrative determination.<sup>8</sup> Under the provisions of article 10, the licensing and assignment of the patent had to be reported to, and approved by, the Central Bureau of Technological Management of the Finance and Economic Committee of the Government Administration Council. Article 11 indicated that a patent holder who satisfied any of the following conditions had to forfeit his patent and return the patent certificate to the state: (1) one who during the term of the patent makes an unauthorized sale of the patent abroad;<sup>9</sup> (2) one who has not worked his patent within two years of its issuance, without having received approval for such postponement; or (3) one who at some point during the term of the patent stops working it for two years without having received approval.

Under the provisions of article 14 the government reserved the right to take over a patented invention.

If, after having already awarded the patent certificate, the central principal organ [the Central Bureau of Technological Management] thinks it necessary that the invention's use and management revert to the state, it may negotiate with the patentee, requesting assignment to the state; if the negotiations do not eventuate in agreement, the Government Administration Council may make the final decision, changing the patent right to the invention right and granting a specified amount of monetary award.

Aliens were eligible for the patent or the certificate of authorship only if they resided in China.

Article 12 of the 1950 regulations made subject to criminal liability any person who made an unauthorized sale of the patent abroad,<sup>10</sup> divulged the invention to persons outside the country without approval, stole another person's invention or revealed the inventor's secrets prior to the invention being made public, disobeyed a prior decision of the government not to make the invention public, or preempted the state's right to exploit and manage an invention.

Article 6 of the 1950 provisional regulations specified the rights of those holding certificates of authorship in the following manner:

<sup>8</sup> This provision for terms up to fifteen years was misleading, as the only concrete benefit the inventor realized from the certificate of invention was the financial award, which was given for a term not exceeding five years.

<sup>9</sup> Although the Chinese term here translated as "patent" is *chuan li ch'üan*, the word "invention" (*fa ming*) may be more appropriate.

<sup>10</sup> Item 10 of article 2 of the Provisional Regulations for the Preservation of State Secrets of the People's Republic of China, enacted June 8, 1951, places "secrets concerning scientific new inventions and discoveries" within the scope of "state secrets." 2 FLHP 19 (1953). For an English translation, see SURVEY OF THE CHINA MAINLAND PRESS No. 113, at 8 (June 10-11, 1951) [hereinafter cited as SCMP].

Except for the right to use and manage the invention, which belongs to the state, the person with the invention right enjoys the following types of rights: (1) based upon the methods provided by the state for incentives, he may receive monetary awards, medals, certificates of merit, decorations, and honorary degrees;<sup>11</sup> (2) he may bequeath the certificate, his heirs being able to receive the monetary awards; (3) upon his request and with the approval of the central principal organ, he may have his name or another special name given to the invention.

Article 16 added that one who held a certificate of authorship could request its conversion to a patent if the invention was not put to use by the government. The Central Bureau of Technological Management could also make this change upon its own initiative.

Although the system of issuing certificates of authorship was set forth in 1950, the amount of the monetary award accompanying these certificates was not specified until the 1954 Provisional Regulations on Awards for Inventions, Technical Improvements, and Rationalization Proposals Relating to Production<sup>12</sup> were approved by the Government Administration Council. These regulations based the award on the amount of money saved by the use of the invention over a period of one year.<sup>13</sup> Monetary awards for inventions were computed once a year and awarded for from three to five years. The highest annual award was 500,000 yuan (50,000 yuan after the 1955 monetary reforms);<sup>14</sup> thus the highest potential award was 250,000 yuan in post-reform currency, or about \$104,000 in United States currency.

The Chinese system for the encouragement of inventions differed from that of the Soviet Union on which it was modeled in three important aspects. First, the Chinese allowed the inventor to use his invention for commercial purposes, either individually or through a corporation. Second, the Chinese granted larger monetary awards to the holders of certificates of authorship.<sup>15</sup> Finally, the interests of the state were more jealously guarded under the system

<sup>11</sup> No record of any conferment of an honorary degree by the Communist Chinese has been located by the authors.

<sup>12</sup> 5 FLHP 53 (1955).

<sup>13</sup> Article 7 provided for the following awards:

Value saved in twelve months*	Percentage of the value saved	Supplements*
less than 1,000,000	30%	0
1,000,000-2,000,000	15%	150,000
2,000,000-5,000,000	12%	210,000
5,000,000-10,000,000	10%	310,000
10,000,000-50,000,000	6%	710,000
50,000,000-100,000,000	5%	1,210,000
100,000,000-500,000,000	4%	2,210,000
500,000,000-1,000,000,000	3%	7,210,000
more than 1,000,000,000	2%	17,210,000

\*Expressed in pre-1955 yuan. These figures can be converted to U.S. dollars by dividing by 10,000 and using the exchange rate then in effect of 2.4 yuan to \$1.00. F. PICK, 1955 PICK'S CURRENCY YEARBOOK 56 (1955).

<sup>14</sup> On March 1, 1955, China underwent a major currency reform, whereby old yuan were converted to new yuan at an exchange rate of 10,000 old to 1 new yuan.

<sup>15</sup> A table of remuneration under the Soviet Instruction Regarding Remuneration for Inventions is found in 2 V. GSOVSKI, *supra* note 4, at 389. F. PICK, *supra* note 13, sets the 1955 exchange rate at 4.00 rubles to \$1.00.

in China. This last difference was most clearly evidenced by the limitation of the term of the patent to less than fifteen years, or to as little as three years, and by the requirement that all licenses and assignments be registered with and approved by the Central Bureau of Technology.

All three of these departures may be explained as accommodations which the Peking government made to the economic circumstances at the time of the promulgation of these two sets of regulations. On the one hand, in accordance with its policy of sanctioning the existence of a sphere of private enterprise, it affirmed the inventor's right to work his patented invention privately. On the other, it introduced various limitations on the proprietary monopoly of the patentee in order to safeguard the interests of the socialist state. It also offered monetary awards that were large relative to those offered in the Soviet Union in order to make the certificate of authorship more attractive to Chinese inventors than the patent. One could validly argue that these departures made the initial Chinese system more elitist than its Soviet model.

Nevertheless, the portent of the future of Chinese patent legislation did not lie in its first major departures from the Soviet statutes, but in a relatively minor difference between the two systems. In addition to monetary awards, the Soviet statute made provision for extending certain privileges to those inventors holding certificates of authorship. These privileges included exemption from the payment of income tax on the first 10,000 rubles of income realized by the inventor from the invention and a right of priority under otherwise equal conditions for appointment to scientific research positions.<sup>16</sup> The Chinese statutes make no mention of such preferential treatment. The omission of provisions according privileges to those holding certificates of authorship is not of great absolute importance in view of the considerable rights and potential pecuniary rewards the Chinese offered to inventors. Rather, the significance of this omission lies in its foreshadowing of later Chinese development of a strong anti-elitist approach to patent law.

This anti-elitist approach was set forth very clearly in the Regulations on Awards for Inventions, issued November 3, 1963.<sup>17</sup> The key provision in these regulations is stated in article 23 as follows: "All inventions are the property of the state, and no person or unit may claim monopoly over them. All units throughout the country (including collectively owned units) may make use of the inventions essential to them." Obviously, this position—that all inventions are societal property—is much closer to the theory expressed by Marx, as discussed above. Thus the 1963 regulations deleted the option of an inventor to obtain a patent. The Communist Chinese apparently found the idea of the patent ideologically unpalatable, even if its practical importance had been vitiated by the structure of the economy and the official attitude toward patents.

In these 1963 regulations the Chinese did more, however, than eliminate the

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<sup>16</sup> Art. 77, Statute of Apr. 24, 1959, On Discoveries, Inventions, and Innovation Proposals, [1959] Sob. Post. i Rasp. Sov. Min. S.S.S.R. No. 435 (Council of Ministers of the U.S.S.R.). For an English translation, see Federico, *supra* note 4, at 58.

<sup>17</sup> 13 CHUNG-HUA JEN MIN KUNG HO KUEI HUI PIEN (COLLECTION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA) 241 (1964) [hereinafter cited as FKHP]. For an English translation, see SCMP No. 3117, at 6 (Dec. 11, 1963).



patent. While insuring state ownership of the invention, the certificate of authorship offered under the 1950 and 1954 provisional regulations entitled its holder to the receipt of relatively generous financial awards based upon the amount of savings the state realized from use of the invention. These awards bore a distinct resemblance to the royalties paid by a licensee to a patent owner in the West. In addition to eliminating the patent, the 1963 Regulations on Awards for Inventions also eliminated the alternative of obtaining a certificate of authorship with its associated pecuniary award. The regulations instead provided for the award of five different amounts of lump-sum payments, termed bonuses, based upon an administrative assessment of the value of the invention. These bonuses were to range from 500 yuan for a fifth class invention to 10,000 yuan for a first class invention.<sup>18</sup> This maximum regular award of 10,000 yuan<sup>19</sup> was much smaller than the maximum award of 250,000 yuan allowed under the earlier regulations. The only honorary awards prescribed in the 1963 regulations were certificates and, in the case of the first three classes of awards, medals of honor. It also remained possible for the invention to be named after its creator.

Despite the lessening of the degree of resemblance to royalty payments and the marked reduction of the size of the financial awards, the 1963 regulations stopped short of adopting the radical position that the extraordinary achievement involved in devising an invention does not call for a reward in the form of money or special rights. Though the evidence currently available is far from conclusive, it suggests that the Communist Chinese since the Cultural Revolution have accepted this radical position. There have been many press accounts concerning lesser industrial creations, termed technical improvements,<sup>20</sup> for which financial awards were provided in a set of regulations issued simultaneously with the 1963 Regulations on Awards for Inventions.<sup>21</sup> The press reports laud the creators of technical improvements, but make no mention of any special financial awards for their achievements. This suggests that both the 1963 Regulations on Awards for Technical Improvements and the Regulations on Awards for Inventions are no longer being implemented. Discontinuance of the payment of special financial awards to inventors would be consistent with the known elimination of the routine payment of bonuses to regular workers for surpassing production quotas or otherwise exceeding set labor standards.<sup>22</sup>

Though the payment of some form of bonus for extraordinary achievement may be resumed, the radical position the Chinese have taken with respect to the rights of an inventor makes it highly unlikely that Peking will at any time soon institute statutory protection for alien inventors even formally comparable

<sup>18</sup> Art. 17, 13 FKHP 241 (1964).

<sup>19</sup> The magnitude of these awards is illustrated by the fact that after the 1956 wage reforms and prior to the Cultural Revolution, a director or chief engineer in a heavy industrial installation earned a maximum annual salary of approximately 3,200 yuan. Thus a 10,000 yuan award would amount to more than three years' salary. See CHU-YUAN CHENG, *SCIENTIFIC AND ENGINEERING MAN-POWER IN COMMUNIST CHINA, 1949-1963*, at 149-54 (1965).

<sup>20</sup> See SCMP No. 72-43, at 26 (Oct. 24-27, 1972); SCMP No. 72-25, at 1 (June 19-23, 1972).

<sup>21</sup> Regulation on Awards for Technical Improvements of Nov. 3, 1963, 13 FKHP 246 (1964). For an English translation, see SCMP No. 3117, at 10 (Dec. 11, 1963).

<sup>22</sup> See *NEW YORK TIMES*, REPORT FROM RED CHINA 178 (1971).

to the protection offered in the West, unless there is a pronounced shift in the domestic policies and practices of the regime. The present leadership is both too intent upon avoiding the creation of an elite group and too consistent in the legal provisions it enacts for Chinese citizens and aliens to alter its legislation drastically in an attempt to accommodate Western trading partners.

Even if the Communist Chinese should enact a statute for the protection of inventions, it is unlikely that the Westerner would find it entirely satisfactory in practice. The difficulties which the Westerner encounters with the protection of his inventions and attendant technology in the Soviet Union and the Eastern European countries, where the currently effective statutes do make provision for issuing patents to aliens, have been described elsewhere.<sup>23</sup> Several of these difficulties might be encountered in China.

One is uncertainty over whether the use of the technology will be confined to that authorized by the Westerner. The communist systems require the free exchange of information and experience among all state enterprises. Pisar reports that while "Eastern enterprises are reluctant to enter into secrecy covenants," the experience of Western enterprises of late "suggests that such undertakings, once made, are scrupulously observed, both domestically and internationally."<sup>24</sup> Nonetheless, the actual prospects for a Westerner's detecting unauthorized use of his technology are in most cases rather slim in view of the size and remoteness of the communist market.

Another problem is the calculation and collection of royalties. Prices are determined according to different principles in state and market economies, making it difficult to equate reasonable royalties in one system with reasonable royalties in the other. Communist negotiators generally prefer to pay a fixed sum in installments rather than to conclude a conventional royalty agreement.<sup>25</sup> Such an arrangement may also be preferable to the Western party because of the difficulty of determining the actual extent of use of the technology. Communist enterprises would normally refuse a Western enterprise permission to inspect the site of the use of the technology or to examine relevant records.

Finally, there would be sizeable difficulties in the prosecution of an infringement suit in a communist state. Given limited access to the communist economy, it would be extremely difficult for a Western enterprise to prove actual infringement. There is also the problem of the impartiality of the body hearing the suit. Particularly in the case of China, a Westerner might find either adjudication or arbitration by a communist organ unsatisfactory.

In addition to considerations generally applicable to transactions involving technology in East-West trade, the Communist Chinese legal system involves many unknowns. There are no substantive or procedural codes, civil, criminal, or commercial. The courts have never established themselves as an independent force, and the extent to which they have been revived after an apparent near demise during the Cultural Revolution is unknown.

Accordingly, all provision for the protection of Western technology should

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<sup>23</sup> See, e.g., S. PISAR, COEXISTENCE AND COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST 317 (1970).

<sup>24</sup> *Id.* at 339.

<sup>25</sup> *Id.* at 342.

be carefully worked out with the Chinese during contract negotiations. Little is known about the terms Westerners have reached with the Chinese on the protection of technology heretofore. Reghizzi, who had access to forty-two Sino-Italian contracts, reports that the Chinese have provided in technical assistance agreements that "the know-how and technical documentation delivered by the sellers" will be used "only for the scope of the present plant."<sup>26</sup> These contracts often state that the parties will "do 'their best' to prevent their personnel from disclosing information and data supplied by the sellers."<sup>27</sup> There also have been agreements that the plant could not be re-exported without the written consent of the sellers.<sup>28</sup> Reghizzi mentions that there have been two known cases of the license of an Italian patent to China.<sup>29</sup> Even in the case of the limited protection provided in the agreements Reghizzi describes, there still remain the problems of detection and enforcement.

The terms reached in Sino-Western contract negotiations on the protection of Western technology ultimately depend upon the relative bargaining positions of the two parties. The greater the Chinese desire for the technology, the more likely they are to compromise in the formulation of contractual provisions for protection. The degree to which they will respect these provisions depends in the final analysis upon their desire to maintain good relations with the trading partner involved and with the country of that trading partner.

### III

#### TRADEMARKS

In 1950 the People's Republic of China enacted the Provisional Regulations Governing the Registration of Trademarks.<sup>30</sup> Under these regulations, domestic public or private factories, merchants, and cooperatives could acquire the right to exclusive use of acceptable trademarks through registration with the Central Bureau of Privately Operated Enterprises of the Finance and Economic Committee of the Government Administration Council. The right of exclusive use was enforceable against infringers in a local people's court. Application for registration of a trademark could also be made by merchants of states which had established diplomatic relations and concluded commercial treaties with the People's Republic of China.

In 1963, the 1950 regulations on trademarks were abolished in favor of the Regulations Governing the Control of Trademarks.<sup>31</sup> While providing that identical or similar trademarks would not be registered for use by different enterprises for the same commodity, these regulations do not mention any right to exclusive use and accordingly make no provision for action against infringers. A foreign enterprise may make application under these regulations for registration in China of such of its trademarks as are registered in its own

<sup>26</sup> Reghizzi, *Legal Aspects of Trade With China: The Italian Experience*, 9 HARV. INT'L L.J. 85, 131 (1968).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 128.

<sup>30</sup> 1 FLHP 528 (1952). For an English translation, see 58 PAT. & T.M. REV. 358 (1960).

<sup>31</sup> 13 FKHP 162 (1964).

country if that country and China have reached an agreement on reciprocity of trademark registration. The Detailed Rules for the Implementation of the Regulations Governing the Control of Trademarks<sup>32</sup> outlines the application procedure a foreign enterprise must follow.

China's position on trademarks as embodied in the 1963 regulations again diverges from that of the Soviet Union. The 1962 Soviet statute on trademarks guarantees a right of exclusive use and provides for suit in the people's courts against infringers.<sup>33</sup> PISAR states that the enforceable guarantee of exclusive use is dormant in the Soviet Union insofar as state enterprises are concerned, but cases have been reported in which a foreign enterprise has brought suit against another foreign enterprise over the right of exclusive use of a registered trademark within the confines of the U.S.S.R.<sup>34</sup> In its failure to recognize a right of exclusive use enforceable by judicial action against infringers, China's position is more radical than that of the Soviet Union, as is the case with patent rights.

One may wonder, however, why China has not gone to the extreme of abolishing the use of trademarks, a course that would seem to be consistent with its apparent decision not to reward inventors. In the classic communist view, trademarks were devices which assisted an enterprise in its ruthless struggle to eliminate all competitors. The Soviet Union, however, developed a justification for use of trademarks which was compatible with the tenets of communist ideology. In the Soviet view, trademarks act as acknowledgements of responsibility for the manufacture of the marked product, which are valuable in controlling the quality of the product.<sup>35</sup> Appearance on the product of a mark distinctively identifying the manufacturer assists the consumer, individual or collective, in his attempt to obtain the best quality of goods for his money. Such also is the Communist Chinese rationale for the use of registered trademarks. Article 1 of the 1963 Chinese regulations on trademarks states that they were enacted "for the purpose of strengthening the control of trademarks and of making the enterprises guarantee and improve the quality of product." Article 3 defines trademarks as marks "representing the quality of the commodity." Article 3 of the Detailed Rules for the Implementation of the Regulations Governing the Control of Trademarks<sup>36</sup> requires the submission of a form stating the quality of the commodity with each application for the registration of a trademark. This form is to be filled out in accordance with the provisions governing the technical standards of products, and it must be examined and certified by the department in charge of the enterprise requesting registration. Article 11 of the regulations provides for cancellation of the registration of a trademark if the quality of the commodity deteriorates.

The use of trademarks to insure that the consumer receives goods of acceptable and consistent quality is in accord with the mass orientation of the Chinese. The use of trademarks may also be more acceptable to the Chinese than the extension of patent rights or remuneration to inventors since the

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<sup>32</sup> *Id.* at 164.

<sup>33</sup> S. PISAR, *supra* note 23, at 330.

<sup>34</sup> *Id.* at 332.

<sup>35</sup> *Id.* at 329.

<sup>36</sup> 13 FKHP 164 (1964).

connection between the use of a trademark and profit is indirect. Furthermore, the trademark registrant is an enterprise, a collective body, not an individual. The Chinese are more wary of an individual acquiring an artificial attitude of superiority through extraordinary rewards or rights than they are of an enterprise acquiring such superiority. Enterprises may be created, reorganized, or dissolved by administrative fiat. Individual attitudes, particularly those of intellectuals, are less susceptible to state control.

The Chinese endorsement of the use of trademarks has been less strenuous than that of the Soviets. Trademarks have been used in the Soviet Union in conjunction with attempts to introduce a modified profit incentive into Soviet industry by inducing enterprises to compete for cash bonuses awarded for superior performance within the confines of the state plan.<sup>37</sup> The Chinese have not experimented as extensively or as enthusiastically with economic schemes tainted with what to them would be traits of capitalism.<sup>38</sup> There has been considerable exhortation that enterprises and workers compete with themselves to break all production records, but there has been less emphasis in China than in the Soviet Union upon competition among enterprises. Hence, it has been less essential that each enterprise have a unique trademark. There also has been less emphasis in China than in the U.S.S.R. upon satisfaction of consumer needs.

On the other hand, consumer satisfaction and success in competition have been two motives in China's foreign trade. These motives provide impetus to the use of trademarks on all commodities made for export. A Supplementary Notification of April 25, 1959 indicates that such statements as "Made in the PRC," "Made in China," "Made at a Certain Place in China," and "Made at a Certain Enterprise in China" shall appear on the packaging or wrappers of commodities.<sup>39</sup> Trademarks to be used on export commodities are to receive certification from the foreign trade organization prior to application for registration.<sup>40</sup>

In an exchange of notes on January 8, 1973, China and Italy reached agreement on reciprocity of trademark registration. A *People's Daily* report of January 11, 1973 stated that "the agreement provides that a corporation or enterprise of the one country may apply for the registration of trademarks in the other country according to law and acquire the right of exclusive use of the registered trademarks."<sup>41</sup> The authors know of no enactment on trademarks more recent than the 1963 regulations. Assuming these regulations are now in force, there are several aspects of both these 1963 regulations and the Detailed Rules for the Implementation of the Regulations Governing the Control of Trademarks with which a foreign party desiring to register a trademark with China needs to be fa-

<sup>37</sup> S. PISAR, *supra* note 23, at 329.

<sup>38</sup> For a look at economic management in the People's Republic of China, see Schran, *Economic Management*, in CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY 193 (J. Lindbeck ed. 1971).

<sup>39</sup> Supplementary Notification of the State Council on the Use of the Written Language for Trademarks and Decoration of Commodities for Export, 9 FKHP 164 (1959).

<sup>40</sup> 13 FKHP 164 (1964).

<sup>41</sup> Agreements on trademark registration have been concluded between China and at least five other nations: the United Kingdom (June 1, 1956); Sweden (Apr. 6, 1957); Switzerland (Apr. 14, 1957); Denmark (Mar. 25, 1958); and Finland (Jan. 26, 1967). D. JOHNSTON & H. CHIU, AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 1949-1967: A CALENDAR 54, 66-67, 81, 208 (1968).

miliar.<sup>42</sup> According to the regulations, application for trademark registration must be made to the Central Administration of Industry and Commerce by those enterprises using trademarks. The name and address of the manufacturing enterprise is to appear, if possible, on commodities on which no trademark appears. Trademarks are to be simple and clear so that they will be easily distinguishable. Designs having undue association with a national or international political entity or organization and politically harmful designs are unregistrable.<sup>43</sup> A language other than Chinese may appear only on trademarks used on goods produced for export. In the case of application from two or more enterprises for registration of identical or similar trademarks, registration will be granted to the first applicant. One administrative appeal is allowed in the case of refusal of registration. Registered trademarks are to be publicly announced by the Central Administration of Industry and Commerce.

A registered trademark of a domestic enterprise is valid from the date of registration until the enterprise requests that it be withdrawn or until it is cancelled for any of the following reasons: (1) deterioration of quality of the commodity, (2) unauthorized change of the trademark, (3) unauthorized cessation of use of the trademark for more than one year, or (4) justified demands from the masses, organs, groups, or enterprises that the trademark be cancelled. A schedule of classification of commodities, which lists seventy-eight classes, appears as an appendix to the Detailed Rules for the Implementation of the Regulations Governing the Control of Trademarks. Separate applications are to be submitted for the use of a trademark by the same enterprise on commodities within different classifications. Approval must be obtained for use of a registered trademark on another commodity in the same classification. In the case of assignment of a registered trademark, the assignor and assignee must submit a joint application for registration of the transfer.

The China Council for the Promotion of International Trade acts on behalf of foreign enterprises in applying for trademark registration. For each trademark, the foreign enterprise must submit a certificate of nationality, one copy of the application form, one copy of a power of attorney, a photocopy of the certificate of registration of the trademark in its own country, twenty copies of the trademark design, and a registration fee of twenty yuan. This registration fee, the same amount required of domestic applicants, is refunded if the application is rejected. The application form must be filled out in Chinese, and Chinese translations of the certificate of nationality and the certificates of registration from the enterprise's country are to be attached. All documents must be duly notarized and certified. If registration is granted, the Central Administration of Industry and Commerce will specify the term during which the registration is valid.

If the foreign enterprise desires to renew the registration, it must submit,

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<sup>42</sup> Provisions referred to in the following paragraphs may be found in 13 FKHP 162, 164 (1964).

<sup>43</sup> An appendix to the Provisional Measures Governing the Control of Unregistered Trademarks of March 1954 gives some examples of trademark designs or wording considered politically harmful. These include references to the Boy Scouts and the New Life Movement begun in the 1930's by the Nationalist Chinese, as well as "symbolic expressions of American imperialism," such as the White House. 1 CHUNG HUA JEN MIN KUNG HO KOU MIN FA TS'AN K'AO TZU LIAO (REFERENCE MATERIALS ON THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA) 160 (1956) [hereinafter cited as MFTKTL].

prior to the expiration of the registration, an application for renewal, the original certificate of registration, one copy of a power of attorney, one photocopy of the certificate of renewal of registration from its own country, twenty copies of the trademark, and a fee of twenty yuan. Each change in the original registration requires the submission of an appropriate application form, a copy of a power of attorney, a document from the foreign enterprise's own country certifying the registration change in that country, and the original Chinese certificate of registration. If the registrant wishes to assign the trademark, he must submit the certificate of nationality of the assignee, an application form, a copy of a power of attorney, a certificate of registration of assignment from his own country, the original Chinese certificate of registration, and a fee of twenty yuan. There is no explicit statement in either the 1963 regulations or their ancillary detailed rules as to whether or not the foreign enterprise must submit a form stating the quality of the commodity on which the trademark is to appear and thereafter maintain that level of quality.

In view of the fact that the Chinese want all exported goods made in China clearly marked as to their origin so as to reap all possible political and economic benefits, it would seem unlikely that a Chinese enterprise would pirate the trademark of a foreign concern for use on exports whether the foreign trademark was registered in China or not. The Chinese enterprise would also have little incentive to use a foreign trademark on goods manufactured for domestic use. Such protection as Chinese law offers to the foreign enterprise against infringement is not of great significance insofar as Chinese enterprises are concerned. The foreign enterprise may be more concerned that another foreign enterprise will pirate its trademark for use on goods sold within China. Present limitations on the market for foreign consumer goods in China and the uncertainty of the protection accorded trademarks under the 1963 regulations would both appear to make obtaining Chinese registration for a foreign trademark currently a matter of less than vital importance.

#### IV

#### COPYRIGHT LAW

The People's Republic of China is not known to have enacted a comprehensive statute on the copyright. Item 8 of the August 1950 Decision of the Government Administration Council on Awards for Invention, Technical Improvements, and Rationalization Proposals Relating to Production indicated that measures and regulations regarding copyright protection were to be drafted by the Culture and Education Committee for approval, promulgation, and implementation by the Government Administration Council.<sup>44</sup> Item 12 of Resolution Two of the Five Resolutions of the First National Publications Conference of October 28, 1950<sup>45</sup> indicated that authors would not be required to sell all their rights of authorship, while item 17 provided that both public and private publication enterprises were to respect the right of authorship and the copy-

<sup>44</sup> 1 FLHP 357 (1952).

<sup>45</sup> *Id.* at 627.

right. The resolution also prohibited unauthorized printing, plagiarism, and unauthorized change of manuscript. Despite these statements of intention, the Peking government has apparently never promulgated a comprehensive copyright statute.

The only known protection available to Chinese authors is that contained in two documents, the Contract for Publication of Works by the People's Presses<sup>46</sup> and the Measures Governing the Payment Given by the People's Presses for Manuscripts.<sup>47</sup> These documents were included in a 1957 compilation of civil law materials published by the Chinese People's University, and probably were intended to serve as model drafts of such types of contracts.

According to the provisions of the Contract for Publication of Works by the People's Presses, the publisher acquires the right to publish the work in question throughout China in all editions and formats during the term of the contract. The contracting author agrees not to allow complete or partial publication of the work by another publisher. The author is made liable for infringement of another person's rights of authorship or right of publication, and the publisher may demand compensation from the author for any losses he incurs as a result of the author's having infringed upon the rights of another. The contract leaves open the possibility of official censorship by stipulating that the publisher may, with proper explanation, require the author to revise the manuscript. If the author refuses to make such revision, the publisher may refuse publication and demand the return of the compensation already given to the author.

The Measures Governing the Payment Given by the People's Presses for Manuscripts prescribes varying amounts of compensation, based upon the number of characters in the manuscript and the number of copies printed, for three types of literature: Chinese translations of classical works of Marxism-Leninism, propagandistic and hortatory literature, and original works in the social sciences and Chinese translations of such works. These payments range from 50,000 yuan (5 yuan after the 1955 currency reform) per thousand characters to 150,000 yuan (15 yuan) per thousand characters. A typical monographic Chinese publication would contain approximately 750-900 characters per page. Under the Contract for Publication of Works by the People's Presses, the publisher is obligated to give the author an accounting of the number of copies of his work printed during the term of the contract. In the case of short essays previously published in newspapers and periodicals which are to appear as part of a work to be used for study or in conjunction with a political campaign, the author is not compensated according to the regular formula. Instead, the Measures provide that he receives a lump-sum payment not related to the number of copies printed.

There are no known revisions of the 1957 materials relating to publication contracts. If there have been modifications, they likely have been reductions in the amount of compensation paid to authors. Though the Soviet Union and Eastern European communist states have copyright legislation which the Communist Chinese could use as a model,<sup>48</sup> it is unlikely that they will soon enact

<sup>46</sup> 3 MFTKTL 533 (1957).

<sup>47</sup> *Id.* at 536.

<sup>48</sup> For a treatment of Soviet law on copyright, see S. PISAR, *supra* note 23, at 362.



a comprehensive copyright statute. A rather drastic alteration of domestic policy would have to precede the appearance of such a law.

The absence of a comprehensive statute for copyright protection supports the theory that the Chinese since 1949 have become increasingly wary of according extraordinary rights to creative individuals by law for fear of contributing to the establishment of an elite group. The repugnance of such a group to Marxist ideology is reinforced in the case of authors and artists by the long historical experience of the Chinese with domination by what could be termed a literary elite. Mastery of the Confucian classics was an essential prerequisite to the enjoyment of high official status in the imperial Chinese governments. Almost all persons enjoying or aspiring to any position of official or social prestige in traditional China cultivated actual knowledge, or the pretense to knowledge, of the substantial body of classical literature. The Communist Chinese have been determined that such a literary group will not reappear. In the case of patent and invention rights, the Chinese wariness of contributing to the establishment of an elite group was initially overcome by the intensity of the regime's desire to push China into the modern age in industrial technology. In the field of literary and artistic achievement, there has been no comparable countervailing motive powerful enough to overcome the regime's distaste for legislating extensive rights for an elite group. Especially since the Cultural Revolution, that distaste has expanded to include almost all types of what the Westerner would consider creative literature. The *belles-lettres* are at a nadir in the People's Republic of China.

#### CONCLUSION

In the second half of the nineteenth century many Chinese intellectuals and leaders struggled with the question of how China could build itself up by adopting Western technology while at the same time preserving China's rich cultural heritage. The Communist Chinese can be viewed as dealing with fundamentally the same problem: how can the technology and goods of the West be transplanted into the People's Republic without at the same time importing the Western systems and ideas associated with those technology and goods? The threat of the industrialized West is not now to China's cultural heritage, but to the communist social and political system. The development of the Chinese law of industrial and intellectual property reveals how serious the leadership under Mao considers the threat of the West.

Whether or not the Communist Chinese leadership will maintain the intense commitment to the realization of a radically communist society after the death of its prime mover, Mao Tse-tung, is uncertain. The charges of "economism"<sup>49</sup> leveled against Liu Shao-sh'i during the Cultural Revolution would seem to indicate that Mao has faced considerable opposition within the leadership to either the substance of radical communism or to the pace at which it has been

<sup>49</sup> The Department of State offers the following definition of "economism": a "[t]erm of ignominy coined by Mao's adherents in 1966. Applied to party opponents who offered material incentives to workers in order to stimulate production rather than relying solely on political and ideological exhortation, as demanded by the militant Maoists." U.S. DEP'T STATE, ISSUES IN UNITED STATES FOREIGN POLICY, NO. 4—PEOPLE'S REPUBLIC OF CHINA 40 (1972).

implemented in China. One wonders whether there are potential successors to Mao who share his faith in the vision of a communist society as well as his skill in implementing that vision in China. One may also wonder to what extent the communist society envisioned by Mao can actually be translated into practice.

The future course of the People's Republic of China with respect to industrial and intellectual property depends largely upon the direction taken by Peking in its basic domestic orientation. Continued insistence upon the eventual realization of a radical communist society within China would most likely entail perpetuation of the policies of not offering legal protection to industrial and intellectual property and not rewarding extraordinary achievements with extraordinary benefits. The example of the more moderate Soviet approach to industrial and intellectual property legislation should discourage any expectation in the West that even a tempering of China's commitment to achievement of a communist society would result in a significant statutory alleviation of the problems arising in Sino-Western trade in industrial and intellectual property. Currently, Soviet legislation grants rights over inventions and trademarks in terms very similar to those appearing in Western legislation; yet Westerners find the substance of these rights distorted in practice by the communist system.

The extent to which the Chinese are willing to negotiate contract measures necessary to accommodate the Western partner's desire for protection of his industrial property rights will be directly related to the Peking government's desire to engage in foreign trade, a desire which has fluctuated greatly over the years and which may be expected to continue to do so. In general the greater the desire of China for a particular transaction and the weaker its bargaining position, the more it will be willing to accommodate the Westerner's desire for protection.

The Westerner may be uncomfortable with non-statutory protection of his industrial property. He may always feel that protection whose enforcement depends only upon the strength of his bargaining position vis-à-vis the Communist Chinese trading corporation is inadequate and must be backed by formal, statutory provisions applicable to aliens, if not necessarily to Chinese citizens. The Communist Chinese trader may find this Western attitude somewhat difficult to understand. According to the official philosophy of his state, except in the case of a communist government vis-à-vis "the people,"<sup>50</sup> the enforcement of any "right," even if provided for in legislation, always depends upon the relative strength of the bargaining positions of the parties involved. Schooled in this philosophy of law and in a system based on social ownership of property, the Communist Chinese negotiator or industrial manager may be somewhat less than understanding of the Westerner's concern for the lack of statutory provisions for the protection of industrial property. China is a society which functions with what many Westerners consider impossibly few laws, so that many types of disputes are satisfactorily resolved without resort to statutory solutions. Thus a Chinese negotiator may be predisposed to doubt that foreign trade transactions need more than the bare minimum of a formal legal framework.

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<sup>50</sup> Mao has defined "the people" as "all classes, strata and social groups which approve, support, and work for the cause of socialistic construction." Address by Mao Tse-tung, *On the Correct Handling of Contradictions Among the People*, Feb. 27, 1957, in 5 FKHP 2 (1957).

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