

HONGSONG SONG\*

## The Development of Copyright Law and the Transition of Press Control in China

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\* Professor, Law School of Yantai University (China), Intellectual Property Academy of Shandong Province; PhD., University of Queensland (Australia). This research is supported by the Ministry of Justice: Legal Research Project No. 12SFB2039, and the Ministry of Education: Humanities and Social Sciences Research Project No. 11YJA820060. E-mail: shs.song@gmail.com.

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[N]either legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life . . . .

— Karl Marx  
*Preface to the Contribution to the Critique of Political Economy* (1859)

## INTRODUCTION

China has experienced a dramatic change in information production and dissemination since the death of Mao in 1976 and the rise to power of Deng Xiaoping in the late 1970s. Although press control is still relatively tight compared to democratic states, it has become significantly looser than it was in Mao's era. The economic reforms of Deng Xiaoping and the open-door policy have transformed the once closed and centrally-planned pattern of information production and dissemination into a relatively market-driven communication system, which is also more open to the rest of the world. During this transition of the mode of information production and dissemination, not only has press control substantially relaxed, but the copyright system has also developed.

What is the link between the relaxation of press control and the development of copyright? Has press control restricted the development of copyright, and has the development of copyright benefited from, and contributed to, the relaxation of press control? Many commentators have touched upon these questions. Some attribute the failure to establish an effective copyright system in China to a regime that controls the flow of ideas,<sup>1</sup> or at least treats press control as an important obstacle to establishing an effective copyright

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<sup>1</sup> See WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 119 (1995).

system in China.<sup>2</sup> Others, who are concerned with the influence of copyright on press control, suggest that copyright may promote freedom of expression<sup>3</sup> or further induce democracy, and thus, help in the transition from an authoritarian to a democratic government.<sup>4</sup> More specifically, some commentators have even argued that the introduction of copyright has had a positive impact on censorship in China.<sup>5</sup> However, this issue has not been fully investigated to date.

This Article uses the development of China's copyright legislation and regulations to illustrate the relationship between copyright and press control in contemporary China. The process of the institutional evolution of copyright law in China is roughly divided into three phases according to the status of copyright law and the press control system. The first phase is the start-up phase, which lasted from 1978 to 1983. During this period, China started to reform its centralized press control system and draft a copyright law. However, no systematic or substantive copyright protection existed, though the concept of copyright occasionally appeared in official documents, and contractual protection of copyright was granted to foreigners in some unusual cases. The second phase is the development phase, which lasted from 1984 to 1991. During this period, and following some trial administrative regulations, the first copyright legislation was enacted. Although this copyright act bore the strong imprint of press control, this law can still be seen as a great retreat from press control in favor of authors' rights. The third is the improvement phase, which extends from 1992 to the present. In response both to changes in domestic preferences, and to considerable external pressure, China has undertaken dramatic improvements to its copyright law.

In the period since 1992, China has joined all the major international copyright conventions, and accordingly revised all

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<sup>2</sup> See PETER K. YU, THE SECOND COMING OF INTELLECTUAL PROPERTY RIGHTS IN CHINA (BENJAMIN N. CARDODO SCHOOL OF LAW, No. 11, 2002).

<sup>3</sup> See PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT (Aspen Publishers 2nd ed. 1996); David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421 (1983); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

<sup>4</sup> See Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613 (1996); Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998).

<sup>5</sup> See Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, in INTELLECTUAL PROPERTY AND ETHICS 195 (Lionel Bently & Spyros M. Maniatis, 1998); Hamilton, *supra* note 4.

domestic copyright legislation and administrative regulations. During this period, most of the imprint of press control has been erased from China's copyright law. However, the censorship regime and state monopoly on publishing, which have an unfavourable impact on the enforcement of copyright, remain.

By investigating the relaxation of press control and the development of copyright in every above-mentioned phase, this article will illustrate how the interaction between state control and market forces has shaped copyright law in different stages of the transition of information production and dissemination, and how copyright has contributed to this transition.

## I START-UP OF REFORM AND THE EMERGENCE OF COPYRIGHT

### A. *Start-Up of Reform*

The Chinese Communist Party established a centralized, pervasive, and all-embracing communication network after 1949, via which they achieved total control over, and a bureaucratic plan for, every aspect of information production and dissemination. The extent and depth of communication control under the Party's governance reached an unprecedented level in China's history from 1949 to 1976.

However, the strength of a pervasive and rigorous press control can be a weakness at the same time. First, the lack of lateral or horizontal flows of communication made the excessively centralized communication system in Communist China a purely vertical system, which was efficient at transmitting information down from the top to the bottom, but inefficient at passing up feedback from the lower level to the higher position, and inefficient at autonomous communication and cooperation between different members and sectors of society.<sup>6</sup> Second, the domination of bureaucratic planning in information production and dissemination, and the elimination of market mechanisms, caused overproduction of political and propaganda materials whilst creating shortages of entertainment and other forms of cultural products deemed unimportant in Mao's China. Third, the elimination of market competition and profit incentive—together with replacement of copyright with fixed state rewards for literary and artistic creation—aggravated the already extreme uniformity of

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<sup>6</sup> A. Doak Barnett, *The Communication System in China: Some Generalizations, Hypotheses, and Questions for Research*, in COMMUNICATION IN CHINA: PERSPECTIVES AND HYPOTHESES (Papers No. 16, East-West Communication Institute, 1978).

approved cultural forms and dreary repetitiveness in expression, and substantially reduced “the regime’s chances of appealing to varying audiences through a diversity of style and content in materials presented.”<sup>7</sup>

During the Cultural Revolution, when the Chinese Communist press control system reached its peak, it was—due to its own defects—simply unsustainable. This system of absolute control was discredited by the disasters of the Cultural Revolution. After Mao’s death in September 1976, and the downfall of the Party’s ultra lefts, the Chinese Communist Party started to restore political institutions that had been destroyed during the Cultural Revolution, including the previous press control system. A relatively flexible mode of bureaucratic planned information production and dissemination was restored to replace the extremely strict totalitarian press control regime that had been in place during the Cultural Revolution. After the Cultural Revolution, many of the former leaders were reinstalled to high positions, and most intellectuals and artists returned to their former positions in state-owned work units. Some features of the press control system from before the Cultural Revolution, such as the author’s remuneration system, were also gradually restored.

Just one year after the death of Mao, the Publication Administration started to restore the basic remuneration system previously provided to authors, albeit very slowly. In October 1977, *Trial Measures on Remuneration and Subsidy of Press and Publication* was issued by the State Publishing Administration (the successor to the General Publishing Office of the 1950s and 1960s). The *Remuneration Measures 1977* granted only a level of remuneration similar to the very restrictive level that had been in place in the first half of 1966. More specifically, this document only provided for the payment of a one-off remuneration based on the quantity of characters in the work. Print-run remuneration was, at this stage, still just the extravagant hope of Chinese authors.<sup>8</sup>

In July 1980, the *Interim Provisions on the Authors’ Remuneration of Books* resumed the cumulative print-run remuneration based on the number of copies printed in addition to the basic remuneration based

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<sup>7</sup> FRANKLIN W. HOU, TO CHANGE A NATION: PROPAGANDA AND INDOCTRINATION IN COMMUNIST CHINA 232 (1961).

<sup>8</sup> Trial Measures on Remuneration and Subsidy of Press and Publication (People’s Republic of China) State Publishing Administration, Oct. 1977. See ZHOU LIN & LI MINGSHAN, LITERATURE FOR STUDIES ON THE HISTORY OF COPYRIGHT IN CHINA 332–33 (1999).

on the quantity of characters.<sup>9</sup> However, the payments remained low. The rate of basic remuneration was one third higher than the level in the *Remuneration Measures 1977*, but was only equivalent to two thirds of the level set in the *Interim Regulations 1958*.<sup>10</sup> The print-run remuneration rate was even more pathetic. For example, the print-run remuneration for 10,000 copies was only three percent of the basic remuneration, and was equivalent to less than one twentieth of the print-run remuneration in 1958.

However, resuming the old system could not in any event resolve the problems that China faced. As was stated in a resolution of the Central Committee of the CCP, the major problem facing China was the gap between the people's increasing need for material and cultural products, and the underdeveloped productive capacity.<sup>11</sup> After the Cultural Revolution, the relaxation of ideological control led to a great increase in the demand for cultural products. Due to its inherent defects, the bureaucratic, centrally planned information production and dissemination system in China failed to satisfy this increased demand.

In order to diffuse propaganda as broadly as possible, the prices of books were set at an artificially low level; consequently, the prices of paper and printing services also had to be set at a very low level. Press houses could barely make any profit from publishing. Every link of the chain of the publishing industry—from literary and artistic creation, publication, paper, printing, to book distribution—relied on state subsidies.<sup>12</sup> Under this distorted price system, the publishing industry was caught in a vicious circle. The more titles it published, the worse its financial situation was.<sup>13</sup> After the Cultural Revolution, when press houses tried to publish more titles to meet people's demands, their productivity quickly reached a financial limit. Without sufficient state subsidies, they could not even cover their own running

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<sup>9</sup> Interim Provisions on the Authors' Remuneration of Books (promulgated by the P.R.C. LAWS & REGS, April 1980) ST. PUBLISHING ADMIN. at 334.

<sup>10</sup> *Id.* at 310–12.

<sup>11</sup> See Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic of China (People's Republic of China) The Sixth Plenum of the Eleventh Congress of CCP, June 27 1981; see also MONROE E. PRICE, ET AL., MEDIA REFORM: DEMOCRATIZING THE MEDIA, DEMOCRATIZING THE STATE 30 (2002).

<sup>12</sup> See Gayle Feldman, *The Organization of Publishing in China*, 107 THE CHINA Q. 519 (1986).

<sup>13</sup> See *id.*; PERRY LINK, THE USE OF LITERATURE: LIFE IN THE SOCIALIST CHINESE LITERARY SYSTEM 168–69 (2000); G. RAYMOND NUNN, PUBLISHING IN MAINLAND CHINA 124 (1966); RUSSELL DRURY, PUBLISHING IN CHINA: DEVELOPMENTS SINCE 1992 111–19 (1998).

expenses, let alone higher rates of remuneration for authors. Particularly in the immediate aftermath of the Cultural Revolution, the national economy of China was on the verge of breakdown.<sup>14</sup> It was impossible for the government to maintain large-scale subsidies for the whole publishing industry under these circumstances. The excessively low authors' remuneration thus partly reflected the crisis faced by the publishing industry in China after the Cultural Revolution.

The shortage of both material and cultural products prompted the Chinese Communist Party to review its policy. The long-standing ideological rigidity within China started yielding to a greater emphasis on economic growth at the expense of political idealism. In other words, the Communist Party's policies were realigned toward economic and social development, and away from political orthodoxy.<sup>15</sup> The Third Plenum of the Eleventh Party Congress in December of 1978 set China on the course of economic reform and opening up to the West, which signaled the beginning of a profound shift toward economic realism in Chinese political ideology.

Reform started first in the production and dissemination of material commodities. Reform was simple here because it would impact less the Party's ideological control than reform in the area of information production and dissemination, and was, therefore, deemed relatively moderate. State-owned enterprises undertaking material commodities production and distribution were encouraged to make profits from the market. This policy also applied to state-owned printers, paper mills and bookstores.<sup>16</sup> State subsidies to these enterprises were cut. Though this policy did not apply to press houses and other media outlets immediately, it made maintaining a price control system more difficult. Meanwhile, from the early 1980s, the Party encouraged the rapid proliferation of print and television news media to respond to the perceived need, but this made it more difficult for the Party-state to subsidize all the media outlets. In response to this new situation, different measures were gradually taken by the party-state so that the market could play a more important role in information production and dissemination, and so the media industry could become more

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<sup>14</sup> See Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic of China (People's Republic of China) The Sixth Plenum of the Eleventh Congress of CCP, June 27 1981.

<sup>15</sup> See Richard Goldstein, *Copyright Relations between the United States and the People's Republic of China: An Interim Report*, 10 BROOK. J. INT'L L. 403 (1984).

<sup>16</sup> See Feldman, *supra* note 12.

self-reliant. During the early 1980s, with the initiation of the policies of reform and openness, the Chinese publishing industry started to shake loose from decades of state control.<sup>17</sup>

The first significant media policy opening in China was the authorization given to the media in 1979 to begin to accept advertising. This policy was intended to increase the diversity of the media and to satisfy the increasing demand of the masses for cultural products without increasing media subsidies.<sup>18</sup>

Until the Cultural Revolution, the Chinese used advertising in newspapers. The main mass medium for advertising was the newspaper, and no advertisements were allowed on radio or television. Between 1966 and 1978, advertising disappeared completely on ideological grounds, even window displays. But after the Cultural Revolution, advertising's usefulness in directing and channeling demand was recognized once more. Commercial advertising (including foreign advertising) returned to China in 1979, after ten years' absence. At the same time, magazine, newspaper, and movie advertisements reappeared, and billboards and shop-window displays were restored.<sup>19</sup>

With the legalization of the sale of advertising in 1979, an increase in the value of media advertising revenues made it possible for Party papers and those founded by other state organizations to become profit-making ventures. After 1983, the media were allowed to retain residual profits so that they could "stand on their own two feet" by selling advertisements, and the government could slash state subsidies to news media, especially to those newly-established media sponsored by lower levels of the Party-state.<sup>20</sup>

Another step in the reform process in the publishing industry was opening book retail to private capital in the late 1970s and early 1980s. On December 2, 1980, the State Bureau of Publication issued a document entitled *Proposal on Developing Collective and Private Bookstores*, which first allowed the existence of private bookstores.

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<sup>17</sup> See Yi Chen, *Publishing in China in the Post-Mao Era: The Case of Lady Chatterley's Lover*, 32 ASIAN SURVEY 568 (1992).

<sup>18</sup> See Resolution, *supra* note 14; Roya Akhavan-Majid, *Mass Media Reform in China: Toward a New Analytical Framework*, 66 GAZETTE: THE INT'L J. COMM'C'N STUD. 553 (2004); DANIEL LYNCH, AFTER THE PROPAGANDA STATE: MEDIA, POLITICS, AND 'THOUGHT WORK' IN REFORMED CHINA (1999).

<sup>19</sup> ROBERT L. BISHOP, QI LAI! MOBILIZING ONE BILLION CHINESE: THE CHINESE COMMUNICATION SYSTEM 140–41 (1989).

<sup>20</sup> See Ashley Esarey, *Cornering the Market: State Strategies for Controlling China's Commercial Media*, 29 ASIAN PERSP. 37 (2005).

The Bureau then proposed “expanding collective bookstores and private bookstores” in the *Report on Book Distribution System Reform* issued on March 28, 1982. These two documents opened the door to private book enterprises.<sup>21</sup> The private book business flourished under the encouragement of the Chinese government. Unlike state-owned bookstores, private book retailers could only sell books to private individuals, and were thus more concerned with meeting the demands of individual consumers.

However, despite existing in large numbers, private bookstores had a very small market share in comparison to the New China Bookstore’s national book distribution and retail sales organization. Because of policy constraints, private book businesses were mostly, to use an Americanism, “mom-and-pop” bookstores. Their investment was negligible, usually ranging from a couple of thousands to tens of thousands of Yuan. Most store owners lacked modern management knowledge and skills; the titles that they carried were mainly popular fiction or supplementary school materials. At this stage, these stores were only supplementary outlets of the New China Bookstores, the national system of state-owned bookstores.<sup>22</sup> So, they were called the “secondary channels,” to be differentiated from the primary channel of the New China Bookstore.<sup>23</sup>

Reform also took place in the state-owned sector during this period. Changes started with the book purchase and sale system, while the organizational structure of publishing houses was left largely unchanged. In the previous publishing system, sale of books mattered little to publishing houses, because distribution was completely entrusted to state-owned bookstores, and there was no returns policy.<sup>24</sup> In 1982, experimental practices were introduced into the state-owned book distribution system. Publishing houses now had to share the loss caused by overstocking with the New China Bookstore on a fifty-fifty basis.<sup>25</sup> This measure undoubtedly increased market pressure on publishing houses and forced them to respond. In

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<sup>21</sup> See Fang Qing & Xu Lifang, *A Brief History of Non-State-Owned Book Business in China*, 21 PUB. RES. Q. 56 (2005).

<sup>22</sup> Yang Deyan, *The Reform of the Book Distribution Industry and the Development of Non-State-Owned Bookstores in China*, 50 (2002) PUB. RESEARCH Q. (2002).

<sup>23</sup> Fang & Xu, *supra* note 21.

<sup>24</sup> Feldman, *supra* note 12.

<sup>25</sup> Summary of the National Meeting on Exchanging Experience of Book Distribution Reform Ministry of Culture 1983, in Selected Documents of Publishing Administration (Publishing Administration office of Ministry of Culture, 1981–1983) 368–74.

conjunction with this measure, a responsibility management system was introduced into the operation of state-owned bookstores, whereby salaries and bonuses were linked with employees' performance and the profitability of the bookstore.<sup>26</sup>

With the relaxation of state control, a genuine market for book consumption started to form in the early 1980s. The increasing importance of consumption also attracted more publishing houses to produce books to meet demand. As early as 1980, popular literature reappeared in China after an absence of three decades. This phenomenon shows the revival of a book consuming market, which "was signaled by the reprinting of traditional popular novels and historical tales and by translations of classic entertainments such as Agatha Christie's Hercule Poirot mysteries and Arthur Conan Doyle's Sherlock Holmes detective stories."<sup>27</sup> However, at this stage, the market influence was still marginalized because of overall state control. For example, from 1981 to 1983, the National Publishing Bureau repeatedly issued notices to control and limit the print run of popular books such as traditional novels, books about sexual knowledge, foreign detective novels, and other Western literature.<sup>28</sup>

### ***B. The Emergence of Copyright***

Generally speaking, therefore, 1979 to 1983 saw only limited reform in the media sector, which reflects the fact that this period was only the start-up phase of economic reform and a political thaw. During this period, limited reform occurred in the marginal sectors of information production and dissemination, while the basic institutions and structure of the culture and media industry remained largely unchanged. Without a robust market mechanism and relatively independent authors and publishers, the social-economic conditions for the development of copyright law were still not in place. At this stage, the concept of copyright was adopted in some Chinese legislation and administrative regulations. The *Economic Contract Law 1981* and the *Civil Procedure Law (Trial Implementation) 1982* directly mentioned the protection of copyright. In late December 1982, the State Council issued the *Interim Measures on Management of Audio-Visual Manufactures* ("Audio-Visual Measures"), which affirmed that the rights of the author and performer as well as the

<sup>26</sup> *Id.*

<sup>27</sup> SHUY KONG, CONSUMING LITERATURE: BEST SELLERS AND THE COMMERCIALIZATION OF LITERARY PRODUCTION IN CONTEMPORARY CHINA 15 (2004).

<sup>28</sup> See Feldman, *supra* note 24 at 45–47, 53–54, 162, 248–49.

manufacturer of an audiovisual product were under protection.<sup>29</sup> However, the articles, which mentioned copyright in some legislation and administrative regulations, lack the detail that would be necessary to apply them in practice. In fact, their existence merely affirmed that the rights of author, performer and publisher were now under protection. However, the details of copyright protection were still unclear in this period, with no official documents providing the term or content of copyright. There was no reliable judicial or administrative channel for authors and publishers to resolve copyright disputes or remedy any losses.<sup>30</sup>

Under this socialist system, the only “right” authors could enjoy was the right to sign publishing contracts with state-owned press houses and receive very limited payments according to government standards. An author did not have an exclusive right to decide whether or not his/her works would be made available to the public. It was the publishing house rather than the author that ultimately decided when a work was suitable for publication. Once an author had decided to make a work public, his/her exploitation rights were virtually reduced to the right to claim remuneration according to the state standards.<sup>31</sup> Once an author’s work had been published or broadcast and the remuneration had been paid, the author then had no

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<sup>29</sup> See Mark Sidel, *The Legal Protection of Copyright and Rights of Authors in the People's Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM.-VLA J.L. & ARTS 477 (1985). Article 6 of the Audio-Visual Measures provided that:

Audio-Visual Manufactures Publication Units shall safeguard the reasonable interests of authors and performers. The remuneration rates and method of payment for artistic and literary programs shall be jointly determined by the Ministry of Radio and Television and the Ministry of Culture. Audio-Visual Manufactures Publication Units shall enjoy copyright of reproduced audio-visual materials in accordance with agreements made with authors and performers. Other units shall not duplicate, reproduce, alter or otherwise publish them without the authorization of the original Audio-Visual Manufactures Publication Units. Audio-Visual Manufactures Publication Units shall not increase remuneration, pay additional remuneration, or use other improper means to induce authors and performers to publish their programs when the authors or performers have already authorized another Audio-Visual Manufactures Publication Units to publish their programs. Original Audio-Visual Manufactures Publication Units may prosecute infringers in the judicial organs.

Interim Measures on Management of Audio-Visual Manufactures (People's Republic of China) State Council, December 1982. State Council Gazette of the People's Republic of China (1983) 15.

<sup>30</sup> Sidel, *supra* note 29.

<sup>31</sup> SANQIANG QU, COPYRIGHT IN CHINA 63 (2002).

right to interfere with the further use of his work. In practice, moreover, there was no need to pay an author or obtain his consent where an adaptation was made of a previously published or broadcast work.<sup>32</sup> Literary and artistic creations were not different from any other material resources in the centrally-planned economy. The Party-state and its propaganda organs could fix whatever prices they wanted to pay for artistic creations, and could use them for whatever purposes they liked. This institutional arrangement fitted very well into a centrally-planned information production and dissemination system. Authors, publishers, printers and bookshops all played their own parts in the centralized machine of information production and dissemination.

Copyright relations between China and Western countries in this phase were also inchoate. China had neither a unified corpus of copyright law nor a copyright treaty with Western countries.<sup>33</sup> China was not a party to either of the two major international intellectual property conventions.<sup>34</sup> Though the 1979 Sino-U.S. Trade Agreement provided leverage for the future development of Chinese copyright law, it failed to provide any level of copyright protection for American authors whose works were distributed in China at this stage.<sup>35</sup> Although the 1979 Agreement committed China to provide copyright protection for U.S. works “with due regard to international practice”, the agreement—specifically Article 6—did not specify the obligations with the requisite detail. The PRC were therefore able to adopt the position that Article 6 did not mandate the enactment of a

<sup>32</sup> See Zheng Chengsi, *The Future Chinese Copyright System and Its Context*, 15 INT'L REV. INDUS. PROP. & COPYRIGHT L. 141 (1984).

<sup>33</sup> ANDREW MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 120 (2005). (Immediately after the reopening, when Deng Xiaoping was visiting the United States in 1979, the issue of mutual protection of copyright was addressed in negotiations on the Sino-U.S. Agreement on High Energy Physics. In March, the United States and China began negotiations on a trade agreement, during which the United States again raised the issue of copyright protection, requesting that international copyright treaties be invoked to protect (U.S.) copyright in China prior to the promulgation of a copyright law.).

<sup>34</sup> In 1980 China deposited an instrument of accession with the World Intellectual Property Organization (WIPO). By joining WIPO, China might now accede to either or both conventions administered by WIPO—the Paris Convention and the Berne Convention. Accession to either convention will bring the PRC into the world community in the areas of patents and copyrights.

<sup>35</sup> Goldstein, *supra* note 15. (This agreement provided that “each party shall seek, under its laws and with due regard to international practice, to ensure to legal and natural persons of other Party protection of copyright equivalent to the copyright protection correspondingly accorded by the other Party.”); Yu, *supra* note 2.

domestic PRC copyright law which would meet international standards.<sup>36</sup> Rather, this provision was interpreted to mean that China was allowed to postpone providing U.S. works with formal protection until China formally adopted a copyright law.<sup>37</sup> Reciprocal protection under Chinese law for foreign works promised in the 1979 Sino-U.S. trade agreement also could not be given in practice because China did not have a copyright law. Foreign works could thus enjoy only limited protection in China, mainly as a matter of contractual obligation.<sup>38</sup> Unauthorized translation and reproduction of foreign works was very common in China at this stage, but because the publishing industry was relatively small and these activities were relatively opaque to outsiders, foreign pressure for China to enact a copyright law was actually fairly low.<sup>39</sup>

Whether China should enact a copyright law was still a matter of controversy within the leadership of the CCP, though some of the top leaders seemed to support moves to develop such a law.<sup>40</sup> To those Chinese officials who preferred to revert to the press control system that had been in place before the Cultural Revolution, a copyright law was unnecessary because the payment of royalties had been guaranteed under the 1980 Interim Provisions and because the

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<sup>36</sup> Goldstein, *supra* note 15.

<sup>37</sup> Opinion on Copyright Issues Concerning Current Translation and Publication of U.S. Books and Periodicals (People's Republic of China) State Administration of Publication, 15 July 1980. *See also* PETER FENG, INTELLECTUAL PROPERTY LAW IN CHINA 88–89 (2003).

<sup>38</sup> *Id* at 89. China had explicitly granted full copyright protection to some foreign corporations, which licensed their products for manufacture or distribution in PRC. Parties in privity with the PRC had thus been able to obtain redress for any copyright infringements through provisions included in licensing agreements and contracts. Through this indirect route, foreign copyright was occasionally acknowledged in practice. In arranging for the translation and licensing of the multivolume Encyclopedia Britannica, the PRC explicitly agreed by contract to give the licensors full protection in the PRC according to American copyright law; Zheng, *supra* note 32. (When Chinese Central Television bought the BBC's English language teaching program *Follow Me* for broadcasting, they also paid the BBC for the right to reprint a series of books that accompanied the programs.). *See* Feldman, *supra* note 12.

<sup>39</sup> Goldstein, *supra* note 15.

<sup>40</sup> MERTHA, *supra* note 33 at 120–21. (In April 1979 the State Press and Publications Administration requested that the State Council establish an administrative organization charged with drafting what would become China's Copyright Law. Approved by CCP Secretary General Hu Yaobang, a drafting group which was christened "the China publishers association copyright research small group" was organized to draft a tentative copyright law.); Sidel, *supra* note 29. (Other small groups of lawyers, authors, and publishers also had begun research into copyright. From the preliminary drafting these groups initiated, the probable features of the future copyright law had been sketched.).

negotiation of publishing contracts—which sometimes included copyright provisions even though no copyright law had been enacted—had resumed.<sup>41</sup> To them, “promulgating a monopolistic, Western-style, proprietary copyright law” had always been perceived “as suspect politically and economically.”<sup>42</sup> Moreover, the concept of “copyright” was not well understood by most Chinese officials. “It was regarded more as a means of regulating the publishing industry than a mechanism for protecting the right of authors.”<sup>43</sup> The first Chinese administrative regulations which provided protection for copyright in the field of the manufacture, reproduction and distribution of audiovisual materials were enacted primarily to combat the illegal import of audio and videotapes deemed unsuitable for domestic consumption by the Chinese population.<sup>44</sup> Ironically, copyright was included in this document mainly because it could strengthen government control over the fledgling audio-visual market; protecting authors’ rights was only a supplementary function.

## II

### **THE PROGRESS OF REFORM AND THE PREPARATION OF THE FIRST COPYRIGHT LAW**

#### ***A. The Progress of Reform in Information Production and Dissemination***

Between 1984 and 1991, reform advanced into almost every sector of the book industry. Shortly after the reform in the book retail sector and the paper and printing industry, the reform in state-owned publishing houses also started. It was obvious that the Party-state wanted to be more cautious in pushing reform related to the core of information production. However, financial pressure obliged the Party-state to slash subsidies to media organs and make publishing houses partially responsible for employees’ bonuses and welfare.<sup>45</sup> Facing the resulting economic pressures, a few pioneer sponsors and managers started to change the way they operated press houses.

<sup>41</sup> Sidel, *supra* note 29.

<sup>42</sup> Goldstein, *supra* note 15.

<sup>43</sup> MERTHA, *supra* note 33, at 121.

<sup>44</sup> Sidel, *supra* note 29. (The *Audio-Visual Measures* provide for the regulation of commercial records, cassette and other audiotapes and videotapes by the Ministry of Radio and Television in response to “some chaotic phenomena . . . in recent years.” “Chaotic phenomena” refers to the unlicensed import and resale of pornographic, exceptionally violent, or politically offensive videotapes, among other problems.).

<sup>45</sup> KONG, *supra* note 27, at 40.

Although all the publishing houses were still nonprofit public institutions in name, some of them started to be regarded and managed as profit-driven business by the Party-state. One of the major measures to reform the operation and management of publishing houses was the so-called “responsibility system,” under which the managers of publishing houses became responsible for making their profits reach a target set by the state; the more profit a publishing house could pay to the state, the more bonus the staff could earn. If it could not reach the target, the manager might be forced to resign and the income of the staff might be reduced.<sup>46</sup> Three years after this reform was introduced into the operation of some pioneering publishing houses in 1985, it was officially acknowledged.<sup>47</sup> In 1988 the Press and Publication Administration gave the green light to “business management in cultural institutions”,<sup>48</sup> this allowed *inter alia* for the introduction of various forms of “responsibility systems” for publishing personnel. The government also gave state-owned publishing houses a chance to compete with private and second-channel distributors and publishers by removing strict controls on book prices, wholesale discounts, and paper allocation and by encouraging marketing.<sup>49</sup>

Even as economic incentives were being introduced into publishing houses, private investment started to participate in the downstream sectors of book retail. The government started to open the provincial wholesale market to private book dealers to a limited degree in 1988.<sup>50</sup> Also in the late 1980s, the Administration of Publication began to experiment with allowing private and foreign investment into the publishing sector. Three private publishing houses were approved as an experiment in reform.<sup>51</sup> British publisher, Pergamon

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46 Zheng, *supra* note 32.

47 KONG, *supra* note 27, at 72.

48 In China, cultural institutions refer to public institutions in the culture field, such as media outlet, university, research institute, school, museum, gallery, performing troupe, and theatre.

49 KONG, *supra* note 27, at 41.

50 Fang & Xu, *supra* note 21. (The Central Propaganda Department and the State Administration of Press and Publication issued *Some Opinions about Current Book Distribution System Reform*. This document announced that private bookstores were authorized to exercise the “second level wholesale right.” In reality, however, only collectively owned bookstores whose applications were approved by the provincial publication administration could obtain this right.).

51 These three private publishing houses are Tianze, Zhuoyue, and Zhanwang. Tianze Publishing House was established by Zhou Yao, a famous scientist, in 1988, and was merged by Northwest University of Agriculture and Forest Technology Press House in

Press, invested in China Academic Publishing House in 1988, and established the International Academic Press, the first publishing joint venture in China.

This limited opening of publishing to private investment could not satisfy entrepreneurs. Many private book dealers tried to find their way into the state-monopolized publishing sector so that they could produce more books to meet market demand. This desire resonated with the publishing houses, which were also eager to pursue profit. The private publishers soon found ways to circumvent state control in collusion with the state-owned publishing houses.

One way to circumvent state control was by purchasing ‘book numbers’ from state-owned publishing houses. Book numbers in this context are actually publishing licenses for books issued by the Administration of Publication to state-owned publishing houses. A book could not (and still cannot) be legally published without a book number. After state subsidies were slashed, publishing houses were eager to find ways to ease their financial problems, but their limited expertise and resources in a market-driven mode of exploitation meant that their attempts to boost income by acting in a more entrepreneurial manner usually failed. Selling book numbers to private book dealers became the easiest way to increase their income. Most publishing houses would request more book numbers than they actually needed from the publication authority, that is, they would overestimate the quantity of book numbers required in their annual plan. From the mid-1980s to the early 1990s, there were some 1,000 to 2,000 book numbers available for purchase by underground publishers each year.<sup>52</sup>

Another way to circumvent state control was “co-publishing.” In 1984, state-owned press houses started to cooperate with outside sponsors, brokers and scholars in order to overcome the shortage of investment, personnel and expertise. Initially, the government permitted publishers to establish “cooperative publishing arrangements” only with state-owned institutions to resolve the difficulty of publishing scholarly books on science and technology, which publishing houses were reluctant to publish because of their meager sales.<sup>53</sup> In fact, this policy opened the door of legal publishing

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2002. See Bao Hong, *The Development and Bottleneck of the Private Publisher in Beijing* (Master Thesis, Tsinghua University, 2007) 37.

<sup>52</sup> LYNCH, *supra* note 18, at 86.

<sup>53</sup> See Some Opinions on Current Publishing Reforms (People’s Republic of China) The Press and Publication Administration and the Propaganda Department, May, 1988.

to private book dealers, who previously could only deal with publishing houses under the table.<sup>54</sup> At the initial stage only state-owned enterprises could act as potential sponsors. However, by borrowing the name of state-owned institutions, private brokers and intellectual elites began to get heavily involved in the publishing business, which had been monopolized by state-owned press houses for nearly thirty years.

The reforms also began to shake the relatively privileged position of those writers who were state-employed and state-salaried artists. In the mid-1980s the government began to withdraw much of its support for the cultural infrastructure. A reduction in financial allocations in real terms to the Writers Associations, the major sponsor of literary creation, broke the “iron rice bowl” of the professional writers’ system. In the second half of the 1980s, almost in tandem with the government cuts, publishing houses and major literary journals also started to reduce the publication of serious literature because of its limited readership. This exacerbated the crisis facing the literary system and forced writers to seek other means of support.

As a result of the commercialization of state-owned publishing houses and the development of private publishing, publishing had become more demand-driven. By the mid-1980s, a huge market of popular literature had been created, dominated by translation of foreign fiction, Chinese martial art novels from Hong Kong, Taiwanese romances, and pulp fiction filled with sex and violence, either imported or locally produced. For the first time in several decades, the book market was offering ordinary Chinese readers light entertainment; before this only serious literary fiction had been available.<sup>55</sup> Some writers also started to write for the popular literature market. However, because most authors and artists still largely relied on the state patronage system, and because the private publishing sector (where most popular books originated) was still largely illegal or semi-legal, many authors remained reluctant to write for this market. An important cultural factor may also have been at work—commercial publication and the notion of earning money from the sales of literary works had still not found favour in the mainstream literary circles.<sup>56</sup> Against this background, the conditions for introducing a Western model of copyright law into China had been

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<sup>54</sup> KONG, *supra* note 27, at 40.

<sup>55</sup> KONG, *supra* note 27, at 15.

<sup>56</sup> KONG, *supra* note 27, at 16–22.

met at this stage. The legislative process of copyright law also reflected this historical limitation.

### ***B. The Drafting Process of the First Copyright Law in PRC***

Before the reforms began, all participants in the information production and dissemination system were integrated into a centralized, pervasive, and all-embracing communication network, and served the central propaganda plan. In this system, the hegemony of the Party-state overwhelmed the property rights of each and every individual. For example, the order of the publishing industry relied on bureaucratic planning and informal agreements among major Chinese publishers. There was a clear division of work between different publishers. In these circumstances no publisher would reproduce another publisher's book. With the introduction of competition and profit incentives into this system in the late 1970s and the early 1980s, the balance was upset. Driven by the pressure of competition and the temptation of profit, reproduction of books and other writings and translations without the permission of the original authors or original publishers started to become widespread. Some authors were not paid the royalties stipulated under the *Interim Provisions 1980*. Conflicts over ownership and unauthorized editing of manuscripts arose.<sup>57</sup> The majority of the popular literature consisted of pirated copies of popular books from Western countries, Hong Kong and Taiwan. However, in the absence of national legislation protecting copyright and other rights of authors, Chinese courts were reluctant to accept jurisdiction over cases involving reproduction without permission, unpaid royalties, and disputes over authorship and unauthorized editing.<sup>58</sup> This chaotic situation could not be resolved under the traditional socialist legal framework, which lacked a clear definition and understanding of the rights of different participants in the information production and dissemination system. This situation caused growing internal and external pressures for a copyright law to define the rights of authors and publishers under circumstances of market competition.<sup>59</sup> Thus, the Chinese government was pushed to take a number of steps to promote the rights of authors in response to both domestic and foreign political and economic pressure.<sup>60</sup>

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<sup>57</sup> Huang Qinnan, On Protecting Author's Rights, (1983) 25 *Studies in Law* 47.

<sup>58</sup> Sidel, *supra* note 29.

<sup>59</sup> Sidel, *supra* note 29.

<sup>60</sup> Goldstein, *supra* note 15.

Because of the complexity of the reform in the cultural and media sectors, the drafting process for a copyright law was much more tortuous than the drafting process for a trademark law or a patent law. While a trademark law was promulgated in 1982 and a patent statute in 1984, the government only decided to issue a very limited trial measure as the first step to advance copyright protection in China in 1984. On June 15, 1984, the Ministry of Culture issued the *Trial Regulations on Copyright Protection of Books and Periodicals* (hereafter *Trial Regulations*), effective from January 1, 1985, and followed with the *Implementing Rules of the Trial Regulations*.<sup>61</sup> As the first administrative regulation systematically protecting copyright in the PRC's history, however, the *Trial Regulations* was a classified document, which could not be published nor disclosed to foreigners. Even the title of the *Trial Regulations* could not appear in media reports, so as not to attract too much foreign attention. Because of its classified condition, the *Trial Regulations* attracted little scholarship both at home and abroad, but its significance as the first comprehensive copyright rules in PRC should not be denied.<sup>62</sup> Its contents cover almost every important aspect of a modern copyright system.

As was indicated in its title, the *Trial Regulations* only applied to literary, artistic and scientific works created by Chinese citizens and published as books or in periodicals by state publishing units. It did not however deny the copyright of unpublished works, or works published as other than books or periodicals. Nor did it require any formality such as registration as a condition of copyright protection. Its *Implementing Rules* further provided that unpublished works and works published other than as books or periodicals could obtain copyright from laws or regulations issued by other state organs. Thus, some commentators claimed the principle of automatic protection was then instituted in China's copyright system.<sup>63</sup>

Under the *Trial Regulations*, authors enjoyed both moral rights and economic rights. Moral rights included the right of publication, the right of paternity, the right of integrity, the right of alteration, and the

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<sup>61</sup> *Trial Regulations on Copyright Protection of Books and Periodicals* (promulgated by the Ministry of Culture, June 15, 1984) MOC 84 84 no. 849 (China); *Implementing Rules of the Trial Regulations on Copyright Protection of Books and Periodicals* (promulgated by the Ministry of Culture, Jan. 1, 1985) MOC 84 84 no. 850 (China); Lin & Mingshan, *supra* note 8, at 337–42.

<sup>62</sup> FENG, *supra* note 37, at 52.

<sup>63</sup> FENG, *supra* note 37, at 52.

right to withdraw a work from circulation (a right which, interestingly, did not find its way into the 1990 Copyright Law). Economic rights included the right of exploiting one's work by publication, reproduction, broadcasting, performance, exhibition, making a film, translation or adaptation, the right of authorizing others to exploit one's work, and receiving remuneration therefrom.<sup>64</sup> Moral rights were perpetual. After the author's death, they were to be protected by the author's legal heir or a competent state authority. The economic rights were protected for the author's life and 30 years thereafter or, in the case of works owned by state or a collective unit, for 30 years from the date of first publication.<sup>65</sup> All economic rights were assignable and inheritable, but agreements to assign or license rights to foreigners were required to be filed with competent authorities for approval—in practice this meant that transactions had to be approved by the provincial publishing authority or by the relevant authority of the State Council, and registered at the Culture Ministry.<sup>66</sup>

A broad range of limitations on copyrights were provided in the *Trial Regulations*, which include fair use exceptions, and statutory license provisions. In addition to providing for almost all the categories of fair use recognized subsequently in the 1990 Copyright Law, the fair use defenses in the *Trial Regulations* also included compiling, adapting, or translating published works as textbooks for school, broadcasting and extracurricular education. Newspapers, radio stations, and television stations were also allowed to reprint or broadcast published books without permission from and without payment of remuneration to the copyright owners, provided that the name of the authors and the title and the origination of the work were mentioned and the other rights enjoyed by the author by virtue of the Regulations were respected.<sup>67</sup>

In addition to the substantive provisions dealing with copyright protection, the *Trial Regulations* also laid out remedies for copyright infringement and legal procedures to be followed in copyright disputes. Specifically, the *Regulations* provided that authors and copyright owners could request provincial publication administrations to hear disputes. Anyone found to have committed a copyright infringement could be required to cease the infringing act, make a

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<sup>64</sup> *Trial Regulations*, *supra* note 61, art. 5.

<sup>65</sup> *Trial Regulations*, *supra* note 61, art. 11.

<sup>66</sup> *Trial Regulations*, *supra* note 61, art. 13.

<sup>67</sup> *Trial Regulations*, *supra* note 61, art. 15.

public apology, pay damages by way of compensation, or be fined or have unlawful income confiscated.<sup>68</sup>

Though classified, the *Trial Regulations* appear to have been widely applied in both administrative settings and judicial proceedings. However, since the *Trial Regulations* addressed only a limited range of subject matter, that is, books and periodicals, there were a large number of “copyright” type disputes and “copyright” dealings that fell outside their scope. In September 1986 this led the Ministry of Radio, Film and Television to issue the *Interim Regulations on Copyright Protection of Audio-Visual Products*, a significant step towards a more comprehensive copyright system, effective from January 1, 1987, as a supplement to the system for books.

The promulgation of the *General Principles of Civil Law* in 1986 marked another milestone, as through these Principles copyright protection found an important “source.” Article 94 of the General Principles provided the PRC’s first major public recognition of copyright, albeit in the most general of ways. This provision, which is still in force, indicates that “citizens and legal persons shall enjoy rights of authorship (copyright) and shall be entitled to sign their names as authors, issue and publish their works and obtain remuneration in accordance with the law.”<sup>69</sup> The operative terms, however, are not defined and no more is said about copyright in the *General Principles*. Nevertheless, this provision was important because as a consequence of its introduction the copyright bureau and the courts could now invoke public statutory authority in support of their decisions, while continuing in substance to analyze and apply the *Trial Regulations*. During the four and a half years between the promulgation of the *General Principles* and the effective date of the 1990 Copyright Law, 500 court cases and 400 administrative actions touching on authorship were resolved.<sup>70</sup> Much of China’s theoretical as well as practical experience with copyright derives from this formative period, and many provisions of the Copyright Law were formulated on the basis of this experience.<sup>71</sup>

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<sup>68</sup> *Trial Regulations*, *supra* note 61, art. 20.

<sup>69</sup> General Principles of Civil Law (promulgated by Order NO.37 of the President of the People’s Republic of China, art. 94 Apr. 12, 1986). The English translation of Art. 94 is cited from the official translation provided by Chinese government.

<sup>70</sup> ALFORD, *supra* note 1, at 77.

<sup>71</sup> FENG, *supra* note 37, at 49–51.

Although the above-mentioned administrative regulations and legislation laid a foundation for the birth of the first copyright law in the PRC's history, the subsequent process of drafting the copyright law was still tortuous. Termed as "the most complicated" in the PRC'S history by NPC Vice President Wang Hanbin, more than twenty drafts of a copyright law were produced,<sup>72</sup> many of which differed substantially from one another.<sup>73</sup> The difficulty of the drafting process reflected tensions between different groups, the demarcation of which revolved mainly around two fundamental issues. First, there were disagreements about the appropriateness of establishing new private property rights in what was still a socialist society.<sup>74</sup> Politically orthodox central government officials were also concerned about how any newly created copyright system would impact on censorship, the income and personnel system for authors, and the dominant status of state-owned media. At stake, to their mind, was the entire press control system.<sup>75</sup> The second concern related to the costs and benefits for China of establishing a copyright system. For example, the draft copyright law was bitterly opposed by government units with responsibility for science, technology and education. In particular, the State Science and Technology Commission feared the consequences of losing the ability to access the unauthorized copies of foreign copyrighted materials that China had enjoyed up to that time.<sup>76</sup>

Intellectual property negotiations between China and the United States played out in such a way as to ease the tension related to the second issue. The United States "insisted that China establish a copyright law as a condition for renewing the U.S.-China Bilateral Trade Agreement in 1989".<sup>77</sup> The State Science and Technology Commission, up to that point one of the principle opponents to the draft copyright law, wished to secure further bilateral science and technology exchanges with the United States and did an abrupt about-

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<sup>72</sup> According to Zheng Chengsi, a member of the drafting committee, of more than thirty drafts of the Copyright Law, almost twenty were drafted after the Copyright Administration handed the drafting to the Legal Bureau of the State Council which in turn handed the drafting to the Legal Working Commission of the Standing Committee of the National People's Congress; see ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA 60 (Sydney: CCH, 1991).

<sup>73</sup> ALFORD, *supra* note 1, at 78.

<sup>74</sup> ALFORD, *supra* note 1, at 77.

<sup>75</sup> The debates surrounding these issues will be discussed in the next part of this paper.

<sup>76</sup> Mertha, *supra* note 33, at 124.

<sup>77</sup> Mertha, *supra* note 33, at 124.

face, becoming one of the strongest proponents of the copyright law.<sup>78</sup> However, the Sino-U.S. intellectual property negotiation had little influence on the debates surrounding the first issue. Debates between authors and the state-owned media lasted to the last day before the vote on the Draft Copyright Law. On September 7, 1990, at the Fifteenth Plenum of the Standing Committee of the Seventh National People's Congress, the People's Republic of China promulgated the first copyright law in its history, with 102 votes in favor and ten opposed or abstaining. The moment marked not only the end of the tortuous drafting road of copyright law, but also the start of a long journey to improve the legislation and enforcement of copyright.

The acceptance of the copyright system was a truly historical event, for it would inevitably lead to fundamental changes in "the mode of production, acquisition and circulation of information and knowledge in Chinese society".<sup>79</sup> Of all civil rights that have been established in PRC system, copyright came closest to challenging the Party-state's press control system.<sup>80</sup> The new status and rights vested in authors by the 1990 Copyright Law meant, at least in theory, the reduction of the power of the Party-state to control literary and artistic creation.

However, China was still on the eve of profound social and economic changes when the first copyright law was passed. Market-driven publishing was only a marginal, even despised, area that was not only strongly controlled but also repeatedly suppressed by the Party-state. The Communist Party still exercised ideological control over authors, artists, and other culture workers, and had economic control over their life in terms of salary and social welfare. Limited by the general course of political and economic reform, not only did the provisions of the Copyright Law still bear the strong imprint of the press control system, there was also limited space and incentives for authors to pursue profits in the market. Without a market for copyright, the rights granted by copyright law are nominal and cannot be used to make market profits via circulation. Authors can usually only gain fixed remuneration from state-owned publishing houses according to national standards.

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<sup>78</sup> Mertha, *supra* note 33, at 124.

<sup>79</sup> FENG, *supra* note 37, at 67.

<sup>80</sup> FENG, *supra* note 37, at 51.

*C. Imprint of Press Control on the First Copyright Law of PRC*

Though compared with the start-up phase the level of commercialization in the media industry increased when the first Copyright Law was passed, the core of the press control system had not changed too significantly. As a result, the provisions of the 1990 Copyright Law of the PRC bore the strong imprint of the preexisting press control system. The influence of press control was mainly reflected in three categories of provisions in the Copyright Law of China. The “Banned Works Provision” was the embodiment of censorship in Chinese copyright law. The provisions on authors’ remuneration and service works were influenced and affected by state patronage. The provisions that granted special status and privileges to media institutions embodied the state monopoly on the publishing industry. The investigation of the influence and legislative background of these provisions will illustrate not only the impact of the press control system on copyright law, but also the efforts of copyright owners to shake free from the restrictions of press control.

*1. Censorship Provision*

The orientation of the Chinese Communist Party’s cultural policy has always been clear. The cultural policy that CCP has persistently adhered to since 1949 is to encourage ideologically correct literary and artistic creation, and to suppress those creations deemed pernicious to communist governance. As a newly adopted piece of legislation that had a strong influence on cultural production, copyright law in China also needed to be seen to further the cultural policy of the CCP and hence to mesh with the various censorship provisions contained in other laws and administrative regulations. The first article of the 1990 Copyright Law that embodied the purpose of the law and the constitutional basis for the law clearly reiterated the thrust of the CCP’s cultural policy. This article indicated that the purpose of copyright law is to encourage the creation and dissemination of works that would contribute to the construction of a socialist spiritual and material civilization, and to promote the development and flourishing of socialist culture and sciences. This provision further implied that works, which could not contribute to achieving this purpose, might not be encouraged. Based on the general principle established in the first article, the fourth article further clarified the scope of works that are not protected by Chinese copyright law. According to this provision (the “Censorship Provision” hereafter), as it was then, “[w]orks the publication or distribution of which is prohibited by law shall not be protected by

[Copyright] Law.” Via this provision, censorship is inserted into the heart of China’s copyright law. The legislative history of this article illustrates the confrontations and negotiations that took place between groups keen to grant more property rights to authors, and other groups who did not want to give up strict control over the flow of information.

The “Censorship Provision” was not contained in the initial draft of the Copyright Law, and there is no evidence showing that the drafters were willing to include it. For example, in the *Ten Main Points of the Copyright Law* and other drafts that were sent for comment to the World Intellectual Property Organization and the International Copyright Society by the National Copyright Administration before 1989, no censorship provision was mentioned.<sup>81</sup> However, at the end of 1989 after the Tiananmen Square Protests, the Communist Party launched political campaigns to strengthen ideological and press control. A movement was initiated to sweep away “reactionary” books, periodicals, decadent music and pornographic films and videos. To concerned propaganda officials and cultural regulators, such control was necessary for the sake of economic planning and “politico-ideological education” of the people. Ideological issues were raised by many conservative elements in the government in the aftermath of the Tiananmen Square incident. They felt that the copyright debate involved issues of ideological correctness and such issues should be explicitly addressed in the Copyright Law.<sup>82</sup> In such an atmosphere certain delegates to the National People’s Congress suggested that copyright should not lend protection to works with pernicious content, and the extent to which copyright works would be subject to government control should be clarified in the draft copyright law.<sup>83</sup>

In contrast, copyright proponents argued that “ideological issues should not clutter up the Copyright Law—that the Copyright Law should not be used as a blunt instrument for meting out punishment for ideological crimes—and that such issues should be covered by the Criminal Act.”<sup>84</sup> The drafters from the National Copyright Administration tried to convince the People’s Congress to use a better formulated provision in place of a baldly stated censorship provision.

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81 See Zheng & Pendleton, *supra* note 72, at 80.

82 See Mertha, *supra* note 33, at 125.

83 See Zheng & Pendleton, *supra* note 72, at 80.

84 Mertha, *supra* note 33, at 125.

Following the interpretation by WIPO on Article 17 of the Berne Convention,<sup>85</sup> they suggested drafting Article 4 as “Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interest.”<sup>86</sup> To convince those delegates of the People’s Congress in the debating process of the Standing Committee, Shen Rengan, the then deputy head of the State Administration of Copyright and one of the drafters of the copyright law, explained that censorship on pornographic and reactionary books should be provided by publication law instead of by copyright law, that copyright would not inhibit the existing regime of planning and censorship, and only the mode of control would have to change somewhat. He even used the 1928 Copyright Law of the Nationalist government as an example to illustrate that copyright law could be harmonized with the continuation of censorship.<sup>87</sup> Although most conservative Party officials could barely comprehend copyright,<sup>88</sup> in a politics charged debate they still defeated the drafters of the copyright law who tried to separate copyright law from censorship. The resulting compromise yielded Article 4 of the Copyright Law, which maintains a strong-form “censorship provision” (in the first paragraph) but has tacked on (in the second paragraph) the suggestion of the Copyright Administration. As a consequence, Article 4 provides both that works banned from publication or dissemination in accordance with the law are not protected by the copyright law, and the use of copyright shall not violate the Constitution and laws or contravene the public interest.<sup>89</sup>

<sup>85</sup> In Guide to the Berne Convention, WIPO states as follows regarding Article 17.2 of the Berne Convention (1971):

It covers the right of governments to take the necessary steps to maintain public order. On this point, the sovereignty of member countries is not affected by the rights given by the Convention. Authors may exercise their rights only if that exercise does not conflict with public order. The former must give way to the later.

The Article therefore gives Union countries certain powers of control.

World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) § 17.2 (1978).

<sup>86</sup> Zheng & Pendleton, *supra* note 72, at 81.

<sup>87</sup> See LECTURES ON COPYRIGHT LAW 17–27 (Supreme People’s Court eds., Law Press 1991); Shen Rengan, *Recall the Major Controversies in the Drafting of the Copyright Law of PRC*, 5 CHINA COPYRIGHT (2008).

<sup>88</sup> A report about the legislative process of the 1990 Copyright Law vividly records how the drafters of copyright law tried to use very simple language to illustrate the concept of copyright to Premier Li Peng, the most recognized representative of the conservative group in CCP. Wu Haimin, *Towards Berne: The Memorandum of Copyright in China* (1992), <http://www.shuku.net/novels/baogaowenxue/zxberni/zxberni.html>.

<sup>89</sup> See Feng, *supra* note 37, at 64–65.

## 2. State Patronage

### a. Remuneration—State Standards

The author's remuneration system is another feature that the new copyright system inherited from the press control system. By incorporating artists and intellectuals into the state-owned work unit system, the Party-state controlled their regular income. By setting down the state standards of authors' remuneration, the Party-state further controlled the authors' fringe benefits from their intellectual creations. These two systems working together made authors completely reliant on state patronage. From 1984 to 1991, the level of authors' remuneration was raised several times. In 1984, the Culture Ministry issued *The Trial Provisions on the Authors' Remuneration of Books*, in which the level of the authors' remuneration reached double the level that it had been under the 1980 Provisional Regulations.<sup>90</sup> In 1990, the National Copyright Administration issued *The Provisional Provisions on the Author's Remuneration of Books*, in which the level of the author's remuneration was raised again.<sup>91</sup> However, compared with the remuneration rules in the 1950s and the 1960s, the methods of payment were still largely unchanged, comprising basic remuneration based on the quantity of characters, and print-run remuneration based on the number of printed copies.

In principle, the 1990 Copyright Law reaffirmed the dominant role of the state system of remuneration. According to Paragraph 1 of Article 27 of the 1990 Copyright Law, the rate of remuneration for the exploitation of works was to be established by the copyright administration department under the State Council jointly with other departments concerned.<sup>92</sup> This clause means that the state plays a

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<sup>90</sup> In Provisional Regulations on Remunerations for Book-Writing (promulgated by the National Publishing Administration, Apr. 1980) (China), the basic remuneration was 3-10 Yuan per 1000 characters for original works; the print-run remuneration was 3 percent of the basic remuneration per 10,000 copies within 50,000 copies. In 1984 Trial Provisions, the basic remuneration was raised to 6-20 Yuan per 1000 characters for original works; the print-run remuneration was 5 percent of the basic remuneration per 10,000 copies within 20,000 copies and 4 percent of the basic remuneration per 10,000 copies from 20,000 to 50,000 copies.

<sup>91</sup> In 1990 Provisional Provisions, the basic remuneration was raised to 10-30 Yuan per 1000 characters for original works; the print-run remuneration was 8 percent of the basic remuneration per 10,000 copies.

<sup>92</sup> Some scholars argue that the legislative intention of Article 27 was to provide authors with some minimum protection, and the state standards were so set as to be the bottom-line of an arms-length bargain for an author's remuneration. However, the

more important role than the market in determining an author's income, and thus was criticized by some commentators as curtailing authors' economic rights. As Alford pointed out, "the state standards of remuneration meant that even those authors able to enjoy their economic rights were essentially limited to receiving no more than the rather modest and uniform levels of compensation set by the state, irrespective of the individual merit of their work."<sup>93</sup>

Meanwhile, however, the 1990 Copyright Law also heralded changes in the state remuneration system even while signaling its continuing dominance. Paragraph two of Article 27 provides that where it is otherwise agreed to in a contract, remuneration may be paid in accordance with the terms of the contract. This means that the parties may agree on schemes of remuneration by contract either lower or higher than the state standards. This clause increased the flexibility of the state remuneration system, preparing a space for potential reform. Before 1990, royalties provisions had already become very common in the publishing contracts between Chinese press houses and foreign authors, and between Chinese authors and foreign press houses. In an increasingly commercialized domestic publishing industry, it was predictable that sooner or later royalties, a more market-driven payment method, would be incorporated into contracts between Chinese press houses and Chinese authors.

#### *b. Work Unit–Service Works*

Defining the relationship between authors and their work units was probably the technically difficult part of drafting China's Copyright Law.<sup>94</sup> During the drafting process the relationship between authors and their work units was changing rapidly with the advance of economic reform. Questions surrounding how the provisions concerning employee works should be drafted were reported to have generated serious debates.<sup>95</sup>

In the traditional press control system of the Communist Party, work units were designed as the intermediate agents to convey the Party's orders to intellectuals and artists, but in practice these units served as organizations that controlled almost all aspects of the lives

practices in publishing industry do not support this opinion. See Feng, *supra* note 37, at 114.

<sup>93</sup> Alford, *supra* note 1, at 79.

<sup>94</sup> See Zheng & Pendleton, *supra* note 72, at 134.

<sup>95</sup> See Gao Hang, *China's Forthcoming Copyright Law*, CHINA BUSINESS REVIEW 15, July-Aug. 1988, at 53.

of authors and artists. Authorial creation was a vehicle of ideology and propaganda, and was hence required to comply with the administrative planning and personnel arrangements laid out by the work unit itself or the Party organization higher up in the hierarchy. This was especially true in the case of more important cultural and propaganda projects, such as films, television programs and memoirs of revolutionary veterans. The theory behind this system was that an author would not be able to create a work without the basic material and technical means created by others for the author, not to mention the knowledge and information that the author constantly learned from others. All fruits of mental and manual labour were therefore directly or indirectly born of collective endeavour for the collective cause.

This theory had a strong influence during the early stages of the drafting of the copyright law. The opposition to the law was mainly tied to extant egalitarian ideology. Virtually all Chinese authors, most of whom were specifically employed as writers by the Party-state, received some sort of salary from their work units, had the right to freely make use of materials owned by the state for their creative activities, and some could even make use of the human resources provided by the state. Hence, granting authors additional rights to compensation through copyright ownership was criticized as overcompensation. Absence of labor mobility in China constituted another reason for objection to the establishment of copyright in China.<sup>96</sup> Many Chinese authors held their positions merely because they were assigned to do the work by the state. Some people argued that it was unfair that one person be assigned to a position and receive additional payments (remuneration) while another must work harder yet only draw his salary, particularly as under the then existing personnel system, it was difficult for a person to change his job once he was assigned.<sup>97</sup>

These objections reflected a fear of the impact of copyright on the functioning of the employing unit and, further, on the press control system. Under the previous press control system, literary and artistic creation was a duty assigned by the Party-state to authors. It was the Party-state and its apparatuses, not the authors, which had the authority to decide how to use these cultural products. Copyright then

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<sup>96</sup> See Zheng Chengsi with Michael D. Pendleton, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 115 (Sweet & Maxwell, 1987).

<sup>97</sup> *Id.*

put the long-standing political, ideological and moral norms to the test by applying new legal concepts and rules to the work unit-author relationship, and drawing a clear boundary between an author and the unit and between units.<sup>98</sup>

Debate has raged over whether authors should be entitled to profit from work done on the job. The legal right of the individual over their copyright works against their work units was a flashpoint of debate throughout the 1980s.<sup>99</sup> Some famous disputes reflect the typical problems that appeared in practice. First is the definition of "service works." In the *Zuo Yandong* case, Zuo Yandong, the author of *The History of Chinese Political Institutions*, signed a publishing contract with Zhejiang Press House of Ancient Books. His work unit, the Archive Academy, claimed the book was a service work, as writing the book was a job assigned to the author by the work unit. Therefore, without the authorization of the work unit, the author had no right to sign the publishing contract.<sup>100</sup>

A second problem concerned what kind of rights the author of a service work could have. In the *Ma Yixiang* case, two former assistants or "ghost writers" were assigned to help a Long March woman soldier write her memoirs. The ghostwriters claimed coauthorship and additional remuneration. At the time of creation of the disputed work, both plaintiffs were staff of a propaganda unit of the People's Liberation Army (PLA), and the assignment was ordered for an anniversary of the PLA.<sup>101</sup> In the *Zhang Zeyu* case, a film director was dismissed halfway through a film's production for alleged adultery. His name was consequently removed from the film pursuant to established official propaganda policy and studio rules. The director took his work unit, the Beijing Film Studio, to court, demanding restoration of his name to a film as a copyright. At the last reporting of the case in 1994, the matter was still unresolved.<sup>102</sup>

One approach to these issues is the model found in Eastern European copyright laws. There, the general approach is to view the author as the original copyright owner who, through legislation,

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<sup>98</sup> See Feng, *supra* note 62, at 52–53.

<sup>99</sup> See Mertha, *supra* note 33, at 122.

<sup>100</sup> In this case, Zuo Yandong, the plaintiff, won the legal proceeding. The court decided that the plaintiff's work was not a service work, and its copyright was solely owned by the plaintiff. See Wu Haimin, *supra* note 88.

<sup>101</sup> Tan Shizhen & Lin Zhiyi v. Ma Yixiang, (Huaihua Prefecture Ct., Hunan, 1989) (China); see Feng, *supra* note 62, at 53.

<sup>102</sup> Zhang Zeyu v. Beijing Film Studio, Civil First No 912 (Haidian District Court, Beijing 1985); see also Feng, *supra* note 62, at 52.

assigns his economic rights to his unit. The relevant provision of the *Trial Regulations* provided that works published in the name of the unit belonged to the unit.<sup>103</sup> In a draft Copyright Law disclosed in 1988, copyright to a work created within the scope of the author's employment remains the property of the employer.<sup>104</sup>

However, some scholars doubted this approach on the basis that it would significantly compromise the rights enjoyed by authors. As few authors in China were freelance, if the copyright in works created in employment generally belonged to the employer, then very few authors would actually own copyright. Copyright would thus be meaningless.<sup>105</sup> Some eclectic approaches were proposed in different drafts of copyright law in the second half of the 1980s. A draft circulated in April of 1987 tried to bring about an interesting balance in that copyright was initially granted to the employer when work represents the will of the unit, is created under its guidance, and where the unit bears full responsibility for the content of the work. In other cases, the author would retain the copyright, but would not use the work in the same way the unit did. If such a work went unused within two years after its completion, the entire copyright would revert back to the author.<sup>106</sup> The Main Points of a Proposal by the National Copyright Administration that was drafted in 1986 provided that copyright in works created within the scope of employment or in the fulfillment of one's duty would belong to the author, unless the work was created under the specific instruction of the employer with its content representing the will of the employer who bore responsibility for the content, in which case the copyright would belong to the employer. Where the copyright in a work made as an official duty belongs to the author, the unit that the author was working at, in performing his/her function, would enjoy priority in using the work without the author's consent. And the author, without the unit's consent, would not be allowed to transfer or authorize the use of the work to a third party who might use the work in the same way as the unit.<sup>107</sup>

The final version of copyright law integrated these two approaches, which resulted in Article 16. Under Article 16, a work created by a

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<sup>103</sup> 1984 Trial Regulations, *supra* note 61 art. 7, para. 2.

<sup>104</sup> See Gao, *supra* note 95, at 53.

<sup>105</sup> See Wu Haimin, *supra* note 88.

<sup>106</sup> See Joseph T. Simone, *Copyright in The People's Republic of China: A Foreigner's Guide*, 7 CARDozo ARTS & ENT. L.J. 1 (1988).

<sup>107</sup> See Zheng & Pendleton, *supra* note 72, at 233.

citizen in performing duties assigned to him by his work unit is deemed to be a work created in the course of employment. The copyright in such a work is enjoyed by the author, provided that the employer has a right of priority to exploit the work within the scope of its professional activities, except that work created in the course of employment mainly with the material and technical resources of the author's work unit and under its responsibility is to be owned by the employer. During the two years after the completion of the work, the author may not, without the consent of his work unit, authorize a third party to exploit the work in the same way as the work unit.

Compared with earlier drafts, the resolution in the 1990 Copyright Law appeared to define "service work" more clearly, and enlarged the author's rights in such work. In the 1990 Copyright Law, the author's relationship with the work unit is redefined. Copyright renders the author's creation of a work primarily a private act, unless it comes within a specific assignment or contractual relationship.<sup>108</sup> However, due to the largely unchanged income and personnel system, the effect of the Copyright Law in clarifying the relationship between author and work unit was compromised. The priority of the work unit to exploit service works is criticized by some commentators as representing a marked limitation on author's copyright, for most authors had been and still were "cultural workers" in state-owned work units when the 1990 Copyright Law was enacted.<sup>109</sup> After the promulgation of the 1990 Copyright Law, a large majority of authors still worked in the state-owned work unit system. Such relationship is traditionally not based on contract, and few authors had labour contracts with their employers. Strictly speaking, it should not be called "employment" but rather, as in common parlance, a "job assignment"—a strictly rationed posting of lifetime service. Without a clear contractual relationship, the boundary of the work relationship in the unit might be blurred, and it would be difficult for Article 16 to be applied in practice.

Meanwhile, the relationship between authors and their work units was changing with the advance of economic reform. The incomplete nature of the reform made the relationship between authors and their work units more complicated and confusing. For example, in the late 1980s and the early 1990s, many authors were able to take concurrent appointment or "loan" themselves to more entrepreneurial units (as well as have their own businesses), while keeping their original unit

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<sup>108</sup> See Feng, *supra* note 62, at 52–53.

<sup>109</sup> See Alford, *supra* note 1, at 78.

job for housing and health care benefits.<sup>110</sup> In this situation, it is hard to discern which would comprise an individual's "real" work unit, and difficult to determine if a given work is a service work created within the course of employment.

*c. The Last Emperor Case: The Difficulty of Redefining the Relationship Between State and Author*

Throughout the second half of the 1980s, Chinese authors and artists, alive to the importance of copyright, constantly tried to redefine their relationship with the Party-state so that they could enjoy copyright more independently and relatively free from state intervention. However, the Party-state was reluctant to give up its extensive control over the lives of authors and artists, and grant complete copyright to them. The tension between the Party-state and authors is reflected in many copyright disputes in this period. As an example, *The Last Emperor* case,<sup>111</sup> China's longest-running copyright dispute, shows how difficult it could be for Chinese authors to challenge the state-unit-author relationship defined by the old press control system.

While in prison, Aisin-Gioro Pu Yi, China's last emperor, wrote a confession entitled *The First Half of My Life*. After his release from prison, he was invited to improve the confession and turn it into an autobiography. Assistance came from the Masses Press, then the publishing arm of the Ministry of Public Security. Li Wenda, an editor of the Press, was assigned to help Pu Yi. The book retained the original title of the confession (with the English title *From Emperor to Citizen*), and was published in 1964. Although Pu Yi was the only stated author on the book, Li Wenda shared the author's remuneration for the first edition of the book with him on a fifty-fifty basis. Pu Yi died in 1967. Madame Li Shuxian, Pu Yi's widow, was his only heir.

In 1984, the filming of *The Last Emperor* ushered in a long-running copyright dispute. Representing the press, Li Wenda signed an agreement to sell the film rights in the autobiography to Bernardo Bertolucci, an Italian film director. However, Madame Li Shuxian,

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<sup>110</sup> See Feng, *supra* note 37, at 89.

<sup>111</sup> Li Shuxian v. Li Wenda, Wang Ying et al. (Beijing High People's Court, IP Appeal No. 18, 1995) (China); see COMMENTS ON INTELLECTUAL PROPERTY CASES OF THE PEOPLE'S SUPREME COURT 367–87 (The Third Tribunal of the People's Supreme Court eds., Intellectual Property Publishing House 2001); ZHENG CHENGSI, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY 61–68 (Sweet & Maxwell Asia, 1997); Feng, *supra* note 62, at 70–71.

claiming to be the sole owner of the copyright, objected to this license and sold the film rights to a Hong Kong director. In March 1985, the Ministry of Public Security (MPS), the administrative unit of the Masses Press, sent a letter to the Copyright Office of the Ministry of Culture (MOC) requesting consultation about the ownership of the copyright of Pu Yi's autobiography. In November 1985, the National Copyright Administration (NCA) issued an official document in reply to the MPS and ruled in the following terms:

*The First Half of My Life* is a joint work created by Pu Yi and Li Wenda, the relationship between whom is not author and editor but co-authors. Li Wenda was an anonymous co-author when the book was published. Therefore, copyright of this book shall be owned jointly by Pu Yi and Li Wenda.<sup>112</sup>

According to this decision, the Masses Press paid the reprinting remuneration and the royalty from the film rights to Madame Li and Li Wenda on a fifty-fifty basis. Li Wenda was satisfied with this result; Madame Li was not.

On April 25, 1989, Madame Li filed suit. The Beijing Intermediate People's Court reportedly considered two theories, both based on the forthcoming Copyright Law 1990. Based on the "commissioned work" theory, Pu Yi was the sole author, commissioned by the Press to produce the work. The defendant was a cadre of the commissioning Press on assignment to help Pu Yi, and the remuneration was to compensate his work, not to imply co-authorship. Based on the "joint authorship" theory, however, the defendant was a joint author because the book was the fruit of close collaboration. That it was published under Pu Yi's name did not mean the defendant relinquished his rights. In 1965, the defendant also revised the book "pursuant to needs of propaganda to foreigners" for an English translation. Thus, he exercised a right that only an author could enjoy. Moreover, after publication, the Masses Press in its internal circular formally recognized the defendant as an actual writer, a matter Pu Yi never disputed.<sup>113</sup>

Because this case was so controversial, the court consulted broadly before reaching a decision. The preliminary opinion of the trial committee of the Beijing High Court was that Pu Yi and Li Wenda were co-authors of the book and thus should own the copyright jointly. NCA and the experts from the Legal Committee of the

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<sup>112</sup> National Copyright Administration official document, (85) Right No. 6, 4 Nov. 1985.

<sup>113</sup> See Feng, *supra* note 37, at 70–71.

National People's Congress also held the same opinion. Zheng Chengsi, the leading copyright expert from the China Academy of Social Sciences, thought Li Wenda should be the co-author of the book, but not the co-owner of the copyright. In order to settle this dispute more carefully, the Beijing High Court decided to ask the Supreme Court for instruction.<sup>114</sup>

Being concerned about the political consequences, which might flow from a declaration of coauthorship, the Supreme Court adopted the view that Pu Yi was the sole author of the book and the sole owner of copyright. In its instruction to the Beijing High Court, the Supreme Court expressly pointed out that "social implications" in particular should be considered carefully when reaching the decision in this case. In his autobiography, Pu Yi had exemplified the great success of the Party-state in rehabilitating war criminals. If the autobiography were deemed to have been coauthored, this would have significant negative political implications.<sup>115</sup>

The copyright dispute over Pu Yi's memoirs is a residual problem from the previous totalitarian pattern of information production and dissemination. In that era, literary creation was not based on the independent decision of an author, but on the organization of the Party-state. The author, no matter whether it was Pu Yi or Li Wenda, had no right to claim his copyright, but had to accept whatever was assigned by the Party-state. The newly established copyright system which was based on the clear boundary of personal rights certainly provides not only a new basis for authors to doubt the socialist system, but also economic incentives for authors to challenge the assignment made by the socialist system. The decision of *the Last Emperor* case vividly illustrates the tension between the state and authors. Symbolically, perhaps in the final decision the consideration that won out was the need to maintain the credibility of Party-state propaganda and the stability of the press control system; an author's attempt to seek property rights was overwhelmed as a consequence.

### 3. State Monopoly on Publishing

In the Communist press control system, state-owned media outlets monopolized the media industry and played an essential role in information production and dissemination. As quasi-public agencies,

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<sup>114</sup> See Zheng, *supra* note 111, at 61–68.

<sup>115</sup> See COMMENTS ON INTELLECTUAL PROPERTY CASES OF THE PEOPLE'S SUPREME COURT, *supra* note 111, at 367–87.

media outlets such as publishing houses, newspapers, periodicals, radio stations, and television stations, also had the privilege of deciding how to exploit published works to suit propaganda needs. Subsequent to first publication, the exploitation of works was normally free and occurred without the permission of authors. For example, there were more than ten famous countryside newspapers and journals which specialized in abstracts and digests before 1991; however, most of them did not pay anything to the authors and publishers whose articles were abstracted and reprinted.<sup>116</sup> The ability of state-owned media outlets to use literary and artistic works freely as part of what was conceptualized as a state privilege undoubtedly had a strong impact on the first copyright law in China. In order to obtain more property rights, authors and artists had to bargain with the media agencies to restrict the influence of their state privileges on copyright.

The remains of the privilege, which reflect the state media monopoly, are mainly embodied in the provisions relating to fair use and statutory licenses. First, in the fair use provision, Article 22, the State and its propaganda agencies are permitted to use works without permission from and without payment of remuneration to the copyright owners, provided that the name of the author and the title of the work is mentioned. Further, it is permitted that other rights enjoyed by the copyright owner by virtue of copyright law are not prejudiced. Clause four of Article 22 provides that newspapers, periodicals, radio stations, or television stations may freely reprint or rebroadcast editorials or commentators' articles published by other media outlets. Since editorials and commentators' articles published by important official media usually convey policies and guidelines of the Party-state, lower-ranked media outlets are obliged to reprint or rebroadcast them according to the institutional arrangements for propaganda in China. Clause seven provides that state organs may use a published work for the purpose of fulfilling their official duties. William Alford criticized the vague expression of this open-ended fair use provision, which gave state organs "the right to make unauthorized use of copyrighted materials to execute official duties."<sup>117</sup> "At no point do the law, the law's implementing

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<sup>116</sup> See Zheng & Pendleton, *supra* note 72, at 165.

<sup>117</sup> Alford, *supra* note 1, at 78–79. Zheng Chengsi and Michael Pendleton have argued that the "Chinese version clearly only refers to copying by departments with judicial or quasi-judicial power and only when involved in procedures dealing with their judicial or quasi-judicial functions," and claimed the bad translation of this clause led U.S. commentators to believe that it "enables any Chinese government agency to freely

regulations, or any other official materials published in conjunction with the law meaningfully limit the broad sweep of its provisions on fair use.”<sup>118</sup>

Second, in the provisions of statutory licenses which are scattered throughout Articles 32, 35, 37, and 40, the state-owned media outlets gain broad rights to use published works and sound recordings without permission from the copyright owners, provided the remuneration is paid to the copyright owners as prescribed in regulations.

The second paragraph of Article 32 provided a statutory license for reprinting. According to this provision, after a work is published in a newspaper or a periodical, other newspaper or periodical publishers may reprint the work or print an abstract of it or print it as reference material, except where the copyright holder has declared that reprinting or excerpting is not permitted.

The second paragraph of Article 35 created a statutory license for performing rights. A performer who for a commercial performance exploits a published work created by another, does not need permission except where the copyright owner has declared that such exploitation is not permitted. This provision was criticized as being inconsistent with the Berne Convention, because Berne only mentions statutory licenses for translation rights, reproduction rights, sounding recording rights and broadcasting rights, but does not provide a statutory license for performing rights.<sup>119</sup>

The first paragraph of Article 37 provided a statutory license for sound recordings. A producer of sound recordings, who, for the production of a sound recording, exploits a published work created by another, does not need permission. This license does not apply where the copyright owner has declared that such exploitation is not permitted.

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expropriate a copyright when the agency determines it is needed.” Zheng & Pendleton, *A Response to United States Government Criticisms of the Chinese Copyright Law*, 13 EUR. INTELL. PROP. REV. 257, 257–66 (1991). However, Alford pointed out the relevant portion of Article 22 (7) of the law provided no support for their assertion. “State organs” means “legislative bodies, the administrative organs, and the judicial organs, etc.” and that “official” business is that within the “function of the state.” Liu Gushu, *Questions of World-wide Interest in Connection with the Chinese Copyright Law*, 4 CHINA PAT. & TRADEMARKS 1, 3–15 (1991).

<sup>118</sup> Alford, *supra* note 1, at 156–57.

<sup>119</sup> See Zheng & Pendleton, *supra* note 72, at 165.

The second paragraph of Article 40 provided a statutory license for broadcasting. A radio station or television station that exploits a published work created by another for the production of a radio or television program does not need permission from the copyright owner, but such a work may not be exploited where the copyright owner has declared that such exploitation is not permitted.

Third, in Article 43,<sup>120</sup> radio stations and television stations were vested with a privilege to broadcast a published sound recording for non-commercial purposes, without permission from and without payment of remuneration to the copyright owner, performer, or producer of the sound recording.

In the drafting process, all these articles, especially Article 43, were the subjects of debate. The significant tension between two broad groups of political actors in China shaped the drafting process. On one side were artists and authors who strove after more rights; on the other side were the media sector and the relevant agencies of the Party-state who tried to reserve more privileges.

Authors, especially composers, complained about low remuneration from their works. Normally they could only obtain remuneration when their works were published for the first time, while the media and other users could earn profits from freely using their works. For example, performers were paid for every performance and for the recording and broadcasting of their performances, while the authors of the works, which they performed were paid virtually nothing. Statistics from the Chinese Association of Composers, show a musical work created by a famous composer was performed by more than 100 singers throughout the country. The composer only received fifteen Yuan (equal to less than U.S. \$4) remuneration, while the singers sometimes could gain more than 10,000 Yuan (about U.S. \$2,000) for one performance.<sup>121</sup> Authors successfully argued for the inclusion of a broad range of economic rights in the draft of the Copyright Law, which included the rights of reproduction, performance, broadcasting, exhibition, distribution, making cinematographic films, television, or video productions, adaptation, translation, annotation, compilation, and the right of authorizing others to exploit their works in the above-mentioned ways

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<sup>120</sup> Chinese Artists and Composers, *Notorious Article 43*.

<sup>121</sup> See Zheng & Pendleton, *supra* note 72, at 164.

by using their strong influence in the Standing Committee of the National People's Congress.<sup>122</sup>

However, before they had time to celebrate their triumph, they soon found themselves caught in a dilemma. On the one hand, without an institutional arrangement to collect royalties for authors, it was very difficult for them to conclude voluntary licenses with users. On the other hand, they worried that the introduction of statutory licenses for their rights would impose significant restrictions on their rights, and leave them little ability to claim more in royalties than the users wished to pay.<sup>123</sup>

The drafting committee suggested a way out of the dilemma, which was to add a transitional term to the provisions of statutory licenses. According to this suggestion, the provisions of statutory licenses would initially apply for two to four years until effective collecting societies and corresponding users' societies could be established. Under the transitional statutory licenses system, media and performers would be entitled to perform, record, or broadcast a published work without authorization from the author, but the user would be required to pay a royalty afterwards. At the same time, a statutory rate for this kind of license would be stated in the law to ensure that the authors could obtain payment of no less than what they might get on ordinary occasions, and at a reasonable level. Once collecting societies were established and qualified to conclude licenses with users' societies and individual users, the transitional system of use and then pay would expire, as well as the statutory rate of royalty.<sup>124</sup>

The composers' representatives, the representatives of performers, as well as broadcasting and sound recording departments, initially accepted this suggestion. However, not long afterwards, representatives from the broadcasting organizations argued that in practice they had no time to obtain a license from a copyright owner after deciding to use a work in their broadcast program, and it was better to follow the convention of act first and report afterwards. That is, there should be no need to get a license; they should only pay copyright owners after using their works. Moreover, they also

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<sup>122</sup> There were a large number of members of the Standing Committee of the NPC, themselves artists, authors and educators, who fell into the authors' group and had a considerable degree of empathy for this group; *see* Mertha, *supra* note 33, at 130.

<sup>123</sup> *See* Zheng & Pendleton, *supra* note 72, at 165.

<sup>124</sup> *See* Zheng & Pendleton, *supra* note 72, at 165.

complained that given the low level of subsidies they gained from the state, they could not afford the payment of authors' remuneration. In May 1990, the consensus on the transitional provisions was overthrown; the draft was rewritten according to the broadcasting organizations' suggestion. This draft was violently opposed by authors (especially composers) and failed to pass by the June 1990 meeting of the Standing Committee of the NPC.

Because of pressure from writers and composers, exception clauses were inserted into the provisions for statutory licenses. Authors' groups insisted that copyright owners should have the right to declare that use under the statutory license is not permitted, so as to balance the unrestricted statutory license to some extent. However, the broadcasting organizations refused to make further concessions on Article 43, because it would mean having to compensate the copyright owners from a dwindling budget covering outlays for operating costs.<sup>125</sup> Thus, Article 43 remained mostly unchanged. As a compromise, however, the free use of published sound recordings by broadcasting organizations was restricted to non-commercial purposes. This restriction may have little influence on the operation of the broadcasting organizations, which are normally defined as non-profit and public institutions. On most occasions, probably except for commercial advertisements, broadcasting organizations did not need to pay remuneration for using published sound recordings in their programs, even after the promulgation of the 1990 Copyright Law.

While the promulgation of the 1990 Copyright Law was an important foundational step towards establishing a proprietary copyright system, it also undeniably reaffirmed the central role of the state in a socialist system by providing broad exceptions for use by government actors.<sup>126</sup> As a result of compromise between these two interest groups, copyright and media privilege were both curtailed in the 1990 Copyright Law. A copyright holder's right to contract was also compromised.<sup>127</sup>

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<sup>125</sup> According to a report submitted to the Standing Committee of the NPC by the Ministry of Radio, Film and Television, the annual budgetary outlays for the Central People's Radio Station was eight million Yuan, the then expenses on remuneration were one million Yuan; if the rules were changed, the expenses could increase to ten million Yuan; see Wu Haimin, *supra* note 88.

<sup>126</sup> See Jordana Cornish, *Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within its Borders*, 9 VAND. J. ENT. & TECH. L. 405 (2006).

<sup>127</sup> In the legislative process of statutory licenses and fair use provisions of the 1976 U.S. Copyright Law, lobbying by relevant interest groups and negotiation between these interest groups also played very important roles in forming the final statutory provisions.

### III

#### MEDIA COMMERCIALIZATION AND THE IMPROVEMENT OF COPYRIGHT LAW

After the crackdown on the 1989 student campaign, the leadership of the Party-state started to reconsider the influence of economic reforms on the stability of the regime. The leadership attributed the 1989 ‘disturbance’ to the relaxation of propaganda and the decline in “thought work” during the process of economic reform and the opening up to the outside world.<sup>128</sup> Deng Xiaoping reiterated that the Party should, on the one hand, ensure its control of economic development and, on the other hand, ensure control over the flow of ideas; stressing “seizing with both hands, both hands holding tight.”<sup>129</sup> Jiang Zemin, the new General Secretary of the CCP after the repression of the Tiananmen Square Protests, also criticized the practices of the previous period as “hard on the economy, soft on politics.”<sup>130</sup>

A new strategy of press control has been developed based on the lessons of 1989. Deng Xiaoping set the new propaganda line: “one focus and two basic points.”<sup>131</sup> The “focus” was China’s economic development, while the “two basic points” were the “Four Cardinal Principles”<sup>132</sup> and China’s reform and opening-up policies. In this

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See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987). One might argue that the legislative process of statutory licences in China’s Copyright Law is only another similar case of compromise between different business interests. However, we should not neglect the fact that in China the negotiation was not between private parties, but between authors and a state-owned media sector which represented media control of the Party-state. Therefore, the statutory licence and fair use provisions in China’s 1990 Copyright Law should be treated as a result of compromise between author’s right and state power rather than compromise between different business interests.

<sup>128</sup> See Lynch, *supra* note 18, at 176–77.

<sup>129</sup> See ANNE-MARIE BRADY, MARKETING DICTATORSHIP: PROPAGANDA AND THOUGHT WORK IN CONTEMPORARY CHINA 44–45 (Rowman & Littlefield Publishers, 2008).

<sup>130</sup> According to Jiang’s opinion, the policy of the CCP in the 1980s paid significant attention to economic reforms, but neglected ideological control.

<sup>131</sup> DENG XIAOPING, THE SELECTED WORKS OF DENG XIAOPING 248 (People’s Publishing House, vol. 3, 1993).

<sup>132</sup> According to the Constitution of the People’s Republic of China, the “Four Cardinal Principles” include (1) the principle of upholding the socialist path, (2) the principle of upholding the people’s democratic dictatorship, (3) the principle of upholding the leadership of the Communist Party of China, and (4) the principle of upholding Marxist-Leninist-Mao Zedong thought. These principles state the Party’s ideological line after 1978.

strategy, Deng stressed the need for strengthened ideological work at the same time as continuing the policies of reform and opening up. This meant the maintenance of the one-party communist state at the same time as engaging in a market economy. Deng Xiaoping's guideline became a blueprint for what would be implemented in propaganda and "thought work" throughout the 1990s and into the early twenty-first century.<sup>133</sup>

After 1989, the nascent process of media commercialization described earlier in this paper suffered a severe setback. Under the new policy, steps towards media reform, which might compromise state control were suspended. For example, the experimental private publishing houses were closed after 1989. The book wholesale business was also closed to private bookstores.<sup>134</sup> Freedom of the press, which once had been overtly discussed and written into one of the drafts of the proposed press law, was banned from even being mentioned in public.<sup>135</sup> Simultaneously, however, along with this new political frost, economic development, which had been at a standstill, was revitalized. Deng Xiaoping broke down the ideological barriers to commercialization by arguing that the market is only a mechanism for economic development during his famous "tour" of Southern China, which restarted economic reform in 1992.<sup>136</sup>

Following this event, the National People's Congress incorporated the concept of the socialist market economy into the Chinese Constitution. Establishing a socialist market economy became the goal of China's reform program. Thereafter, commercialization assumed an astonishing pace in every respect. The market was to have a dominant role not only in the allocation of consumer goods and services but also in the allocation of production resources. The private sector dramatically expanded into previously closed areas such as real estate, commercial aviation, and financial markets.<sup>137</sup>

While commercialization was getting the upper hand in other sectors, it also began to make renewed progress in information

<sup>133</sup> See Brady, *supra* note 129, at 44–45.

<sup>134</sup> Temporary Rules on Reinforcing the Administration of Collective, Individual, and Private Book Stores and Stalls, The State Administration of Press and Publication, (The St. Admin. of Ind. and Comm., 25 November 1989) (China).

<sup>135</sup> See YUEZHI ZHAO, MEDIA, MARKET, AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE 36–40 (Univ. of Ill. Press 1998).

<sup>136</sup> See Suisheng Zhao, *Deng Xiaoping's Southern Tour: Elite Politics in Post-Tiananmen China*, 33 (8) ASIAN SURVEY 739 (1993).

<sup>137</sup> Some Opinions on Encouraging the Development of Non-state Economy (The State Council, 19 February 2005).

production and dissemination. Because of the improved investment environment, market forces such as private investment and foreign enterprises started to participate in the process of information production and dissemination more broadly and thoroughly. Taking the publishing industry as an example, the growth of private bookstores reached unprecedented levels in the first half of the 1990s. The quantity of non-state bookstores increased from 29,669 in 1994 to 33,415 in 1995.<sup>138</sup> In addition, private book businesses began to achieve some larger scale effects on the book market. Four large-scale private book and periodical wholesale markets had taken shape and were acknowledged by the government.<sup>139</sup> In the name of collective bookstores, private book dealers were able to indirectly enter the provincial book wholesale business, which was officially only opened to collective bookstores. Supported by these private distribution channels, private publishing improved in scale and quality, despite official disapproval by the government.

The increasing strength of the private sector also resulted in official acknowledgement. In 1997, the Fifteenth National Congress of the CCP officially acknowledged that the private economy is an important component of the socialist market economy. This expression was incorporated into the Chinese Constitution one year later. This official policy encouraged the further establishment and development of private enterprises. Because of this favorable policy, many private cultural studios and companies have emerged and developed since the mid-1990s. In the name of cultural studios or cultural companies, private investment was able to enter the publishing sector in a manner more acceptable to the General Administration of Press and Publication (GAPP).<sup>140</sup> The attitude of GAPP towards private publishing also subtly changed. Although officially buying and selling book numbers was still prohibited, the book number trade in a disguised manner started to receive the acquiescence of press control authorities in the mid-1990s. As a

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<sup>138</sup> China Institute of Publishing Sciences, *Report of the Development of China's Private Book Industry*, 11 PUBLISHING RESEARCH 5–21 (2003).

<sup>139</sup> These markets are Huangni Street Market in Changsha City, Wusheng Road Market in Wuhan City, Dongliu Road Market in Xi'an City, and Jintai Road Market in Beijing. In the Huangni Road Book Market, for example, there were more than 200 bookstores, which created more than 2000 jobs with sales of 200 million Yuan RMB in 1996. See Fang & Xu, *supra* note 21.

<sup>140</sup> See generally Hongsong Song, *Dancing in Shackles: Copyright in China's Highly Regulated Publishing Market*, 60 J. COPYRIGHT SOC'Y U.S.A. 285 (2013).

result, private publishing has developed rapidly since then. By 2002, the private sector exceeded the market share of the state-owned sector.<sup>141</sup>

China's entry into the World Trade Organization (WTO) in 2001 has further advanced the transition in information production and dissemination. One major impact has been the internationalization of the media. In its Accession Protocol to the WTO, China made market access and national treatment commitments in the distribution services and audiovisual services sectors within three years of accession. To fulfill China's commitments upon joining the WTO, GAPP and the Ministry of Foreign Trade and Economic Cooperation issued the Provision on the Administration of Foreign-investment Book, Newspaper, and Periodical Distribution Enterprises on March 17, 2003, which opened the book distribution market to foreign investors subject to certain conditions. In August 2003, GAPP revised the Administrative Rules on the Publication Market and allowed private investment to engage in both national and provincial level wholesale markets. In summary, since 1992, the Chinese economy has experienced considerable marketization, privatization, and internationalization.

These economic changes have also caused a transition in information production and dissemination which has resulted not only in further relaxation of press control, but also in a remarkable improvement of copyright law. In order to illustrate the interrelation between the relaxation of press control and the improvement of copyright law, this paper will investigate the primary interactions between press control and copyright during the economic transition in this period.

#### ***A. Market Driven Remuneration and the Waning of State Patronage***

After Deng's tour in Southern China, policy makers tried to make China's information production and dissemination more market-driven. These market reforms had changed many aspects of economic

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<sup>141</sup> The Transcript of Colloquium of Investigation of Private Cultural Studio, Mar. 20, 2008. This colloquium was organized by the GAPP in order to gather first-hand information about private publishing and conducted by Government officials from the Office of Book Publication, the Office of Book Distribution, and the Office of Policy and Law of GAPP, and scholars from the China Institute of Publishing Science. As interviewees, administrative staff from the Working Committee of Non State-owned Sector in China Association of Book and Periodical Distribution, and private publishers from fifteen large-scale culture companies and studios attended this colloquium.

activities in China, including publishing, and many rules characteristic of old “socialist” practices, such as the state standards for authors’ remuneration, were no longer functional. Under the old unified remuneration system, the publishers bore both possible losses and profits originating from their publications. Neither was borne by the authors. Neither the publishers nor the popular writers were satisfied with this payment method any longer; they preferred to conclude different schemes of remuneration by contract, such as royalties or a percentage of the actual sales. Market forces played an essential role in the re-emergence and growth of copyright royalties in China in the 1990s. From the early 1990s, private publishers began to play a more and more important role in the publishing sector. Estimates suggest that the contribution of the private publishers exceeded half of the production value of the publishing industry in 1999.<sup>142</sup> The market-driven private publishers preferred to offer remuneration higher than the state standards to attract high-quality manuscripts that can result in higher profits. Along with the increase of the private publishers’ influence, the use of a payment method for authors’ remuneration that can reflect the market value of a work, such as a copyright royalty, had gradually attained a dominant position in the publishing sector. Facing competition from private publishers and reduction in state subsidies, state-owned publishers had little choice but to adjust to the new environment and to follow the payment rates of private publishers. In fact, private publishers in the name of state-owned publishing houses had published the majority of bestsellers after the mid-1990s. In these cases, a private publisher paid the authors’ remuneration, not a state-owned publishing house, although the latter’s name was on the cover.<sup>143</sup>

The market-driven reform of the personnel system and the work unit system also drove more and more authors away from the state patronage and into the market. For example, Wang Shuo, the first writer to receive copyright royalties for his work, quit his job in a state pharmaceutical company and became an individual entrepreneur and freelance writer in 1984. Unlike in the 1980s, throughout the 1990s, quite a number of authors gradually became aware of the market value of literary works. Carrying on the growing tide of

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<sup>142</sup> See Xu Xiao, *The Evolution of Private Publishing in Contemporary China*, 66 *Century 21* (2001); Qiu Feng, *Private Publishing Waiting For Real Marketization*, 6 *China Report* 33–34 (2006).

<sup>143</sup> For further investigation of this phenomenon, see Song, *supra* note 140, at 300.

commercialization, the authors tried to establish closer ties with the publishing industry and the cultural market. Following Wang Shuo, more and more writers began marketing their works and then selling them to the highest bidder, ignoring the fixed manuscript fees set by the state. For example, an Auction of Top Manuscripts was held in Shenzhen in the fall of 1993, at which eleven manuscripts were sold successfully with total receipts amounting to 2.496 million Yuan.<sup>144</sup>

In the process of commercialization, the market forces gradually changed the behavior of the participants in the publishing sector and established a new set of conventions largely based on the profit motive. The official acceptance of copyright royalties shows how the new behavioral principles achieved a dominant role in practice and forced the state to change the formal rules to match reality. In 1992, after Wang Shuo became the first Chinese author to receive copyright royalties from a state-owned press house, more and more press houses began to use royalties as a means of attracting popular works. This practice was also implicitly accepted in official circles. In January 1992, the National Copyright Administration issued *The Circular on the Standard Contract of Copyright License*. Article 9 of the Standard Contract provides three payment methods for authors' remuneration: (1) basic remuneration plus print-run remuneration, (2) lump sum, and (3) royalties. This represented a very significant shift: for the first time in forty years royalties were affirmed as an acceptable basis for payment in an official document.

From this point, the state standards for remuneration were largely irrelevant. Moreover, the notion of private profit became more justifiable as the market developed. The authors of popular books could become millionaires on the basis of royalties from their books alone, while the authors of academic works without large market sales probably received nothing from their work, or may even have had needed to compensate the publisher's losses. These practices were reaffirmed by the Provisions on the Remuneration of Literary Works issued by NCA in April 1999, which formally acknowledged royalties as a payment method. In the revised 2001 Copyright Law, the state standards were formally degraded from compulsory rules to supplementary rules. The state standards only apply in cases where the method of remuneration is not specified in the publishing agreement.<sup>145</sup>

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<sup>144</sup> See Kong, *supra* note 27, at 28–33.

<sup>145</sup> See Feng, *supra* note 37, at 136.

The emergence and growth of copyright royalties in the 1990s was a significant event for both the relaxation of press control and the development of copyright. The increasing importance of market-driven copyright royalties meant not only that copyright holders were able to enjoy market profits, but also that there was a significant decline in state patronage and a corresponding rise in authors' independence. More and more authors and artists escaped from state-owned sectors and entered private sectors. Independent authors were increasingly able to survive on the support by the copyright system and the market. The reappearance of freelance writers in China from the late 1980s to the early 1990s gives us some evidence of the increase in living space for authors.<sup>146</sup>

Furthermore, the growing non-state-owned sectors and the market started to provide alternative employment choices for the Chinese people and further reduced the importance of state patronage. Life employment in state-owned work units was also subject to reform. The relationship between the work unit and its members started to undergo a transition from the comprehensive control described earlier in this paper to something that would be more recognizable to Western eyes as an employment relationship.

The financial independence offered by the copyright and the market mechanisms gave authors the ability not only to reject state employment and the control of the Writers Association, but also to break away from the state cultural establishment and even to challenge mainstream ideology. Quite a few writers such as Wang Shuo and Wang Xiaobo who criticize or mock mainstream ideology in their works, live solely on their copyright royalties. Wang Shuo even coauthored and published a book with Liu Xiaobo, a former 1989 state prisoner, and used the copyright royalties to pull him from unemployment after Xiaobo was released from prison.<sup>147</sup> Because of their critical views of the cultural establishment and the mainstream ideology, the works of these independent writers are often very popular and thus, have become the favorites of private publishers.

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<sup>146</sup> See Ding Dong, Xie Yong, On Freelances (1998) 349, *Writers*.

<sup>147</sup> According to the recollection of the private publisher of this book in his blog, Liu Xiaobo used a pen name to circumvent the official ban. Wang Shuo then became the sole copyright owner of this joint work. To help Liu, Wang transferred all the copyright royalty of around half million Yuan to Liu. See Yefu, About Wang Shuo, on Military Station of Side-plot (Apr. 5, 2008), [http://blog.tianya.cn/blogger/post\\_show.asp?BlogID=340363&PostID=13295011&idWriter=0&Key=0](http://blog.tianya.cn/blogger/post_show.asp?BlogID=340363&PostID=13295011&idWriter=0&Key=0).

***B. The Impact of the Reduced State Monopoly on Copyright Environment***

As a result of the introduction of market mechanisms into the media sector, the state monopoly in information production and dissemination was being substantially compromised during the period. Some sectors of information production and dissemination, such as film, audiovisual production, TV program production, performance troupes, and book distribution, opened up to private investment. Although the ownership of publishing houses, TV stations, and newspapers was still monopolized by the state, commercialization had transformed the status of these media institutions from solely public propaganda agencies to part money-making enterprises. Because of this changed situation, after the promulgation of the first PRC Copyright Law, authors and artists grew more discontented about the media's privileges to exploit their copyrighted works without payment or permission. Finally, this discontent resulted in the elimination of statutory licenses for public performances and sound recordings. It also led to the modification of the privilege of broadcasting organizations in Article 43 during the revision of copyright law in 2001.

The process of modifying Article 43 illustrates the interaction and controversy between the copyright owners and the state-owned media sector about removing the imprint of state monopoly from copyright law. Despite strong complaints against Article 43 from authors, artists, and producers of sound recordings, the Ministry of Radio, Film, and Television and the Central Committee Propaganda Department were firmly opposed to any change. When the State Council tried to take measures to resolve the inconsistency between the 1990 Copyright Law and the international copyright treaties in the 1998 revision of the Copyright Law, "no movement was possible" on Article 43 due to opposition from the broadcasting industry and the governing bodies in the central government and the Party's Central Committee.<sup>148</sup> In December 1998, the State Council sent the NPC Standing Committee a draft of the Copyright Law that did not include any change of Article 43. The NPC Standing Committee debated the issue from 23 to 26 of December, 1998. Due to the extent of the conflict, especially the strong opposition to Article 43 from the representatives of the literary and artistic circles, the draft was sent back. Subsequently, in April and June of 1999, another two versions

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<sup>148</sup> See Mertha, *supra* note 33, at 126.

were sent up to the NPC Standing Committee; both were also rejected for the same reason.<sup>149</sup> As a result, the State Council redrafted the revision of the Copyright law and submitted it to the NPC Standing Committee in November 2000. Even after the NPC passed the second reading of the draft in April 2001, consensus still could not be reached on Article 43.<sup>150</sup> The representatives of the literary and artistic circles even threatened to boycott the next proposal if Article 43 was not changed. Just several months prior to China's accession to the WTO at the Doha Ministerial in November of 2001 and facing strong pressure to make the Copyright law comply with TRIPS standards, the NPC adopted a compromised solution. Article 43 was modified to read, "radio stations or televisions stations that broadcast published sound recordings do not need to obtain permission from, but shall pay remuneration to, the copyright owners, except where the parties agree otherwise."

Clearly, state monopolies in the media and the publishing sectors were major factors that continued to influence the reservation or revocation of statutory licenses in certain areas. In the area of performances and production of sound recordings where the statutory licenses were abolished in 2001, the influx of private investment had already broken down the state monopoly. In the area of broadcasting and the printing press where state monopoly remained, statutory licenses were retained in spite of strong opposition from copyright holders.

### **C. Complying with International Standards Under Foreign Pressure**

In the early 1990s, only ten years after the initiation of economic reform and the open door policy, enormous demand for foreign information and cultural products had built up in Chinese society. The extent of copyright piracy indicated the level of this demand. In the early 1990s, Western countries regarded China as a major centre of piracy. For example, the International Intellectual Property Alliance (IIPA), an association established by a group of copyright-intensive firms in the United States, claimed 415 million U.S. dollars of copyright-related losses in China in 1992.<sup>151</sup> Clearly, without both

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<sup>149</sup> See Mertha, *supra* note 33, at 130.

<sup>150</sup> See XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21<sup>ST</sup> CENTURY 7 (Sweet & Maxwell Asia 2002).

<sup>151</sup> IIPA, Special 301 Submission, February 12, 1993. See Andrew C. Mertha, Pirates, Politics, and Trade Policy: Structuring the Negotiations and Enforcing the Outcomes of the

strong copyright protection and access to the Chinese market, Chinese demand cannot bring profits to foreign copyright owners. To ensure profits from their copyrighted products, foreign copyright owners and enterprises producing copyright-intensive products started to push China to improve its copyright system and reduce the market barriers imposed by press control. From this perspective, the copyright negotiations between China and the Western countries can also be deemed to be not only a conflict between two countries, but also a form of struggle between state control and market forces.

At the beginning of the economic reform and open door policies, forcing China to establish a copyright system became a key demand of foreign copyright owners. Mainly due to the restrictions of the press control system, the protection provided by China's copyright law was obviously lower than international standards. Thus, pushing China to comply with international standards also meant removing the imprint of press control in China's copyright law. The process of the Sino-U.S. copyright negotiation in the period clearly illustrated the interaction between copyright and press control.

In May 1991, under the Special 301 process, China was identified as a "priority foreign country" that was failing to protect U.S. intellectual property.<sup>152</sup> The USTR stated that China's weak IPR regime was causing substantial losses to U.S. businesses,<sup>153</sup> and the USTR demanded a greater degree of enforcement of China's new copyright law. At the same time, the United States announced an investigation into the Chinese trade practices under Section 301 of the 1974 Trade Act. China was given a deadline of November 26, 1991 (after several extensions during negotiations the deadline was finally extended to January 16, 1992) to comply with U.S. demands, or face a 100 percent tariff increase on exports to the United States.<sup>154</sup> After five rounds of negotiation and several times teetering on the edge of trade war, on January 16 and just six hours before the deadline, the United States and China finally reached an agreement, the Sino-U.S. Memorandum of Understanding on the Protection of Intellectual Property (1992 MOU).

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Sino-US Intellectual Property Dialogue, 1991–1999 35 (2001) (Ph.D. thesis, University of Michigan).

<sup>152</sup> "Section 301 of the Trade Act of 1974 grants the United States unilateral power to punish countries considered a threat to U.S. trading interests and to enforce U.S. rights under existing bilateral and multilateral trade agreements." Mertha, *supra* note 33, at 37.

<sup>153</sup> See Robert B. Frost, *Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119 (1995).

<sup>154</sup> See Mertha, *supra* note 33, at 42–43.

In the 1992 MOU, China promised to accede to international IPR treaties, especially the Berne Convention for the Protection of Literary and Artistic Works and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. Through the international conventions, the United States successfully broke through the restriction of press control on foreign copyright. Article 3, paragraph three of the 1992 MOU stated that upon China's accession to the Berne Convention and the Geneva Convention, these Conventions will be international treaties within the meaning of Article 142 of the General Principles of the Civil Law of the People's Republic of China. In accordance with the provisions of that Article, where there is an inconsistency between the provisions of the Berne Convention and the Geneva Convention on the one hand, and Chinese domestic law and regulations on the other hand, the international conventions will prevail subject to the provisions to which China has declared a reservation, which is permitted by those Conventions.<sup>155</sup>

Article 19 of the Provisions on Implementing International Copyright Treaties, promulgated on September 25, 1992, reiterated that where preexisting administrative regulations relating to copyright may conflict with these Rules, these Rules ought to apply; but where these Rules may conflict with international copyright treaties, the international copyright treaties ought to apply.

The Chinese copyright owners thus received less protection in China than their foreign counterparts because their own domestic laws covered the Chinese.<sup>156</sup> Foreign copyright holders were accorded greater protection than domestic copyright holders mainly in the areas of copyright protection of software and utility designs, fair use (which was more restricted than the Chinese copyright exceptions described above), statutory licenses, and the scope of copyright. These provisions are summarized below. Two thirds of these provisions solely or partially related to press control.

### *1. The Scope of Copyright*

Articles 11, 12, 14, and 15 of Provisions on Implementing International Copyright Treaties provided a series of rights that

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<sup>155</sup> Stephanie L. Sgambati, *China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Property Piracy in China*, 3 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 139, 142–65 (1992).

<sup>156</sup> See Mertha, *supra* note 33, at 129.

Chinese copyright holders did not have. Article 11 provides that owners of copyright in foreign works has the exclusive right to authorize any performance, while Chinese copyright holders do not have these rights for performance recorded in mechanical form. Article 12 provides copyright owners in foreign cinematographic works, television works, and works of video recordings with greater rights to authorize public performances than their Chinese counterparts. Article 14 provides rental rights over copyrighted cinematic works only to foreigners. Article 15 provides certain rights only for owners of copyright in foreign works to prohibit the importation of their works. Among these ways of using copyrighted works, mechanical performances and public performances are the most important methods the Communist Party utilized to mobilize masses in its propaganda actions. Depriving Chinese copyright owners of the rights to authorize mechanized performance and public performance was undoubtedly for convenient use of these performances as propaganda. In the 2001 revision of the Copyright law, the rental right, the right of public performance (including the mechanized performance), and right of public communication are extended universally.

## *2. Statutory License*

Articles 13, 16, and 18 of Provisions on Implementing International Copyright Treaties provide that the relevant provisions of statutory licenses do not apply to foreign copyrighted works. Article 13 provides that prior authorization of the copyright owner shall be required for newspapers and periodicals to reprint a foreign work, except the reprinting of articles on current political, economic and social topics; thus, the statutory license for reprinting provided in Article 32 of the 1990 Copyright Law only applies to the Chinese copyright owners. Articles 16 and 18 provide that in the case of public performances, foreign works' recording and broadcasting, and sound recordings, the provisions of the Berne Convention shall apply. Thus, the statutory licenses for public performance, sound recording and broadcasting provided in Articles 35, 37, and 43 of the 1990 Copyright Law only apply to Chinese works. In the 2001 revision, the statutory licenses for public performance and sound recording are eliminated. The privilege of broadcasting organizations in Article 43 is modified. Thus, only the statutory license for reprinting remains.

### 3. Fair Use

Articles 10 and 13 of The Provisions on Implementing International Copyright Treaties provide some limitations on the broad fair use provisions for the benefit of foreigners. Thus, the strength of the exclusive rights granted to foreigners is greater than those protecting Chinese copyright owners. Clause eleven of Article 22 of the 1990 Copyright Law, which provides an exception for the fair use for the purpose of translation of a published work from the Han language into minority nationality languages for publication and distribution within the country, does not apply to foreign works. Clause four of Article 22 of the 1990 Copyright Law, which provides for fair use by reprinting or rebroadcasting by the media of each other's editorials or commentators' articles, does not apply to foreign works. Only foreign articles on current political, economic or religious issues published by newspapers, periodicals and radio fall within the scope of fair use. Since the 2001 revision, fair use of copyrighted works has been generally limited to activities that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the authors and copyright owners.

Between 1992 and 2001, although several provisions that reflected the press control system were deemed inconsistent with international standards and thus, no longer applied to foreign works, they applied to Chinese citizens until the revision of the Copyright law in 2001 according to TRIPS standards. As a result, most of the inconsistencies were removed, and the double standard problem was largely resolved. The history of the development of China's copyright law reveals that negotiations over copyright between foreign governments and China have the capacity to remove the imprint of press control on China's copyright law. The exogenous pressure constrained the power of the Chinese government to reshape copyright law to suit the needs of press control, though it has often been criticized as encroaching on China's sovereign right to independently develop its copyright law. The nearly decade-long double standard problem in copyright protection reveals just how reluctant the Party-state has been to remove the imprints of press control from China's copyright law.

However, the elimination of aspects of press control from copyright law does not mean foreign copyright owners can freely exploit the Chinese market. Censorship, importation quotas, and state monopolies in the media industry in fact heavily compromise foreigners' right to participate in information production and

dissemination and to directly provide their copyright products to Chinese consumers. Lacking full access to the Chinese market and the media business, the foreign copyright owners will find it difficult to exploit their copyright independently without the involvement of Chinese enterprises as joint venture partners or licensees. Aware of the negative impact of press control on copyright regulations, the United States has often raised concerns about press control in its copyright negotiations with China.

Indeed, foreign pressure has contributed to the relaxation of censorship, importation quotas, and state monopolies over media industry. For example, the Intellectual Property Rights Agreement of March 1995 led to greater openness in matters of censorship.<sup>157</sup> Prior to this agreement, a common complaint from American copyright owners was that the censorship system was being used to delay the release of films and music albums, sometimes indefinitely. Under the terms of the 1995 Agreement, China is required to decide on matters of censorship within sixty days, and should normally do so within 10 days, an obligation which clearly has much wider political implications.<sup>158</sup> During the U.S.-China intellectual property talks in 1996, the Chinese authorities made further concessions eliminating its ten-imports-per-year quota for American film, ending the monopoly of the China Film Distribution and Exhibition Company over film distribution, and allowing Chinese film studios to sign cooperative agreements with U.S. film producers to distribute foreign motion pictures.<sup>159</sup> During its accession to the WTO, China also promised to open certain sectors of information production and dissemination to the enterprises based in other Member States.<sup>160</sup>

While foreign governments and enterprises have kept pushing China to open its media sector, the Party-state has tried to maintain a strict press control system, despite the promises made during the accession to the WTO. Recently, the United States took two actions

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<sup>157</sup> See Burrell, *supra* note 5, at 195.

<sup>158</sup> See Burrell, *supra* note 5, at 195.

<sup>159</sup> See Yu, *supra* note 2.

<sup>160</sup> These sectors include: (1) the wholesale and retail of books, newspapers, and magazines; (2) distribution of audiovisual products; (3) cinema theatre services; and (4) the importation of books, newspapers, magazines, and audiovisual products. See WTO, Protocol on Accession of the People's Republic of China, (2001). But the publication and sole distribution of books, newspapers, magazines, and audiovisual products, news agencies, radio and TV stations remain off-limits to foreign investors. See Catalogue for the Guidance of Foreign Investment Industries, State Planning Commission, State Economy and Trade Commission, Ministry of Foreign Trade and Economic Relation, 1 Apr. 2002 (China).

targeting China's press control system to the WTO Dispute Settlement Body. One complaint issued in April 2007 focused on China's censorship system and the censorship provision in China's copyright law. The complaint particularly addressed China's denial to protect and enforce copyright and related rights of works that have not been authorized for publication or distribution within China.<sup>161</sup> Meanwhile, another dispute brought to the WTO by the United States against China complained that China's state monopolies over the media industry, specifically the restrictions on access to the market for cultural goods affected trading rights and distribution services for certain publications and audiovisual entertainment products.<sup>162</sup> The WTO Dispute Panel Reports on both complaints favored the United States. The WTO Panel concluded that Article 4 denies copyright protection to banned works, breaches China's obligations under the TRIPS Agreement.<sup>163</sup>

In response to the WTO ruling, China accepted the Panel's report and removed the censorship provision from the PRC's Copyright Law. Article 4 has been changed into: "Copyright holders, when exercising their copyright, may not violate the Constitution and laws, and may not damage the public interest. The State implements supervision and management over publishing and dissemination according to the law."<sup>164</sup>

These disputes show that although China's copyright Law had been substantially improved, the participation of foreign individuals and enterprises in China's information production and dissemination has not been correspondingly enlarged, owing to the restriction of the press control system. Now more international concern is focusing on the negative influences of China's press control system on the enforcement of copyright law. If the negotiation between China and

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<sup>161</sup> Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007).

<sup>162</sup> Request for the Establishment of a Panel by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/5 (Oct. 11, 2007).

<sup>163</sup> Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009); Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009).

<sup>164</sup> On 26 February 2010, at the Thirteenth Plenum of the Standing Committee of the eleventh National People's Congress, China promulgated a revision of Copyright Law. This revision came into force on 1 April 2010.

Western countries on this issue can enable foreign copyright-intensive products to enter the Chinese market more freely, it will be a step further for copyright to extract itself from state control.

### CONCLUSION

In this paper, the primary political and economic changes in China between 1978 and the present, especially in the media system, have been examined. The developmental trajectory of the Chinese copyright law has also been traced, comparing and contrasting the commercialization of the major sectors of China's book industry such as creation, publishing, distribution, retail, and consumption. The evolution of copyright law in China reveals that the reemergence, development, and improvement of China's copyright law positively correlates with the degree of relaxation of press control in these sectors. Without the various reforms and open door policies and the subsequent media commercialization, the reintroduction of copyright into China would have been impossible. The introduction of the profit incentive and competition in the early 1980s led to the need to define the interests of different participants in information production and dissemination, which further led to the drafting of the first copyright law. The development of this copyright legislation was, however, also conditional on and limited by the reform of the press control system in ways that are perhaps not always apparent. The relaxation of press control prepared the ground for the copyright law; however, the very limited nature of that reform compromised the level of copyright protection that eventuated in the 1990 Copyright Law of P.R. China. Similarly, the later more extensive relaxation of press control caused by the commercialization and the internationalization of the media industry after 1992 led to the gradual removal of most of the constraints that had been necessary in 1990.

Digging into the linkage between the transition of press control and the development of copyright law, it is apparent that market forces constitute the essential momentum driving both processes. When profit incentive and competition were introduced into information production and dissemination to remedy the negative impacts and the unsustainability of the totalitarian press control, the market forces had an opportunity to rise at the margins of the media industry. Once released, the market forces became self-driven. To generate more profits, the newly introduced market forces and the entities representing them in information production and dissemination, such as private enterprises, foreign copyright-intensive businesses, authors who were shifting from being cultural workers to cultural

entrepreneurs, and commercial publishing houses, kept pushing to participate in the process of information production and dissemination more broadly and more thoroughly. The pressure, thus generated, forced the state not only to remove some of the restrictions on their participation, but also to start to put in place the systems of law and rights necessary to make that participation possible. The former resulted in the relaxation of press control, while the latter resulted in the development of freedom of speech and copyright. The relaxation of press control and the development of the copyright system are actually concomitant results of a transition in information production and dissemination, which are different from and mutually support each other. This process of transition can also be seen as a process of constant public negotiation between the market forces and the state control. The market participants, by contending for more copyright protection and less press control, contribute to the transition of information production and dissemination from a centrally planned pattern to a more market-driven pattern.

To stress the relationship between the development of copyright law and the relaxation of press control, this paper has concentrated on the changes to the press control system. However, important to remember is that “today, the media business and the publishing industry remain the most heavily regulated industries in China,”<sup>165</sup> despite the substantial deregulation of the last three decades. The Party-state still maintains strict control over key sectors of the media industry and media content. In the last decade, the basic features of the press control system remained unchanged, and no substantial change has been made to the state-monopoly about book publishing and censorship system. For this reason, although China’s copyright law is largely consistent with international copyright standards and bears few marks of press control, the influence of censorship and state monopolies, in particular, on book publishing and on the copyright process should not be ignored. Investigating the evolution of copyright legislation is not enough. To fully understand the relationship between copyright and press control in contemporary China, further investigation needs to be undertaken into how the systems interact in practice.

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<sup>165</sup> Anna S.F. Lee, *The Censorship and Approval Process for Media Products in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 127 (Mary L. Riley ed., Sweet & Maxwell 1997).

