

# Copyright and China Trade

*Recent developments look promising for recognition by China of copyrights; a look at international implications*

BY NEIL BOORSTYN\*

## AUTHORS NOTE:

To the extent that copyright protection is afforded under the Universal Copyright Convention to foreign authors whose work is first published in a U.C.C. country, and such protection is available, the thrust of this article has international application and pertains throughout the community of signatory nations.

Recent political and diplomatic developments will have far-reaching implications for U.S. licensing executives and businessmen who engage, or plan to engage, in trade with the People's Republic of China. The problems and opportunities facing American firms are enormous and the extent to which the problems are resolved will have a bearing on the profitability of their commercial ventures.

One of the many problems involves copyright protection of intellectual property in the international setting of the China trade. This is a particularly vexing problem, since the PRC does not now have copyright laws nor is it a signatory to any international copyright treaty. The absence of copyright relations affects copyrightable goods exported to the PRC, the importation into the U.S. of goods produced in the PRC, and licensing agreements involving such goods.

Unless our copyright laws were applicable, this lack of copyright protection could prevent a U.S. importer or licensee of copyrightable goods made in China from enjoining an American competitor from copying and selling the imported items. Similarly, an American exporter of copyrighted matter to China needs copyright protection in order to prevent the re-entry into the U.S. of unauthorized copies of such goods.

The question is, how can an American importer or exporter — of books or other written materials, musical works, computer software programs, pictorial, graphic, or sculptural works including two- and three-dimensional works of fine, graphic, or applied arts, photographs, prints, art reproductions, technical drawings, fabric designs, pantomime or choreographic works, toys, games, dolls, other works of artistic craftsmanship or copyrightable matter — obtain copyright protection.

\*Phillips, Moore, Weissenberger, Lempio & Majestic, San Francisco, CA.

The U.S. Copyright Act of 1976<sup>1</sup>, which became effective on January 1, 1978, provides full copyright protection for any copyrightable work first published in this country irrespective of the nationality or domicile of the author or creator of the work.<sup>2</sup> This provision represents a departure from prior law which did not grant copyright protection to foreign nationals merely because the work was first published here. Publication, in the copyright sense, means generally the distribution of copies of the work to the public by sale or other transfer of ownership.<sup>3</sup>

By virtue of the new law, copyrightable goods and articles made in China, exported, and first sold in the U.S. may enjoy full copyright protection under our laws. Full copyright protection includes a bundle of exclusive rights and the right to exclude others from unauthorized uses.<sup>4</sup> Therefore, a U.S. importer may prevent an American competitor from copying and selling the protected goods, and a U.S. exporter may prevent unauthorized copies from re-entering this country.

In addition, since the U.S. is a signatory to the Universal Copyright Convention (UCC), as well as other international copyright treaties, once U.S. copyright protection attaches to the work of a national of the PRC, protection will also be afforded by other UCC member nations.<sup>5</sup> Therefore, the American importer of Chinese works can prevent the unauthorized duplication and public sale in the U.S. and in many foreign countries. First publication in a UCC member nation may also result in both domestic and international copyright protection.<sup>6</sup>

## First Publication

This recent availability of copyright protection to foreign authors by reason of a first publication in the U.S., or a UCC nation, bears directly on the important question of the rights of assignees and exclusive licensees. For example, if for any reason the foreign author is precluded from obtaining a U.S. copyright, the assignment of copyright or grant of an exclusive license to a U.S. citizen would give the American assignee or licensee no greater rights than the foreign assignor or licensor. However, the right of the foreign author to now claim U.S. protection makes possible the assignment of the copyright or the grant of an exclusive license to an American firm which can then claim protection as an assignee of copyright, or exclusive licensee.<sup>7</sup> Furthermore, the new law provides for the divisibility of copyright; that is, the assignee or exclusive licensee of any of the rights of copyright (the right to reproduce copies, the right to prepare translations or

other derivative works, the right to sell and distribute copies, or the right to perform or display the work publicly) may, by virtue of the assignment or license own that particular exclusive right and thereby become entitled to all the rights and protection accorded copyright owners, including standing to sue for infringement in U.S. Courts.<sup>8</sup>

The U.S. importer's ability as an assignee or exclusive licensee to claim international copyright protection for articles produced in China, despite the latter's lack of internal copyright laws or membership in any multinational treaty convention, should prove an invaluable commercial and competitive advantage to American firms engaged in the China trade.

On the other hand, an American exporter of copyrighted goods to China may obtain protection against the unauthorized duplication of such goods and its re-entry into and sale in the U.S. This protection is available under the new Act's specific prohibition against infringing importation.<sup>9</sup> Generally, U.S. law provides sanctions against the unauthorized importation into the U.S. of goods lawfully produced abroad as well as goods the foreign production of which would constitute an infringement of copyright if our law could be applied.<sup>10</sup> In other words, the U.S. exporter could prevent the entry into this country of goods produced in China, if such production would violate U.S. copyright law, and the exporter can sue for infringement when lawfully-produced goods are without authorization brought into the U.S.

U.S. firms trading with China as importers or exporters of copyrightable works now have available statutory provisions which, if properly utilized, will result in international copyright protection previously not readily obtainable. It should be pointed out, however, that a number of complex statutory formalities must be complied with in order to secure full protection and counsel should be sought to insure the necessary compliance with U.S. and international copyright laws.

Recent developments auger well for the recognition by China of U.S. copyrights. Within the past year, China, in an effort to conform with the requirements of international trade, announced that it would recognize U.S. trademarks which can now be registered in the PRC. Permission to register was based on the fact that U.S. law permits registration here of Chinese trademarks. This principle of reciprocity applies with equal force to copyrights and full recognition and registration of U.S. copyrights in China may soon become a reality.

#### NOTES

1. Public Law 94-553, 90 Stat. 2541, Title 17 United States Code, Section 101, et seq.
2. 17 U.S.C. Sec. 104(b)(2)
3. 17 U.S.C. Sec. 101
4. 17 U.S.C. Sec. 106
5. E.g., U.C.C. (Paris Text, July 24, 1971) Article II, 1
6. 17 U.S.C. Sec. 104(b)(2), U.C.C. Article II, 1
7. 17 U.S.C. Sec. 101
8. 17 U.S.C. Sec. 201(d)(1), (2)
9. 17 U.S.C. Sec. 602(a), (b)
10. Id.