

Copyright Law in China: Challenges, Opportunities and Future Developments

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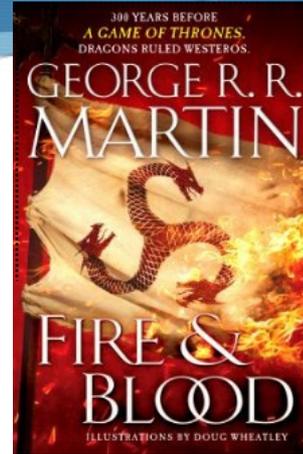
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Current Chinese Copyright Law

- ◆ Contained in 2010 Copyright Law and numerous regulations, rules and legal guidelines issued by the People's Court:
 - ◆ Supreme Court Guidelines and Interpretations regarding diverse copyright issues, including internet copyright disputes, criminal copyright, and application of civil law copyright principles
 - ◆ Cybersecurity Law (2016) with provisions on NTD
 - ◆ Diverse Regulations including **Copyright Regulations** and Regulation on Protection of the Right to Network Dissemination of Information
 - ◆ Diverse special measures governing collective rights, customs enforcement, etc.
 - ◆ **Good News!** Most of Chinese copyright law is similar to US Copyright Law. If your work is copyrightable under US law, it is generally copyrightable under China's laws.
 - ◆ **Better News!** Even if your work is not copyrightable under US laws, it might be Under Chinese laws
 - ◆ **Best News!** Copyright enforcement is on the rise in China

Why Copyright Matters



Copyright Protection Equivalency

CHINA

- ◆ Article 3 For purposes of this Law, the term “works” includes, **among other things, works of literature, art, natural sciences, social sciences, engineering and technology, which are created** in any of the following forms:...
- ◆ Article 2 (Regulation) The term "works" as referred to in the Copyright Law means **intellectual creations with originality** in the literary, artistic or scientific domain, insofar as they can be **reproduced in a tangible form**.
- ◆ Article 3 (Reg.) The term "**creation**" as referred to in the Copyright Law means **intellectual activities**
- ◆ **INTELLECTUAL CREATION + REPRODUCIBLE**

US

- ◆ Copyright protection subsists, in accordance with this title, in **original works of authorship fixed in any tangible medium of expression**, now known or later developed
- ◆ **ORIGINALITY + FIXATION**

CREATION NOT COPYING

Protected Works: Categories

CHINA Article 3:

- ◆ written works;
- ◆ oral works;
- ◆ musical, dramatic, *quyi*, choreographic and acrobatic works;
- ◆ works of the fine arts and architecture;
- ◆ photographic works;
- ◆ cinematographic works and works created by a process analogous to cinematography;
- ◆ graphic works such as drawings of engineering designs and product designs, maps and sketches, and model works;
- ◆ computer software; and
- ◆ other works as provided for in laws and administrative regulations.

What's Not Protected Under Copyright ?

CHINA

- ◆ **Official Public Documents:** laws and regulations, resolutions, decisions and orders of State organs, other documents of a legislative, administrative or judicial nature and their official translations;
- ◆ **News on current affairs;**
- ◆ calendars, numerical tables and **forms of general use**, and **formulas.**
- ◆ **Ideas, processes, etc.**
- ◆ **Expired works**

US

- ◆ Works of US Government
- ◆ Ideas, processes, etc.
- ◆ Expired Works
- ◆ **Useful Articles**

“Ideas” Are Not Protectable



Lady Gaga Meat Dress



Yin Gao's Sound Dress

Registration is Not Required

CHINA

- ◆ Article 6 Reg. A copyright shall **subsist on the date when a work is created.**

Creation is sufficient

US

Art. 408(a) (a) Registration Permissive.—At any time... during the subsistence of any copyright secured ..., the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim



But it is Good Idea

- ◆ Registration with **the Copyright Protection Centre of China (CPCC)**
- ◆ Prima facie proof of ownership. Generally favored over testimonial evidence of copyright ownership
- ◆ Lowers evidentiary red tape (notarization, etc)
- ◆ Can be used to strengthen claims of infringement, including to secure takedown from websites
- ◆ Particularly critical if using copyright as a back up to other forms of intellectual property protection

Who Owns Copyright?

CHINA

- ◆ Article 11 (Reg). Except where otherwise provided in this Law, **the copyright in a work shall belong to its author.** The author of a work is the citizen who **creates the work.**

US

- ◆ Art. 201(a) Initial Ownership.— Copyright in a work protected under this **title vests initially in the author or authors** of the work. The authors of a joint work are co-owners of copyright in the work.

AUTHORS FIRST

Who Can be an Author?

- ◆ People?
- ◆ Corporations/Legal Entities?
- ◆ Spirits?
- ◆ Animals?
- ◆ Artificial Intelligence?



Authorship in Flux

CHINA

- ◆ People
- ◆ Corporations (Work for Hire/
Commissioned Works)

US

- ◆ People
- ◆ Corporations (Work for Hire)

Currently other non-human authorship is not recognized



Work for Hire

Some Intriguing Differences

CHINA

- ◆ Created in Course of Employment Usually Owned by Employer
- ◆ Except for certain works, including drawings of engineering designs and product designs, maps, and computer software created **mainly with the material and technical resources of the legal entity** or other organization and for which the legal entity or other organization bears responsibility (Author retains copyright subject to right to use by Employer)

US

- ◆ Created in the Course of Employment; owned by Employer Absent Agreement to the Contrary



Work for Hire (US)

- ◆ Art. 201(b) (b) Works Made for Hire.—In the case of a work made for hire, **the employer or other person for whom the work was prepared is considered the author** for purposes of this title, and, **unless the parties have expressly agreed otherwise in a written instrument** signed by them, owns all of the rights comprised in the copyright.
- ◆ A “work made for hire” is a work **prepared by an employee** within the scope of his or her employment (Art. 101)



US Commissioned Work

Article 101 A “work made for hire” is...

(2) a work specially ordered or commissioned for use as a contribution to a

- ◆ collective work,
- ◆ as a part of a motion picture or other audiovisual work,
- ◆ as a translation,
- ◆ as a supplementary work,
- ◆ as a compilation,
- ◆ as an instructional text,
- ◆ as a test,
- ◆ as answer material for a test, or
- ◆ as an atlas,
- ◆ if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

◆ WORK FOR HIRE BY AGREEMENT (LIMITED)

Work for Hire (China)

- ◆ Article 11 Where a work is created under the auspices and according to the intention of a legal entity or other organization, which bears responsibility for the work, **the said legal entity or organization shall be deemed to be the author of the work.**
- ◆ Article 16 A work created by a citizen **in the fulfillment of tasks assigned to him by a legal entity** or other organization is a work **created in the course of employment.** Subject to the provisions of the second paragraph of this Article, the copyright in such work **shall be enjoyed by the author;** however, **the legal entity or other organization shall have priority to exploit the work within the scope of its professional activities**

The Split Work for Hire (Art. 16 Continued)

- ◆ In any of the following cases, the author of a work **created in the course of employment** shall enjoy the right of authorship, while the legal entity or other organization shall enjoy the other rights included in the copyright and may reward the author:
- ◆ **drawings of engineering designs and product designs, maps, computer software** and other works which are created in the course of employment **mainly with the material and technical resources of the legal entity** or other organization and for which the legal entity or other organization bears responsibility;
- ◆ works created in the course of employment the copyright in which is, in accordance with laws, administrative regulations or contracts, enjoyed by the legal entity or other organization.
- ◆ **Subject to 2 year exclusive right of exploitation (Art 16, Reg)**

Commissioned Works China

- ◆ Article 17 The ownership of the copyright in a **commissioned work shall be agreed upon in a contract** between the commissioning and the commissioned parties. **In the absence of such a contract or of an explicit agreement in such a contract, the copyright in the work shall belong to the commissioned party.**

◆ **NO CONTRACT THEN
COMMISSIONED PARTY OWNS
WORK**



Economic Rights

CHINA

- ◆ Reproduction
- ◆ Distribution
- ◆ Making Available
- ◆ Rental
- ◆ Public Display, Performance and Presentation
- ◆ Broadcast
- ◆ Cinematography
- ◆ Adaptation , Translation and Compilation; and
- ◆ Other rights to be enjoyed by copyright owners. (Article 10)

US

- ◆ Reproduction
- ◆ Distribution
- ◆ Public Display and Performance
- ◆ Adaptation (Derivative Works) ◆
- ◆ Public Performance by Digital Audio Transmission

Term of Protection

CHINA

Economic Rights

- ◆ Generally life + 50

Or

- ◆ 50 Years from Publication

US

Economic Rights

- ◆ Generally life + 70

Or

- ◆ 95 years from publication or 120 years from creation (whichever is shorter)

China (Personal) Moral Rights

- ◆ Article 10 (1) the right of **publication**, that is, the right to decide whether to make a work available to the public; **(First Publication)**
- ◆ (2) the right of authorship, that is, the right **to claim authorship** in respect of, and to have the author's name mentioned in connection with, a work; **(Credit/Patrimony)**
- ◆ (3) the right of **revision**, that is, the right to revise or authorize others to revise a work; **(Revision)**
- ◆ (4) the right of **integrity**, that is, the right to protect a work against distortion and mutilation; **(Integrity/Alteration)**
- ◆

Moral Rights

Terms of Protection

Right of Publication

- Term Limited to Life + 50 Years

Patrimony, Integrity, Revision

- Term is Infinite (No End)

Moral Rights: Transactional Issues

- ◆ Moral Rights **Cannot be Assigned or Transferred**
- ◆ BUT the **Rights of Revision and Integrity Can be Waived** (Right of Authorship/Patrimony **CANNOT** be waived)
- ◆ **Harm to Reputation** is **Critical Aspect** for violation of Rights of Revision/Integrity; Unauthorized change alone does not violate rights

Moral Rights: Post Mortem

- Exercisable by **Successor or Legatee** OR “Copyright Administration” where no Successor or Legatee

EXCEPT for **Right of Publication**, if not exercised within **50 years** of publication, **protection expires**

US Fair Use: Balancing Test

- ◆ Nature of the Use
- ◆ Nature of the Work Infringed
- ◆ Amount Taken
- ◆ Market Impact
- ◆ Others Factors ?



US Statutory Factors

- ◆ In determining whether the use made of a work in any particular case is a fair use the factors to be considered **shall include**—
- ◆ (1) the **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- ◆ (2) the **nature** of the copyrighted work;
- ◆ (3) the **amount and substantiality** of the portion used in relation to the copy-righted work as a whole; and
- ◆ (4) the effect of the use upon the **potential market** for or **value** of the copy-righted work.

China Fair Use: “Fair Dealing”

- ◆ Article 22 In the following cases, a work may be used without permission from, and without payment of remuneration to, the copyright owner, **provided that the name of the author and the title of the work are mentioned** and the other rights enjoyed by the copyright **owner** in accordance with this Law are not prejudiced:

12 Specific Exceptions

- ◆ Personal use for study, research or appreciation
- ◆ Limited Quotations
- ◆ Unavoidable Republication for News Reporting
- ◆ Republication, transmission for current affairs reporting
- ◆ articles (newspapers, political, economic or religious issues)
- ◆ Translating for class room use
- ◆ Use by State organs ...for implementing their duties within a reasonable scope

12 Specific Categories

- ◆ Library – archive, museum reproduction for display or preservation
- ◆ Publicly installed artworks display and reproduction
- ◆ Free performances of already published works, where no fee collected or remuneration paid, or economic benefits gained
- ◆ Translation into Minority languages
- ◆ Translating into Braille for publication

The Future: We are Entering a Period of Experimentation?



- ◆ Third Copyright Law Revision?
- ◆ Refinement of New Ecommerce Regulations and Network Regulations?
- ◆ Continuing Efforts To Increase Copyright Enforcement And Reduce Digital Piracy?

Third Revision of Copyright Law

- ◆ **Third Revision of Copyright Law**
 - ◆ New Concepts such as “**audio visual works**,” emphasizing **contractual arrangements**, employing a **modified 3-step test** for “fair use/fair dealing”; renewed focus on role of contracts in ordering copyright; clarified work for hire applications
 - ◆ Refining terms and reorganizing existing laws for ease of convenience (“Structural”)

Third Draft Revision: “Structural” Changes to the Law

- ◆ Compilation of diverse regulations, administration rulings makes for ease of reference
- ◆ Definitions Expanded for Greater Clarity
 - ◆ **applied artworks**, meaning refers to toys, furniture, ornaments and other such two- or three-dimensional works of plastic art that have a practical function and have a an aesthetic significance (Art. 3.9)
- ◆ Terminology Altered in Accordance with International Practice
 - ◆ “Cinematographic processes” altered to “Audio-visual works”

Exclusive Rights Require Written Contract

- ◆ **Proposed Article 54.** Where it is agreed upon in the contract that the methods permitted to be used are **exclusive rights**, but the content of the exclusive rights have not been agreed upon or the agreement is unclear, it shall be considered that the person receiving permission **has the right to exclude any person, including the copyright holder, to use the work in any similar way.**
- ◆ **Without a written contract, you may find you gave away more than you intended**

Work for Hire Refinements

- ◆ **Draft Article 20:** Works created by employees in completing their work duties and during working hours **are professional works**, their copyright entitlement is to be agreed upon by the parties. **Where the parties have no agreement or the agreement is unclear**, the copyright of professional work is enjoyed by the **employee**...where the copyright of professional work is enjoyed by employees, the work unit may use the said work in their professional **scope free of charge, and has an exclusive use right of two years.**
- ◆ 2 Year exclusive use right; Exceptions to employee ownership for engineering design drawings, product design drawings, maps, computer programs and related files as well as works created by employees or news publishers, press agencies, radio stations or television stations in the completion of their reporting duties

Fair Use is Fair Dealing with Modifications

- ◆ **Draft Article 43:** Under the following circumstances, works may be used without the permission of the copyright holder, and without paying remuneration, but **the full name** or appellation of the copyright holder, the name of the work and the **source** of the work shall be indicated, and it may not infringe other rights enjoyed by the copyright holder according to this Law... When using works in ways provided by the previous Paragraph, **it is prohibited to influence the regular use of the work, and it is prohibited to unreasonably harm the lawful rights and interests of the copyright holder**
- ◆ Modified 3 steps; not US balance; Although it does have a catch-all

12 Specific Exceptions

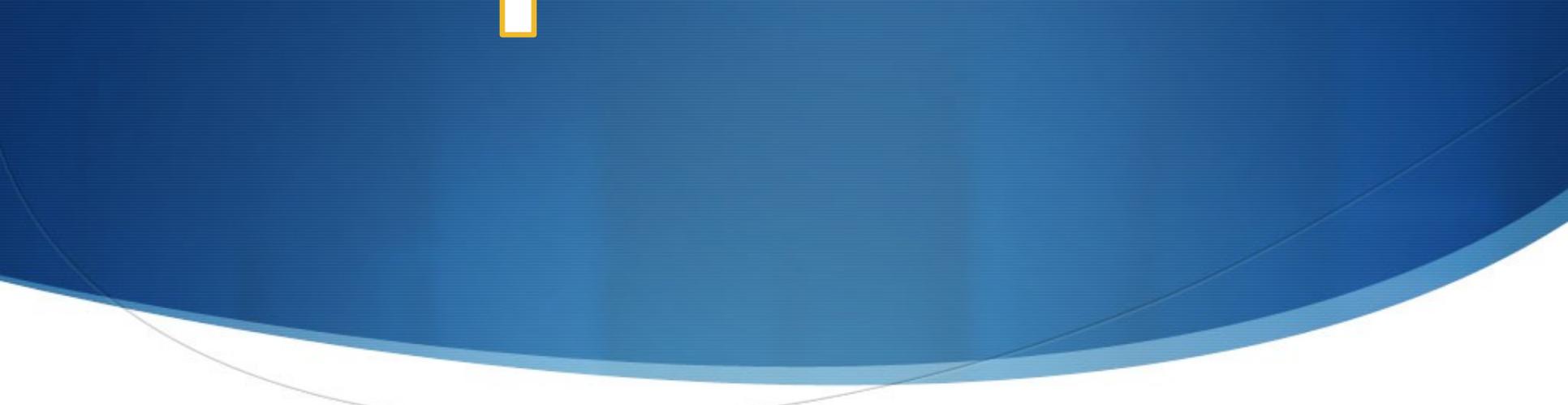
- ◆ Personal study reproduction; political, economic or religious issues)
- ◆ Limited Quotations;
- ◆ Inevitable Republication for News Reporting;
- ◆ Republication, transmission for current affairs type articles (newspapers, translating for class room use
- ◆ Use by State organs ...for implementing their duties within a reasonable scope;

!2 Specific Categories and One Catch-all

- ◆ Library – archive, museum reproduction for display or preservation;
- ◆ free performances of already published works, where no fee collected or remuneration paid, or economic benefits gained;
- ◆ Publicly installed artworks display and reproduction
- ◆ Translation into Minority languages
- ◆ Translating into Braille for publication;
- ◆ Other circumstances

New Ecommerce Regulations

- ◆ **Expanded scope of coverage** to all “e-commerce operators”
- ◆ **joint and several liability** with the vendors, where a platform operator knows, **or should know**, that a vendor has violated another’s intellectual property rights
- ◆ **Detailed Notice and Takedown Guidelines** including Counter Notifications
- ◆ Platform Liability for harmful **products if ecommerce platform operators know, or should know the products do not comply with security and other requirements.**



THANK YOU!

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