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COPYRIGHT ISSUES REGARDING CHINA PUBLICATIONS USED IN U.S. LIBRARIES*

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In the last two decades, the rapid emergence and evolution of digital technology has quickly changed our traditional thinking about the use of library materials. The proper use of digital materials can no longer be as easily defined as the print ones. Many legal issues such as intellectual property right (IPR) are more important than ever and have become major challenges for library decision makers. This is especially true for the U.S. libraries using digital materials from China and China libraries using digital materials from the U.S. There is confusion and misconception about the proper use of these materials. This paper will introduce the current copyright protection efforts in China, and help U.S. academic libraries deal with copyright issues in using digital materials from China.

Copyright Protection in China

Since China launched its "Open Door" policy in 1978, there has been an effort to gradually establish a nationwide system for the protection of intellectual property (IP). The Chinese government believes that a good intellectual property protection system will play a significant role in promoting science and technology, enriching the Chinese culture and developing the Chinese economy. After ten years of deliberation, China adopted its first Copyright Law on September 7, 1990, effective June 1, 1991. In 1992, the China accepted the Berne Convention for the Protection of Literary and Artistic Works. In 1993, China joined the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms.

The Chinese Copyright Law and the rules for its implementation explicitly protect the copyright and other legitimate rights and interests of the authors of literary, artistic and scientific works. The law provides additional protection for the copyright of written works, oral works, music, operas, *quyi* (folk art forms including ballad singing, story telling, comic dialogues, clapper talks, cross talks, etc), choreography, works of fine arts, photographs, films, TV programs, video tapes, engineering designs, product designs and their descriptions, maps, sketch maps and other graphic works, as well as computer software. China is among a select group of countries that have explicitly listed computer software as an object of protection under copyright law. As a necessary supplement to the Copyright Law, these regulations came into effect in October 1991. On September 25, 1992 the Chinese State Council promulgated the Regulations on the Implementation of the International Copyright Treaty, providing specific rules on protecting foreign authors' copyrights in accordance with international treaties.

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China acceded to the WTO in 2001. To honor its commitments, China amended its IP related law. In the same year, the revised China Copyright law replaced the 1990 law, effective on September 15, 2002. The Implementation Rules for Copyright Law are consistent with the new Copyright Law and China's WTO commitment.

Since 2000, the Chinese people's court system has been under organizational reform. So far, the Supreme People's Court and 31 provincial higher courts have set up their respective civil tribunals devoted to IP cases. In addition, all the intermediate people's courts where the people's governments of these 31 Provinces, autonomous Regions, and Municipalities Directly under the Central Government are situated have also set up their respective IP courts.¹

There are three categories of liabilities for IP infringements in China: civil, administrative and criminal. Correspondingly, the approaches to impose the liabilities vary. In the judicial system, the civil tribunal of a court is responsible for establishing and imposing criminal liability. While the administrative authorities are concerned with the matter of civil liability to the same extent, they focus more on the administration and protection of the public interest, and impose administrative liabilities mainly for violation of the administrative law and regulations. An interested party's requests made to seek legal relief are no more than a. cessation of an infringement b. compensation of damages and c. punishment of then infringement. Then, the party involved may choose the civil, the administrative or the criminal approach to protect its own IP rights.²

The revised Copyright Law's remedial measures cover all requirements under WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), such as permanent injunction, statutory damages and the establishment of the comprehensive provisional measures for evidence preservation, property preservation and temporary injunctions. Promulgated by the Supreme People's Court and the Supreme People's Procuratorate on December 8, 2004 and effective as of December 22, 2004 were several issues relating to the specific application of the Law to the Treatment of Criminal Cases of IP Infringement. Article 5 reads: Whoever, for the purpose of making profit, commits any of the acts of infringement of the copyright provided for in 217 of the Criminal Law, with the illegal profit being more than RMB 30,000, he/it has done an act with "other serious circumstance", and shall be sentenced to the fixed-term imprisonment of not more than three years or criminal detention, and shall also only, be fined for the crime of copyright infringement, if any of the following situations apply: (1) the illegal business turnover is more than RMB 50,000; (2) the number of reproductions made or distributed without authorization of the copyright owner of his/its literacy, music, cinematographic, television or video work, computer software or other work is more than 1,000 pieces (copies) in total; and (3) there are other serious circumstance.³

As for the criteria, the Article 11 explains: The circumstance of directly or indirectly charging and collecting fees by way of publishing paid advertisement shall be considered "for the purpose of making profits" as is provided for Article 217 of the Criminal Law. The phrase "without authorization from the copyright owner" in Article 217 of the Criminal Law will be considered to refer to any of the following circumstances: lack of authorization by the copyright owner, forging or altering copyright owner's authorization; or licensing document or going beyond the authorization or license.

Questions and Answers on Copyright Issues for International Users

COPYRIGHT IN GENERAL

1. *What is the jurisdiction of the Chinese court on copyright issues? Is the case foreign-related civil IP where two interested parties are Chinese and foreign citizens, legal entities or other organizations, but the infringing act takes place in a foreign country, or the subject matter of the infringed right is in a foreign country?*

According to the provision of Article 304 of the *Opinions of the Supreme people's Court on Several Issues Relating to the Application of the Civil Procedure Law of the People's Republic of China*, all of the following are foreign related civil cases: when interested parties in the case are foreigners, the legal fact takes place in a foreign country, or the subject matter of the infringed right is in a foreign country. Cases of the following nature are also foreign-related civil cases: the two interested parties are a Chinese and a foreign citizen, legal entity or other organization; the act of infringement of the IP right takes place in a foreign country; or the subject matter of infringed right is in a foreign country. The Chinese court has jurisdiction over such cases.

A case of dispute over copyright on a computer network shall be under the jurisdiction of the people's court of the place where an infringing act is committed or where the defendant has his or its domicile. The places where infringing acts are committed shall include places where equipment used to carry out accused infringing acts, such as network servers or computer terminals, etc. are located. Where the place in which an infringing act is committed or in which the defendant has his or its domicile is difficult to be determined, the place in which the plaintiff has deposited the finances of the contents of infringement may be deemed the place where the infringing act is committed.

2. *What is the legal basis on which foreigners bring civil IP lawsuit to a Chinese court? Should U.S. libraries be concerned with U.S. citizen, legal entities or other organizations bringing IP lawsuits relating using publications produced in China to Chinese courts?*

Where a foreigner brings a civil IP lawsuit to the Chinese court to protect his /her/its intellectual property rights, the Chinese court will review the case in two aspects. First, the court has to decide if the lawsuit meets the requirements for the court to accept it. This should be based on the Chinese Civil Procedure Law, which determines if the plaintiff has the right for the lawsuit: what are the contents of the right, and whether the accused infringing act constitutes an infringement according to the international treaties China has acceded to as well as the Chinese civil law and the relevant IP laws. The former is related to the procedure; the latter to the issues addressed in the substantive trial. As long as the publication, whether print or electronic, is published in China, and the copyright holder is a Chinese citizen, legal entity or other organization, U.S. libraries do not have to worry about the lawsuit brought to a Chinese court by U.S. citizen or entity.

3. *Who is the copyright holder of digital contents? Who is the copyright holder of print materials? Are there any fundamental differences between these two types of copyright?*

As a principle of Chinese Copyright Law, copyright belongs to the author. According to Article 11, the copyright of a work shall belong to its author, unless otherwise provided in the Law. The author of a work is the person who has created the work. When a work is created according to the intention and under the supervision and responsibility of a legal entity or other organization, such legal entity or organization shall be deemed to be the author of the work.

The citizen, legal entity or other organization whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.

The copyright holder of the print material and its digital format is the same. There are no fundamental differences between the two. In Chinese Copyright Law, there are no additional rules which separate the belonging of the copyright of the print or digital material; therefore, when the copyright and the permission of use is not transferred, the person who creates the work or the legal entity or organization who is responsible for the work is the copyright holder of the work. Article 12 reads: "Where a work is created by adaptation, translation, annotation or arrangement of a preexisting work, the copyright in the work thus created shall be enjoyed by the adapter, translator, annotator or arranger, provided that the exercise of such copyright shall not prejudice the copyright in the original work." The digitization of print materials is a simple act of duplication, not a creative activity; therefore, it does not generate any new copyright.

1. Is there any major discrepancy between the Chinese and U.S. copyright laws? How should U.S. libraries handle this?

In principle, the Chinese Copyright Law is consistent with the WTO's TRIPS agreement and the Bern Convention. However, international treaties allow contracting parties to establish their own copyright regulations if such regulations can meet the minimum requirements of the treaties. Therefore, there are some discrepancies between Chinese and U.S. copyright laws.

Before Oct. 2001, Chinese Copyright Law did not allow the author to transfer the copyright. In other words, the original author owns the perpetual copyright. The copyright that the publisher or the database content provider obtains from the author is only the right of usage. There is a time limit for this right. Once it expires, the original author regains the copyright. This part of the Chinese Copyright Law changed in Oct. 2001. Now, the original author may transfer the ownership of copyright permanently to the publisher or the database content provider. This practice is now in line with the U.S. copyright law. In the US, the owner is the creator, or another person/entity to whom ownership is conveyed in writing. Accordingly, works of Chinese authors being used in the US should be treated the same as works by US authors.

There is difference between the Chinese and the U.S. copyright laws regarding the fair use of digitized print materials in the library collection.

Section 404 of the US Digital Millennium Copyright Act (DMCA) amends the exemption for nonprofit libraries and archives in section 108 of the Copyright Act to accommodate digital technologies and evolving preservation practices. Prior to the enactment of the DMCA, section 108 permitted such libraries and archives to make a single facsimile (i.e., not digital) copy of a work for purposes of

preservation or interlibrary loan. As amended, section 108 permits up to three copies, which may be digital, provided that digital copies are not made available to the public outside the library premises. In addition, the amended section permits such a library or archive to copy a work into a new format if the original format becomes obsolete—that is, if the machine or device used to render the work perceptible is no longer manufactured or is no longer reasonably available in the commercial marketplace.⁴ The US copyright law is more flexible regarding fair use. The Chinese Copyright Law Article 22 reads: “In the following cases, a work may be exploited 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 shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (8) reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work.”

The Chinese Copyright Law includes only the definition of live performance, not mechanical performance. On Dec. 9, 1999, however, a notification was issued by the China National Administration of Copyright indicating that mechanical performance is part of performance right, and permission is needed from the copyright owner regardless of the fact if the performance is for profit or not.

5. *Are modern punctuations of pre-modern Chinese texts protected under Chinese copyright law?*

Just like the language, punctuation is in public domain. However, the action of punctuating the text should be protected by the copyright law. Many of the ancient Chinese texts do not have punctuation. Punctuating involves a series of intellectual activities such as version selection, collation, paragraphing and punctuating. By nature, these activities are considered as arrangement which is protected by Article 12 of the Chinese Copyright Law which reads “Where a work is created by adaptation, translation, annotation or arrangement of a preexisting work, the copyright in the work thus created shall be enjoyed by the adapter, translator, annotator or arranger, provided that the exercise of such copyright shall not prejudice the copyright in the original work.”

However, not all punctuating can enjoy the protection of the copyright law. The act of punctuating the text already punctuated by someone else does not generate new authorship, even if such act can be compensated monetarily. Please refer to the memo “The response to the copyright issue in rare book punctuating” issued by the China National Administration of Copyright in July 12, 1999.

6. *What Chinese publisher copyright policies we should be aware of in order to protect our libraries? What Chinese copyright holders’ rights we should be aware of?*

U.S. libraries should be aware of the following:

- a. The publisher including database producer (licensor) owns the copyright when authorized by the original author or the authorized third party.
- b. This right is protected by Chinese and U.S. laws and international copyright treaties.
- c. Licensee shall use reasonable care to prevent the disclosure, dissemination, copying and use of the databases.
- d. The publisher may only use the individual work of an author for a predetermined period of time. Once it expires, the copyright returns to the original author, and the library may not be allowed

to use it anymore. Even if the author transfer the copyright to publisher or database producer, the author may still have moral right over his/her work.

- e. For database producers, it is virtually impossible to obtain copyright authorization from all authors and get them compensated. For various reasons, it is possible to include unauthorized texts in the database. Therefore, the licensor is required to provide information on such unauthorized inclusion, so that the user library may evaluate the risk involved.

For example, in some of its database contacts, Tsinghua Tongfang included the following clause: "The Licensor reserves the right at any time to withdraw from the Licensed Products any item or part of an item for which it no longer retains the right to publish, or which it has reasonable grounds to believe infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable. The Licensor shall give written notice to the Licensee of such withdrawal. If the withdrawal represents more than ten percent (10%) of the journal in which it appeared, the Licensor shall refund to the Licensee that part of the fee that is in proportion to the amount of material withdrawn and the remaining un-expired portion of the subscription period." Similarly, in the Northeast Research Libraries Consortium's generic license agreement for electronic resources, it also says that "in the event of any unauthorized use of the Licensed Materials by an Authorized User, Licensee shall cooperate with Licensor in the investigation of any unauthorized use of the Licensed Materials of which it is made aware and shall use reasonable efforts to remedy such unauthorized use and prevent its recurrence. Licensor may terminate such Authorized User's access to the Licensed Materials after first providing reasonable notice to Licensee (in no event less than two (2) weeks) and cooperating with the Licensee to avoid recurrence of any unauthorized use.

7. U.S. Government publications are in the public domain. Is this also true for the Chinese government publications?

It is true, since article 5 of Chinese Copyright Law reads: This Law shall not be applicable to: (l) laws; regulations; resolutions, decisions and orders of State organs; other documents of a legislative, administrative or judicial nature; and their official translations. The selection or arrangement of government publications by a publisher can be protected by the Chinese Copyright Law. Chapter II, Article 10.16 indicates that the Law protects "the right of compilation, that is, the right to compile works or parts of works into a new work by reason of the selection or arrangement".

8. Some government publications of the Chinese Republican period were reprinted in the 1960s by Chinese government agencies and in the 1980s by commercial publishers. Does either of the publishing agencies own the copyright of these materials?

A mere reprint does not generate new copyright; however, a new arrangement or editing of an older version of work does.

9. Showing the library purchased Chinese feature films (in DVD, VCD, VHS formats) inside the classrooms and library buildings is typical fair use in U.S. Is there a similar fair use law in China for showing such films? Can libraries also allow such films to be shown within the campus facilities free of charge in China? If this is considered illegal, where can people obtain the showing rights of these films outside of the library building and classroom but within the campus?

Yes, there is application clause in the Chinese Copyright Law. Article 22 reads: "In the following cases,

a work may be exploited 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 shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (6) translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed; (9) free-of-charge live performance of a published work and said performance neither collects any fees from the members of the public nor pays remuneration to the performers;”

“The above limitations on rights shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.”

COPYRIGHT ON E-RESOURCES:

1. What crucial areas should librarians look for in the contracts for e-sources, to ensure that those e-resources purchased can be used to support activities of regular teaching and research needs at the library? What are some of the important terms and clauses that librarians should make sure that they are included in contracts?

To avoid of the risk of copyright infringement, the library should take the following measures:

- 1) To uphold the position of copyright protection, the library should have disclaimer on copyright in their webpage.
- 2) Select publishers with good reputation. In general, large size publishers, or publishers with long histories, and academic research institutions are compliant with copyright law.
- 3) Pay attention to recently publicized copyright disputes, and avoid products published by the parties involved.
- 4) Use proper channels of acquisition.
- 5) Include copyright warranty clause in the license agreement or purchase contract.

Special attention should be paid to the following clauses:

- 1) The definition of authorized users. Try to define the authorized users based on your targeted library users such as currently enrolled students, faculty, and staff as well as walk-in patrons.
- 2) The definition of authorized usage, such as browsing, preservation, downloading, printing out, number of simultaneous users, perpetual rights, uploading to the library server, the range of IP addresses, etc.
- 3) ILL and document delivery. Some database publishers prohibit interlibrary loan and document delivery of electronic publications, to protect their profit. The library should specify the use of interlibrary loan and document delivery in the agreement to avoid the risk of copyright infringement.
- 4) Whether licensee is allowed to charge a fee from walk-in patrons for offering access to the database.
- 5) Whether licensee is allowed to distribute documents retrieved from Databases to Customers and to charge a fee for such document delivery.
- 6) Whether licensee is allowed to print, download, and distribute (in any form, including, but not limited to: printed, electronically relayed, posted to user restricted list services or user

restricted bulletin boards, or magnetically stored).

- 7) Whether licensee is allowed to download the complete database for digital preservation purposes.

2. What should librarians be aware of when considering subscribing or purchasing an aggregated database from China?

From the view of copyright, libraries should pay attention to the following:

- a. The database provider should have a license issued by the Chinese government to publish such kind of publication.
- b. How was the copyright authorization obtained? It should be obtained from the author/original publisher or from copyright collecting agency.
- c. The database provider should be able to provide evidence of payment to copyright holders.

3. Does the term "authorized uses" cover practices such as: display, digitally copying a portion, printing a copy of a portion, recovering copying costs, making an archival/backup copy, course packs, electronic reserve, electronic links, caching, indices, scholarly sharing, or interlibrary loan? In other word, do we have to include these elements in the license when purchasing e-resources from China?

Chinese copyright Law Article 22 (8) indicates that the reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work, is fair use. In practice, however, "authorized uses" do not necessarily cover all the things above. User libraries should negotiate with the producer or vendor for such rights. The authors believe that Northeast Research Libraries Consortium's generic license agreement for electronic resources is a good model for a license agreement.

4. Are there restrictions on loading stand-alone CD-ROM data or a program purchased from China on a U.S. library's local network?

It is permissible if such act meets the requirement of China Copyright Law Article 22 and does not violate the right management system and circulating technical measures of the product.

5. Is it legal for the U. S. libraries to make backup copy of CD-ROM purchased from China for preservation purpose?

It is permissible according the China Copyright Law Article 22 Clause 8.

FAIR USE, INTER-LIBRARY LOAN, DIGITIZATION, MICROFILMING, ETC.

1. In China, is it legal to transfer contents from printed and electronic resources to other libraries for interlibrary loan purposes? If so, are there any restrictions?

Yes, it is legal, as long as such transactions are:

- a) Free of charge or charge lower than cost
- b) The borrowing library bears part of the cost
- c) Authorized by license, e.g. CASHEL
- d) There is no limit for interlibrary loan on purchased print material
- e) Limited institution for e-content delivery

2. *Is it legal or can it be considered "fair use" under Chinese law to provide English subtitles to older Chinese film?*

Based on the purpose of such act, it is permissible under Article 22 of the Chinese Copyright Law.

3. *Would Chinese publishers or vendors object to electronic interlibrary loan that a library system provides to their users? If not, what are the usual terms they use regarding number of pages and formats for delivery?*

They probably will not object to electronic interlibrary loan, but it is a good idea to write it out clearly in the license agreement.

4. *What legal procedures are required to digitize materials held by the libraries in China?*

It is uncertain now. The Implementing Rule of Information Network Communication Right is its final reading. It maybe approved by the State Council later this year. Currently, it is legal to digitize materials held by a library and allow their use by regular registered library users.

5. *Some Chinese institutions duplicate the microfilm or databases of rare books held in American libraries without officially letting American owner library know. Is this practice a legal act? If it is not, what are the rights of owner library?*

If the microfilm or databases of rare books are compiled or created by owner library, owner library owns the copyright, and the owner library has the right to prohibit others from copying the microfilm or database.

¹ Jiangzhi Pei, "Latest Developments in Judicial IP Protection in China," *China Patents and Trademarks*, 2004(3): 3.

² Wu Yuhe, "An Overview of the IP Enforcement System in China," *China Patents and Trademarks*, 2005(1): 85.

³ Supreme People's Court and the Supreme People's Procuratorate of Several Issues Relating to Specific Application of Law to the Treatment of Criminal Cases of IP Infringement, Article 5, December 8, 2004.

⁴ The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary, December 1998.