To Steal a Book Is No Longer Such an Elegant Offense: The Impact of Recent Changes in Taiwanese Copyright Law

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In 1992-93, Taiwan revised its copyright laws in an attempt to closer approximate the rights given to the owners of copyrighted works in the United States. In the face of the difficulty of penetrating the Taiwanese judiciary and potential for unpredictability regarding the rights of such owners, Mr. Lu probes the ways in which Taiwanese copyright laws differ from those in the United States and which may burden those seeking copyright protection. He also traces the cultural and historical impediments to more rigorous intellectual property protections in Taiwan but notes the current incentives and evidence of Taiwanese efforts to improve such protections, as well as outlining the rights unique to the Taiwanese code.

INTRODUCTION

As Taiwan’s importance as a trading partner for the United States increases, so does the significance of Taiwanese intellectual property law in general, and copyright law in particular. Taiwan is currently the 8th largest trading partner of the United States, with $48.2 billion worth of goods traded between the countries in 1995. The United States continues to have a large trade deficit with Taiwan, and Taiwanese businesses have


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3. Taiwan had a surplus of $12.2 billion in trading with the United States in 1997; in 1996 the U.S. deficit was $11.4 billion. See Paul Blustein, Off Balance, and Likely to Get Worse; '97 Trade Gap Neared $114 Billion; Asia May Make '98 Figure Higher, WASH. POST, Feb. 20, 1998, at G1.
been accused of serious infringements of American intellectual property.\footnote{4}{See, e.g., \textit{U.S. Firms Ask for Trade Sanctions to Stop Counterfitting in Taiwan}, Agence Presse France, Feb. 19, 1997, available in LEXIS, News library, Curnws file (Nintendo of America and the International Intellectual Property Alliance claiming that Taiwanese businesses infringed $260 million worth of American intellectual property in 1996).} As a result, the United States has continually pressured Taiwan both to allow more free entry of American intellectual property and to ensure the protection of intellectual property from Taiwanese infringers. Other countries, including members of the European Union and Japan, have also pressed for the modernization of the Taiwanese copyright scheme in order to protect their copyright owners.

In response to international pressure and the demand from Taiwan’s own copyright owners, the Taiwanese Legislative Yuan\footnote{5}{The Legislative Yuan (literally, “mansion” in Chinese) is the national legislature of Taiwan.} enacted extensive revisions to Taiwan’s Copyright Code in late 1992 and early 1993, with the goal of implementing a system which approximates the copyright protection schemes available in Europe and the United States.\footnote{6}{See Chung-Sen Yang & Judy Y.C. Chang, \textit{Recent Developments In Intellectual Property Law In The Republic Of China}, 13 UCLA PAC. BASIN L.J. 70, 73, 76 (1994). If Taiwan’s membership application is approved by the World Trade Organization, there may need to be additional changes for Taiwan to comply with WTO’s intellectual property law requirements. However, at least one commentator considers the copyright laws to be largely in compliance with WTO requirements. \textit{See Laura W. Young, Taiwan and WTO Membership: IPR Laws Now Almost Completely Comply with TRIPS Requirements}, E. ASIAN EXECUTIVE REPS., June 15, 1996, at 9.} Due to these changes, new types of works such as computer programs and audio works are protected; the duration of copyright protection has been significantly lengthened; copyright owners have increased property rights and moral rights in their works; and the enforcement scheme has stiffer penalties for copyright infringers.

As the predominant exporter of intellectual property in the world, the United States should consider profitable exploitation of intellectual property an important tool to alleviate the trade deficit with Taiwan. In particular, since American companies dominate the computer software market, with a near monopoly on operating system software,\footnote{7}{For example, Microsoft Corp. of Redmond, Washington produces the Windows operating system, which is used in 85% of PC’s worldwide. \textit{See Steve Lohr, Refusing to Say the M-word}, N.Y. TIMES, Mar. 9, 1998, at D3.} and have a very strong presence in the music and motion picture industries, easier commercial exploitation of those works can provide great economic benefits to those companies and to the United States as a whole. It is vital for American copyright owners who might consider exploiting their works in Taiwan to understand the impact that the 1992-93 amendments have had on the substantive rights of copyright owners in Taiwan.

Unfortunately, discovering the effect that the 1992-93 legislative amendments have had on Taiwanese court decisions is a difficult, if not impossible, task. Taiwan is a civil law state, with a legal system that oper-
ates very differently from British or American common law.\textsuperscript{8} Court verdicts are not a part of the public record, and court opinions are generally available only to the parties in dispute. There is no official case reporter.\textsuperscript{9} In addition, precedents have a diminished persuasive value and almost no binding effect on the courts.\textsuperscript{10} Research on Taiwanese court cases thus tends to depend largely on insider knowledge, word of mouth, and news reports about significant cases. In interpreting Taiwanese law, then, the first and most basic step is to look at the plain language of the statute and at highly publicized cases. Such cases may not give a full picture or have complete predictive power on how the courts would generally react to a given copyright issue, but they should still provide insight into how the Taiwanese copyright statutes operate.

Given these difficulties, this Comment is not meant to serve as a guide to the application of settled Taiwanese copyright law. Rather, the goal is to explain the origins of the main differences between the copyright laws of Taiwan and the United States and to explore how these differences may operate in practice. It seeks additionally to explain how such differences may negatively affect the rights of the owners of copyrighted works who seek to protect their work in both the United States and Taiwan.

In Section I, I will outline the substantial differences between current Taiwanese and American copyright law, and note the practical impacts they may have on the rights of copyright owners in the two countries. Many of the differences significantly reduce the rights of American copyright owners in Taiwan when compared to the rights they enjoy in the United States. Others create additional burdensome requirements that the copyright owners need to satisfy before they can receive copyright protection in Taiwan.

Moreover, in Section II, I will show how the cultural heritage and the attitudes of Taiwanese society may continue to pose enforcement problems for owners of copyrighted works. Both the Taiwanese government and the population at large have made a conscious effort to align themselves with Europe and North America in many areas of law, including copyright. However, Taiwanese culture still has its own ingrained notions about authorship, ownership, and the concept of intellectual property in general.

\textsuperscript{8} For a good, quick primer on the difference in philosophy between civil and common law, see E. Allan Farnsworth, \textit{A Common Lawyer's View of His Civilian Colleagues}, 57 L.A. L. REV. 227 (1996).

\textsuperscript{9} See Interview with John Liu, Esq., in San Mateo, Cal. (Apr. 5, 1996).

\textsuperscript{10} The exception to this is certain Supreme Court decisions, which are published and do have a binding effect. See Fa Yuan Zu Zhi Fa [Court Organization Code] § 57, infra Appendix B. See also Michael M. Hickman, Note, \textit{Protecting Intellectual Property in Taiwan}, 60 WASH. L. REV. 117, 120-21 (1984). My examination of these Supreme Court decisions revealed no relevant decision on the Copyright Code. See Si Fa Yuan Da Fa Guan Hui Yi Jie Shi Hui Bian [The Compilation of Decisions of the Supreme Court] in ZUI XIN LIU FA QUAN SHU [THE UPDATED COMPENDIUM OF STATUTES] 1482-1518 (Da Zhong Guo Tu Shu Gon Si [The Great China Books] ed., 1995) [hereinafter COMPENDIUM].
I submit that this stems from traditional Chinese conceptions of intellectual property. I also examine the way in which recent Taiwanese history, particularly the diplomatic isolation that started after the Chinese civil war and continues to this day, has contributed to Taiwan’s reputation as a nation filled with copyright infringers.

In Section III, however, I will show that Taiwan is making a good faith effort at transforming its own concept of intellectual property rights, despite continuing enforcement problems. With Taiwan’s recent democratic reforms and the development of a substantial volume of home-grown intellectual property, the situation is improving for copyright owners. In fact, authors may enjoy certain rights under Taiwanese law that they would not enjoy in the United States. As a result, I conclude that, wherever practical, American copyright owners who are considering exploiting their works in Taiwan should seek to obtain copyright protection in both countries.

I.
THE DIFFERENCES BETWEEN TAIWANESE AND AMERICAN COPYRIGHT LAW
PLACE SUBSTANTIAL BURDENS AND LIMITATIONS ON THE RIGHTS OF AUTHORS SEEKING TAIWANESE COPYRIGHT PROTECTION

To a casual observer, the requirements for copyright protection in the two countries are fairly similar. An American author is technically not required to do anything at all to protect her original, creative works. On a practical level, she has to register her work by filling out the requisite documentation and sending two copies of the work along with a registration fee to the Library of Congress. Until she does so, she cannot initiate suits against infringers of her work. In addition, she cannot obtain statutory damages against people who infringe her work before she registers.

Once she registers, those who wish to use her work, except in a limited, generally not-for-profit manner, must obtain her permission. She thus acquires control over most exploitations of her work.

A Taiwanese author is also not technically required to do anything beyond creating and completing her work in order to receive copyright protection. Like an American author, however, she must register her

12. See id. § 408(b) (1994).
13. See id. § 411(a) (1994) (no suit before registration); § 412 (no statutory damages or attorney’s fees for infringement before registration). There is a grace period of three months for published works. See id.
14. Such uses are known as “fair use.” See id. § 107 (1994).
15. See id. § 106 (1994). “Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following [privileges of copyright] . . . .” Id.
16. See Zhu Zuo Quan Fa [Copyright Code [of the Republic of China]] § 13 [hereinafter Copy-
work by submitting the requisite paperwork and one copy of the work with a registration fee to the Ministry of the Interior. Until she registers, she also cannot file a civil suit against an infringer.  

Both authors, assuming they have satisfied the registration requirement, can bring suits against infringers in their respective countries who use their works in an unauthorized and unfair manner. Both can recover a sum determined by the actual damages (the amount of money lost as a consequence of the infringement) and the actual profits (the amount of money that the infringer earned by exploiting their works). If both actual damages and actual profits are hard to prove, both authors may seek statutory damages, which the laws set at a predefined range depending on the extent of the infringement and the egregiousness of the infringer’s conduct. If the infringer claims fair use, the rules by which the courts evaluate that fair use claim are virtually identical. In addition, both authors may request court injunctions prohibiting the infringer from future infringement of their works. Finally, in both countries, authors and their heirs enjoy copyright protection for fifty years after the author’s death.

The experiences of the American author and the Taiwanese author may seem fairly similar as far as the creation of copyright protection and the actions they can take against infringers are concerned. However, in many other important aspects of copyright protection, their experiences will diverge. For example, they will encounter varying degrees of difficulty in exploiting their works if they are not sole authors, but instead collaborated with other people. The American author will generally be able to exploit a work that she jointly authored with others, even without their consent, as long as she compensates the other author(s) fairly for the use of the work. The Taiwanese author, on the other hand, will not be able to...
exploit such a work unless she can obtain permission from the other author(s); if they refuse to give such consent, she may not be able to use the work.\textsuperscript{24}

An American author who seeks to publish in both the United States and Taiwan and receive copyright protection in both countries may run into some handicaps in obtaining Taiwanese copyright protection and in enforcing that protection. She would essentially be putting herself in the position of her Taiwanese counterpart, without being able to fully anticipate these problems based on her experience in securing copyright protection in the United States. Below, then, I will outline some differences between the two countries’ laws that would substantially affect the rights of such an author. These differences are the ones which are most likely to create problems in her quest to exploit her work in a profitable manner and to stop others from unjustly enriching themselves from her labor.

A. The registration requirement severely inconveniences copyright owners

Initially, the Taiwanese registration requirement\textsuperscript{25} appears to present little problem for an American copyright owner. After all, she would already be accustomed to the American registration requirement. In addition, an initial failure to register does not bar future protection in either country;\textsuperscript{26} the copyright owner therefore does not need to worry about a late registration negating her rights. However, upon closer examination of the Taiwanese registration requirement, an American author would discover a significantly greater burden than she anticipated. Whereas she would only need to register once in the United States, she would need to register multiple times in Taiwan. Namely, she would need to register whenever she wishes to publish, transfer, or even authorize the use of her work.\textsuperscript{27} Therefore, if, for example, United Press International wished to authorize the use of its works by five major Taiwanese newspapers, three television stations, and a Taiwanese on-line news service, the authorization would need to be registered nine times for each article.

Furthermore, because the registration requires at least the temporary submission of the originals of personal identification documents,\textsuperscript{28} it imposes an additional burden on foreign authors. The author would have to

\begin{itemize}
  \item \textsuperscript{24} See Copyright Code §§ 19, 40, infra Appendix A.
  \item \textsuperscript{25} This may be a misnomer of sorts; as indicated above, Taiwanese law (like American copyright law) does not require registration as a prerequisite to copyright protection; however, since it is a prerequisite to suit, I feel that one may justifiably consider it an essential requirement for copyright protection.
  \item \textsuperscript{26} See Copyright Code § 13, infra Appendix A; 17 U.S.C. § 201 (1994) (copyright resides in the original author unless explicitly transferred).
  \item \textsuperscript{27} See Zhu Zuo Quan Fa Shi Xing Xi Ze [Enforcement Regulations of the Copyright Code] § 3 [hereinafter Copyright Regulations], infra Appendix B.
  \item \textsuperscript{28} See id. § 6, infra Appendix B.
\end{itemize}
either leave her documentation with a Taiwanese agent or be willing to produce them every time that her work needs to be registered. Either way, the author would be greatly inconvenienced.

B. The limitations on the exploitation of joint works reduce the exploitability and the value of the works

Most audiovisual works and computer programs, as well as a significant portion of literary works, are joint works, created by the substantial efforts of more than one person. Both Taiwanese and American laws allow joint ownership of copyright for works with multiple authors. However, Taiwanese law requires all copyright owners with rights to a particular work to grant permission before the work can be exploited. Moreover, the Taiwanese statute requires an apportionment of the property rights and any material benefits derived from the work, based on the proportional contribution of each joint author. American courts, on the other hand, allow one of the joint authors to pursue her own exploitation of the work without authorization from other authors if she compensates them fairly for the exploitation. American caselaw also provides for the equal division of profits regardless of contribution to the work unless overridden by contract. A casual observer may thus consider the Taiwanese system to be a better way to ensure that the rights of all of the joint authors are upheld, one that is designed to equitably compensate each author for her contributions.

However, the scheme presents unexpected problems for joint authors. Because all joint authors must consent before an exploitation of the work can be undertaken, a dispute between joint authors may impede the exploitation of the work. One author can block the exploitation of the work or make it much more costly. In addition, the requirement that the relative contributions of the authors be ascertained may lead to uncertain judicial interpretations; it is unclear whether the courts will be interpreting the apportionment as based on the amount of work expended, the degree that the work enhanced the value of the product, or a mixture of the two. If the authors are not in agreement with each other, exploitation of a joint work

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29. I interpret the provisions to require an official document such as a passport or a driver’s license. The inconvenience of having to leave either of those documents with an agent and not having access to it would be considerable.


31. See Copyright Code §§ 19, 40, infra Appendix A.

32. See id. § 40, infra Appendix A.

33. See, e.g., Goodman v. Lee, 78 F.3d 1007, 1012 (5th Cir. 1996); Ashton-Tate Corp. v. Ross, 916 F.2d 516, 522 (9th Cir. 1990); Oddo v. Ries, 743 F.2d 630, 632-33 (9th Cir. 1984).


35. While the statute provides for the constructive assent by joint authors unless they have reasonable reasons to refuse, it did not define the degree of reasonableness. It may very well be interpreted to have a low threshold of reasonableness. See Copyright Code §§ 19, 40, infra Appendix A.
in Taiwan will invite prolonged litigation over the reasonableness of joint authors' refusal to grant permission and over the apportionment of the profits. The work may be essentially worthless until such issues can be resolved.

C. The Taiwanese presumption that the employee owns a work for hire further creates complications in exploiting such works

In joint ownership situations, there is another important legal difference that can further complicate the exploitation of joint works in Taiwan. In the American copyright scheme, works for hire are owned by the employer. This provision occasionally causes apparently inequitable results, leaving the employees undercompensated. Nevertheless, the provision does enable employers to publish works for hire without obtaining employee consent. It can thus act to further discourage litigation about the exact authorship of the works.

The Taiwanese copyright code, however, presumes that the employee owns the copyright for works for hire. This presumption can be overridden by contract, but there may be evidentiary difficulties in showing that a valid contract existed. Taiwanese law does recognize non-written contracts, but, as in U.S. law, the proponent of the contract has the burden of persuasion. It also makes joint ownership of copyrighted works more likely than does the American rule. This in turn necessitates the application of Taiwanese joint authorship rules. For example, unless otherwise indicated by contract, an American motion picture would be owned by the movie studio that hired the director, the actors, and other personnel who worked on the movie. A Taiwanese motion picture, on the other hand, may be considered a joint work owned by all persons who made a significant contribution to the form and content of the motion picture. For employers accustomed to the American rule, the Taiwanese rule can cause significant problems in securing employee consent to the use of works for

36. As shown above, the American law on the subject is considerably simpler. Yet a quick search yielded six published opinions by the Federal courts on the subject of joint ownership of copyright works in 1996 alone. See Goodman v. Lee, 78 F.3d 1007 (5th Cir. 1996); Harris Custom Builders, Inc. v. Hoffmeyer, 92 F.3d 517 (7th Cir. 1996); Merchant v. Levy, 92 F.3d 51 (2d Cir. 1996); Zuill v. Shanahan, 80 F.3d 1366 (9th Cir. 1996); Harmony Gold U.S.A., Inc. v. FASA Corp., 40 U.S.P.Q.2d 1057 (N.D. Ill. 1996); Herbert v. United States, 36 Fed. Cl. 299 (1996). Given the complexity of the Taiwanese statute, the interpretation is likely to be far more difficult.


38. See, e.g., Philadelphia Orchestra Assn. v. Walt Disney Co., 821 F. Supp. 341, 343 (E.D. Pa. 1993). Walt Disney paid $2,500 to the Philadelphia Orchestra in 1939 for the music of "Fantasia," which was a considerable amount given the times, but which became a tiny fraction of the earnings of the film. The Court ruled that since the work was a work for hire, Disney owns all of the copyright in the film. See id. at 351.

39. See Copyright Code §§ 11-12, infra Appendix A.

40. See Ming Fa [Civil Code] § 153, infra Appendix B.

41. See Ming Shi Su Song Fa [Civil Procedures Code] § 277, infra Appendix B.
D. Shorter copyright terms for certain types of works reduce their value

The differing lengths of copyright protection may also create a trap for an American copyright owner. Taiwan generally grants copyright protection for a duration of the life of the author plus 50 years, just as the United States does. There are, however, works for which protection is limited to an absolute term of 50 years. These include photographic works, audiovisual works, sound recordings, and computer programs. This distinction may appear trivial, since most of these works are considered works for hire, and American law provides absolute term lengths for works for hire. However, the term is significantly longer in the United States. While at first 50 years of protection may seem more than sufficient for these works, which generally become outdated within a decade, such a term may still severely reduce the value of certain works. One particular example is Disney's recent re-release of "Snow White and the Seven Dwarves" on videocassette. In Taiwan, Disney's rights over the cartoon classic expired in 1987. Disney can continue to exploit the work in Taiwan, but if the movie becomes available to Taiwanese video companies, they are not barred from reproducing and selling the cartoon themselves to directly compete with Disney. For Disney, a Taiwanese release of "Snow White" on videocassette would have been less profitable and perhaps dangerous to its future uses of the cartoon in Taiwan. Assuming that the rate of sales and profit for Disney are the same in Taiwan as in the

42. I do not mean to suggest here that the American rule is more equitable. Indeed, if we view works for hire from the standpoint of the comparative power of employers and employees, the Taiwanese rule may very well be far more equitable. Nevertheless, the Taiwanese rule appears to create greater likelihood of litigation over copyright ownership, thereby reducing the usefulness of copyright rights.  
43. See Copyright Code § 30, infra Appendix A.  
45. See Copyright Code § 34, infra Appendix A.  
47. In the United States, such works are protected for 75 years following their publication or 100 years following their creation, whichever comes first. See id.  
48. SNOW WHITE AND THE SEVEN DWARVES (Disney 1937). Disney made its first home video distribution of the cartoon movie on Oct. 25, 1994. See Jeff Jensen, Can 'Snow White' Dwarf 'Jurassic'?, ADVERTISING AGE, Oct. 31, 1994, at 8. At least four other significant Disney cartoon movies are still copyrighted in the United States but not in Taiwan, due to the difference in the length of protection. See PINOCCHIO (Disney 1940); DUMBO (Disney 1941); BAMBI (Disney 1942); SONG OF THE SOUTH (Disney 1946).  
49. This does not mean, of course, that those competitors can pass off their tapes as being from Disney, since trademark protection can be renewed repeatedly in Taiwan. See Shang Biao Fa [Trademark Code] § 24 [hereinafter Trademark Code], infra Appendix B. Nevertheless, even though the consumers would not be confused as to the identity of the marketer, competitors are allowed, and they would most likely cut into Disney's profits.
United States, Disney would be foregoing at least $45 million in profits if, due to this provision, Disney does not release the film on videocassette in Taiwan.\textsuperscript{50} While not all movies will have the popular appeal of "Snow White," this provision will nevertheless reduce the value of many old films and sound recordings which otherwise might still be exploitable in Taiwan.

\textbf{E. Enforcement problems are expected to continue despite efforts to bring Taiwan into compliance}

While the 1992-93 amendments strengthened both civil damages and criminal penalties for copyright infringement,\textsuperscript{51} enforcement may continue to be problematic. First, the current Taiwanese code apparently continues to require subjective bad faith as a prerequisite to suit in some situations.\textsuperscript{52} This may be difficult for the plaintiff to prove. In contrast, in the United States, intent is not a requirement for a finding of infringement.\textsuperscript{53} Second, Taiwan's criminal prosecution of copyright infringers is a mixed blessing. While on the surface criminal liability may be an additional deterrent against copyright infringement, such liability will likely increase the incentive for defendants to contest charges of copyright infringement, resulting in prolonged court battles. Ironically, these provisions for criminal penalties may thus make it significantly harder for authors to receive compensation from infringers of their works.

On an even more fundamental level, there are questions about the Taiwanese judiciary's competence to interpret new and largely untested intellectual property law.\textsuperscript{54} One odd example of Taiwan's rocky start in enforcing intellectual property protections is the case of an Intel executive

\textsuperscript{50} I prorated Disney's $500 million profit (estimated) on the video release by the population of the two countries. \textit{See} Michael I. Rudell, \textit{Details of Net Profit Definition}, N.Y.L.J., Apr. 26, 1996, Entertainment Law Section, at 3.

\textsuperscript{51} The provisions for civil damages now allow full recovery of either actual damages or actual profits, as mentioned above. \textit{See} Copyright Code § 88, infra Appendix A. There are a variety of criminal liability provisions for violating the Copyright Code: unauthorized reproduction of copyrighted works, for example, would yield a prison term of six months to three years for the infringer. \textit{See id.} § 91, infra Appendix A.

\textsuperscript{52} \textit{See id.} § 87(2) (requiring knowledge or bad faith), infra Appendix A.


\textsuperscript{54} There are additional concerns with the impartiality of the Taiwanese judicial system. A judge was recently given a life sentence for accepting over US $7 million in bribes. \textit{See Taiwan County Magistrate Given Life Imprisonment for Graft}, Agence France Presse, Dec. 23, 1996, \textit{available in} LEXIS, News Library, Cumws File. There has also been a major investigation involving many prosecutors, police officers, and court officials in Taipei regarding illegal electronic gambling machines. \textit{See Taiwanese Prosecutor Given 20-year Jail Term for Gambling Scam}, Agence France Presse, Jan. 29, 1997, \textit{available in} LEXIS, News Library, Cumws File. A joint survey done by the Taipei Bar Association, the Association of Judges, and a private foundation found that attorneys in Taipei have little faith in the honesty and ethics of judges and prosecutors. \textit{See Survey Finds Corruption Rife in Courts}, Financial Times Asia Intelligence Wire, Mar. 25, 1997, available in LEXIS, News Library, Cumws File.
who was sentenced to a six-month prison term for using a Chinese version of Intel's own Pentium mark, which a Taiwanese corporation had previously registered.\(^{55}\) While this type of problem is likely to decrease as judges learn more about intellectual property law, it may take some time to adjust, since until recently Taiwanese courts have not needed to take on an extensive load of intellectual property cases.

II.
THE DIFFERENCES BETWEEN THE COPYRIGHT LAWS OF THE UNITED STATES AND TAIWAN AROSE FROM DIFFERENCES IN CULTURE AND HISTORY

Even if copyright owners are successful in proving their cases to Taiwanese courts, they may also have to contend with the attitude of many Taiwanese, including law enforcement officials, that copyright infringement is a minor moral offense, if it is an offense at all.\(^{56}\) Below, I will outline some of the difficulties that copyright owners will continue to face in enforcing their rights in Taiwan, and I will also discuss the reasons why such different attitudes have taken root in the first place. Taiwan's culture has been greatly influenced by mainland Chinese culture,\(^{57}\) and traditional Chinese concepts of intellectual property have contributed greatly to the mindset that many Taiwanese still hold about copyrighted works. These traditional values include society's active encouragement for members of the intellectual elite to copy each other's work; the Confucian derogation of most creative works, including drama, novels, and choreography; and a lack of conceptual separation between the physical book and the expressive value of its contents. In addition, modern Chinese/Taiwanese history, including the anti-foreigner attitudes provoked by the aggressive actions of European countries and Japan in the 19\(^{th}\) and 20\(^{th}\) centuries, as well as the diplomatic isolation and political oppression that Taiwan began to encounter following the Nationalists' 1949 flight from the mainland to Taiwan, further compounded the problem by creating a deep-rooted distrust

\(^{55}\) See Intel Executive Loses Copyright Case in Taiwan, Reuters North American Wire, May 16, 1995, available in LEXIS, News Library, US File. The executive was allowed to pay a fine in lieu of the sentence. Despite the title of the article, this was a trademark case rather than a copyright case. However, the judge's apparent misinterpretation (in my opinion) of the Trademark Code, which actually requires the Taiwanese corporation to defer to Intel's usage of the Pentium mark, is an indication that the judiciary might still not be well versed in intellectual property law.

\(^{56}\) This may seem contradictory to the fact that copyright infringement is a criminal offense. However, such situations are not rare in Taiwan or even in the United States; adultery is a criminal offense in Taiwanese law, and sodomy is a criminal offense in many U.S. states, but neither is usually prosecuted criminally.

\(^{57}\) Taiwan's population is 97.8% Han Chinese. Seventy-eight percent are "native" Taiwanese, whose ancestors emigrated to Taiwan from mainland China before the island was ceded to Japan in 1895. Twenty percent were those whose families emigrated to Taiwan from mainland China around the fall of the Nationalist government in China to the Communists in 1949. See PATRICK JOHNSTONE, OPERATION WORLD 170 (1993).
and resentment of foreign pressure. All these attitudes will contribute to the possibility of infringement in the foreseeable future.

A. The ancient and medieval Chinese concept of authorship was not conducive to the concept of copyright

There are a variety of reasons why, unlike the British and some other Europeans, the Chinese did not have a concept of copyright until that concept was forced upon them in the 20th century. First, the domination of Confucian ideology discouraged many types of creative works. Without such suppression, the authors whose works became immensely popular might have pushed for some protection of their rights, but instead, the authors of many classic novels and plays stayed anonymous and silent. Second, that very same Confucian domination also encouraged the copying of certain works and discouraged creativity even within the sphere of Confucianism itself. It often became safer and easier for Confucian scholars to copy works that were acceptable to the government rather than to create. The Confucian emphasis on analysis of the past rather than the future further exacerbated the consequences of this tendency. Third, in Chinese/Taiwanese property law the book has traditionally been viewed as a physical object only, rather than a vessel for intellectual work. While the origins of this concept are unclear, the consequence is that there is little regard for the content itself; the theft of a physical book is considered more serious than the theft of the ideas contained in the book.

Confucianism first became the official ideology of the Chinese state when Emperor Liu Che58 of the Western Han Dynasty59 declared it to be such in 140 B.C.60 Adopted along with other Confucian doctrines was the doctrine that creative works are petty works which do nothing to further the interests of the state, the ruler, or the people.61 As a result, while many creative works of literature were written in ancient China, and large segments of the population enjoyed these pieces, readers did not hold the authors of such works in high esteem. For example, Tang62 novellas were not considered works of high culture. If authors were associated with these novellas, their future political careers could be ruined. Therefore,

58. Commonly known as Wu Di, or the Martial Emperor.
61. For the Confucians' anti-art attitudes, see SIMA, supra note 60, at 7349 (Emperor Liu Yu of Southern Song (A.D. 420-479) having an inappropriate fascination with music), 12846-7 (Li Shidao not considered a good successor for his brother, a warlord, due to his liking for painting), 15284 (a love for acting being blamed partially for the downfall of Emperor Li Chunxu of Later Tang (907-936)). While Sima Guang's account of historical events has been considered to be relatively impartial, as a Confucian scholar himself, he was known to have significant Confucian biases.
any attribution rapidly vanished.  

Presumably, if the official ideology had supported the production of creative works, the government would have sought ways to ensure the profitability of creative writing, possibly resulting in the development of copyright law. There have been many examples of official ideology affecting law and people’s attitudes. For example, leaders during the North-South Dynasties period greatly valued a person’s lineage when placing him in their systems of civil service. This led the government to develop extensive legal systems to track people’s lineage. The legacy of those laws, even after later dynasties abolished them, is that the Chinese people, up to this day, pay great deference to their clan structure. Official disdain for creative writing, on the other hand, has left society a legacy of not recognizing the authors of those works and therefore not compensating them monetarily for their creativity.

Confucian ideology did more than suppress creative works and their authors. It also firmly established a canon of prescribed texts for study, to the exclusion of all others. Some of this tendency can be attributed to the Confucian belief that the ancient “Three Dynasties” were ideal models for the empire, leading to an ideology that reflects on the past rather than the future. Later, the intertwining of political and Confucian doctrines led...
to the establishment of an official interpretation of Confucianism; deviation was considered heresy. As a result, non-Confucian works and Confucian works that provided non-official interpretations of Confucian texts were often suppressed. For example, a Qing assistant minister was impeached and sentenced to death in 1729 for using an alternative interpretation of the Confucian classic Da Xue and not the official one, developed by medieval scholar Zhu Xi. Therefore, young scholars seeking official appointments were encouraged to copy not only the content of classic works, but also to adopt the exact interpretation previously approved by official ideologists. In other words, what would be considered copyright infringement today was condoned by the government. This development was further fueled by the Ming and Qing Dynasties' heavy-handed censorship of materials suspected of being disrespectful to the government or the emperor. Works that on the surface had nothing to do with the government or the emperor could lead to the execution of entire clans if the government "discovered" hidden meanings through strained interpretations. It was thus not only more expedient but also safer for scholars to copy rather than to create. Authors who wished to protect their works from being plagiarized had to resort to hiding them.

The legal emphasis throughout Chinese history on property rights in the physical book (as opposed to its contents) further detracted from the protection available for the contents of a written work. For example, soon after the Qing general Zeng Guofan captured Li Xiucheng, one of the last generals of the failed quasi-Christian Taiping Tianguo rebellion in 1864, unauthorized versions of the interrogation logs were published within months, with no apparent official reaction; it seems that as long as the actual interrogation logs were not stolen, the government was unconcerned with such unauthorized copying.

71. A.D. 1616-1911.
72. See OUTLINES, supra note 63, at 893. He was given a last minute reprieve, but was still dismissed from his office and sentenced to hard labor. See id.
74. A.D. 1368-1661.
75. The founding emperor of the Ming Dynasty (1386-1661), Zhu Yuanzhang, for example, executed a number of officials whose reports to him contained words that were homonyms of the words for "thief" or "monk," since he was suspicious of them satirizing his early days, as a monk and then a thief. See OUTLINES, supra note 63, at 734.
76. The famous Chinese short story collection Liao Zai Zhi Yi contained a story of a Qing scholar seeking to enter himself in the governmental examination; the young scholar copied and memorized eight articles and then carefully hid those articles away from the other test takers. While the story is fictional, it reflected common practice at the time.
While a thorough examination of Chinese history here is impossible, various incidents and trends in Chinese history indicate a reason for the lack of a system of copyright protection. Confucian ideology discouraged the creation of creative works. The interaction of that ideology and the censorship that became particularly rampant in late medieval dynasties created further incentives for works to be copied. These fostered and strengthened the emphasis on protecting property rights to the physical book rather than its contents, creating a system in which the rights of the author were considered unimportant. They therefore contributed to the modern Chinese mindset that, despite the imposed Euro-American concept of intellectual property, copyright is not an important right.

B. Modern Chinese/Taiwanese history has continued to foster a lack of respect for copyright

Naturally, these attitudes became deeply rooted in the Chinese mindset, and the treaties imposed by the Westerners at the turn of the century that, among other things, promised Chinese implementation of intellectual property laws did little to alter the situation. Indeed, the Chinese populace as well as the government resented these terms greatly, viewing them as unfairly imposed. As a result, there was not even nominal implementation of these treaties' intellectual property terms until 1928, when the first Copyright Code was created by the military government of the Republic of China (ROC). That code lacked many things that Westerners would expect to see in copyright statutes: the civil damages for copyright infringement were limited; to get copyright protection, an author needed to go through a quagmire of registration procedures; and foreign authors could only receive ten years of copyright protection. The Berne Convention to establish international standards for copyright law was drafted in 1886, but no Chinese regime joined the Berne Convention until 1992, when the People's Republic of China (PRC) joined. The political and military turmoil that plagued China for much of the 20th century also contributed to the lack of enforcement of intellectual property laws. Soon after the republican revolution in 1911, China was divided, governed by regional warlords paying nominal adherence to one of two governments, either in Beijing or in Guangzhou (Canton), each claiming to be the legitimate government of the entire ROC; not until 1928 was there a pretense of national unity. Furthermore, the Japanese invasion (1937-1945) made the enforcement of laws difficult in areas still under Chinese control and

78. See OUTLINES, supra note 63, at 984-87.
79. See COMPENDIUM, supra note 10, at 615.
80. See ALFORD, supra note 63, at 50-52.
81. See ALFORD, supra note 63, at 34, 115.
impossible in areas under Japanese occupation.83 Even during the brief times when it actually had the power to enforce the laws, the ROC judiciary was inefficient at best and often corrupt.84 The ROC judiciary, then, had not had a chance to fully enforce the terms of the 1928 law when the Nationalist (Kuomintang, or KMT)-dominated ROC government evacuated to Taiwan after losing the Chinese Civil War (1945-1949).85 There, the ROC government found an island whose populace was Chinese in culture and therefore shared many of the traditional Chinese ideas about authorship. In addition, the people had never experienced an effectively administered copyright regime.86

After the ROC government relocated to Taiwan, two political factors added to the general ineffectiveness of the copyright laws. First, the Taiwanese government,87 a government imposed from without and primarily composed of mainlanders, was anxious to institute a system of censorship both to prevent communist infiltration and to suppress any political dissent. Anything that an author wrote could be used against her, and frequently was.88 Under such a political atmosphere, conditions similar to the ones that incentivized copying during Ming and Qing times returned; it became safer for Taiwanese publishers to copy foreign works rather than publishing comparable domestic works, because they could blame the foreigners for perceived anti-government criticism. Second, Taiwan was strapped for hard currency during this early period of reconstruction. The government was thus not interested in enforcing laws that would further force the Taiwanese to pay foreign copyright owners for easily pilferable contents. While the copyright statute was revised in 1959 to appease the United States,89 enforcement of the law was still not seriously undertaken. There was little foreign pressure: the United States and Japan, while they pressed for the 1959 revision, did not wish to pressure the Taiwanese gov-

83. See 4 ENCYCLOPEDIA, supra note 82, at 350-56.
84. See ALFORD, supra note 63, at 53, 110.
85. China was forced to cede Taiwan to Japan after the Sino-Japanese War of 1894. See OUTLINES, supra note 63, at 973.
86. The Japanese copyright statute, which was in force during the Japanese administration of the island, was similar to the statute adopted by the Republic of China. See ALFORD, supra note 63, at 50. However, enforcement was apparently lax in Taiwan. For example, many Taiwanese publications from that era bear no copyright notices, which would have been required for effective protection.
87. I will start to refer to the ROC government as the “Taiwanese government” at this point, since by this time it had lost effective control of mainland China.
88. The historian/commentator Bo Yang, to whom I owe much of my knowledge of Chinese history, for example, was imprisoned for almost ten years for translating a Popeye cartoon that featured Popeye and one of his nephews running for president against each other; the government perceived of it as a parody of Chiang Kai-shek’s clear attempt to have his son, Chiang Ching-Kuo, succeed him as president. He was fortunate in a way: in the 1950s, hundreds of people were summarily executed as suspected Communist sympathizers in a purge known as “the White Terror.” See, e.g., “Pro-Communist” Taiwanese Lecturers Reinstated 23 Years On, Agence France Presse, June 16, 1996, available in LEXIS, News Library, Cumws File.
89. See ALFORD, supra note 63, at 97.
ernment any further since they were concerned with its viability, and Great Britain, another country whose works were often pirated, had broken its diplomatic relations with Taiwan and could not exert any pressure.

These conditions, then, led to rampant infringement by Taiwanese publishers. But when Taiwan’s economic conditions improved and the political oppression slowly eased, the severity of the infringement got worse, not better. As late as 1988, the United States was still losing “tens of million of dollars” annually to Taiwanese copyright infringers. The United States threatened both to revoke Taiwan’s most favored nation (MFN) tariff status and to impose trade sanctions on Taiwan for these violations, under a provision of the Omnibus Trade and Competitiveness Act of 1988. The pressure was initially not well-received in Taiwan, but eventually the Legislative Yuan enacted the 1992-93 revisions to the Copyright Code, which were designed to give Berne-like protection for copyrighted works. There were, however, continued murmurs, both in the legislature and in the populace in general, that these concessions betrayed Taiwan. Resistance was bitter particularly because Taiwan could not (and still cannot) join the Berne Convention due to opposition from the PRC.

In Chinese/Taiwanese history, then, the copyright regime has not taken root until very recent times. Inherited cultural attitudes were not conducive to the idea of copyright, and post-World War II economic and political difficulties created further problems with copyright enforcement. In short, social attitudes could not be expected to welcome the 1992-93 Amendments.

III.
DESPITE LEGAL AND CULTURAL PROBLEMS, AMERICAN COPYRIGHT OWNERS SHOULD STILL PURSUE COPYRIGHT PROTECTION IN TAIWAN

These attitudes will likely continue to present problems with enforcement of copyright laws in Taiwan. As I discussed in Section I, there are continued lapses within the Taiwanese court system involving the consistent enforcement of these laws. Further, while the laws have been re-

90. It might have been irrational for the United States and Japan to have worried that the enforcement of intellectual property laws would lead to the fall of the Taiwanese government, but that was apparently one real concern. See id. at 96.
91. See 19 ENCYCLOPEDIA, supra note 82, at 433.
94. See ALFORD, supra note 63, at 106.
95. See A Chinese Puzzle; Rights in Taiwan, PUBLISHERS WKLY., May 18, 1992, at S17.
vised to be in substantial compliance with international standards, the bulk of the population is not necessarily going to be in full compliance with those laws immediately. In the past, Taiwanese courts have been slow to react to revisions in the law, and thus publishers have continued to pirate U.S. works undaunted. It is perhaps no surprise that a recent report claimed that despite the new enforcement efforts, American companies lost $189 million to Taiwanese infringers in 1994. Even if the government is willing to go all out in prosecuting infringers, if a high number of people continue to disregard the recent copyright protections, enforcement will be difficult.

However, while the two previous sections outlined legal and societal problems with the enforcement of copyright, American copyright owners should still obtain Taiwanese copyright protection wherever practical, if they are interested in exploiting their works in Taiwan. First, there are some rights available to copyright owners in Taiwan that are unavailable in the United States, which may add to the value of Taiwanese copyright protection. Second, Taiwan is making a good faith effort toward compliance with international standards of copyright protection, for a variety of reasons.

A. Some rights unavailable in American law are granted by Taiwanese law

While a number of the differences between Taiwanese and American law are detrimental to the interests of American copyright holders, there are some rights granted by Taiwan, not available under U.S. law, which significantly add to the value of a work in Taiwan. While these rights probably do not compensate for the detrimental differences, they may nevertheless provide another reason to consider obtaining Taiwanese copyright protection.

1. Moral Rights

The Taiwanese Copyright Code grants a number of moral rights to the authors of copyrighted works. Although these rights exist in many European countries, they are generally unavailable to American copyright owners. They include the rights of public announcement, attribution, and

96. See ALFORD, supra note 63, at 110.
98. That is, rights that are usually considered non-financial in nature, and that are not transferable to other people.
99. The Visual Artists Rights Act of 1990, 17 U.S.C. §§ 101, 106A (1996), grants rights of attribution and integrity to the authors of certain kinds of paintings, drawings, prints, sculptures, etc. that are mainly meant to be items of fine art and not mass produced. In addition, ten states have limited moral rights legislation. See GORMAN & Ginsburg, supra note 73, at 482-83. California, for example, protects art from destruction or alteration without the artist's consent. CAL. CIV. CODE § 987.
They guarantee that a work will not be altered without the author's consent, or be published under a name other than the author's. While these rights are of minimal monetary value, the statute gives them some weight by allowing statutory damages for their infringement. Since these rights are not transferable and not inheritable, they protect only the authors and not copyright owners. In essence, monetarily, they are not worth much. Nevertheless, they protect the works from being misattributed or mutilated, and therefore many authors may find them valuable.

2. Rental Rights

The Taiwanese Copyright Code also gives a copyright owner the exclusive right to lease out her copyrighted works, consistent with European standards. This means that video rental stores and similar shops are required to pay license fees to authors whenever rentals are made; copyright owners are not entitled to similar licensing fees in the United States. Due to the popularity of the somewhat-misnamed KTV parlors and rental bookstores in Taiwan, if this additional right can be effectively enforced, copyright owners will benefit greatly.

B. Taiwan, in spite of its history and culture, should be able to transform itself into a country that will respect and implement copyright protection

Despite these promising aspects of the new law, it may seem impossible, given the perception that Taiwan bowed to unwelcome U.S. pressure, for the populace to respect the terms of the Copyright Code. As I indicated above, enforcement problems may persist for some time. However, there are three factors that indicate that the Taiwanese copyright regime will be respected and enforced. First, Taiwan's recent democrati-

(Deering 1998). However, the statute has apparently rarely been invoked—only three published cases have referred to it. See Lubner v. City of Los Angeles, 45 Cal. App. 4th 525 (1996); Ripley v. Pappadopoulos, 23 Cal. App. 4th 1616 (1994); Pelletier v. Eisenberg, 177 Cal. App. 3d 558 (1986).

100. See Copyright Code §§ 15-17, infra Appendix A.
101. See Copyright Code § 85, infra Appendix A.
102. However, the rights do not terminate at death; the violations against the presumed wishes of the author are actionable. See Copyright Code § 18, infra Appendix A.
103. See Copyright Code § 29, infra Appendix A.
104. See Jonathan Hill, Copyright Warning on CD Prices, SOUTH CHINA MORNING POST, Dec. 12, 1995, at 5.
105. For a fee, these parlors provide movie and music video rentals and allow the renters to use cubicles set up for viewing these videos.
106. Current enforcement is difficult, however, due to lax KTV licensing enforcement. While the government has begun a campaign to crackdown on KTV parlors operating without licenses, a large number of these parlors are still operating without paying user fees. See Alice Hung, Eleven People Die in Taiwan Blaze, Arson Suspected, Reuters North American Wire, Apr. 17, 1995, available in LEXIS, News Library, Curnws File. However, the movie rental system appears to be better organized. See Phua Mei Pin, Fast-Forward Help for Video-Rental Shops, STRAITS TIMES (Singapore), May 10, 1996, at 7 (using the Taiwanese distribution system as a possible example for Singapore).
zation and diplomatic isolation make it necessary for the country to show itself to be a valuable member of the international community. Part of the respect Taiwan hopes to earn, then, would require it to be in substantial compliance with international standards of protection for intellectual property. Second, the foreign, particularly American, pressure for the enhancement of the copyright regime, while not welcome and perhaps accepted grudgingly, should indeed be effective given Taiwan’s dependence on international trade. Third, and perhaps most importantly, Taiwan’s own copyright owners have become greater in number and more vocal, and in this struggle, they will advocate the strengthening of the copyright enforcement regime as well. Essentially, while foreign pressures and perceptions will fuel the drive for stronger copyright protection, it may be pressure from within that will transform Taiwanese society over time and make copyright infringement less prevalent in the future.

1. Taiwan’s desire to be accepted as a member of the international community

Respecting copyright law may be an important step in Taiwan’s quest to end its diplomatic isolation. Only 28 states still maintain diplomatic relations with the island, and none are regional powers of any kind. Part of this isolation is attributable to diplomatic pressures from the PRC. The PRC considers Taiwan a renegade province, and refuses to establish diplomatic relations with any state that recognizes Taiwan, thus precluding states from recognizing both Taiwan and the PRC. Nor would previous Taiwanese administrations accept dual-recognition, instead insisting that “the Han and the thief cannot stand together.” Moreover, in the past there was a strong perception that Taiwan, like the PRC, was an absolutist

108. See, e.g., Taiwan’s President Lee to Visit 4 African Nations, Japan Economic Newswire, Feb. 22, 1998, available in LEXIS, News Library, Curnws File (China refusing to establish diplomatic relations with South Africa unless South Africa abandons its recognition of Taiwan, causing South Africa to switch recognition from Taiwan to the PRC on January 1, 1998).
109. This was at a time when China might have accepted dual recognition since many countries that it was eager to establish relationships with still recognized Taiwan. Taiwan’s inflexibility arguably cost it its United Nations membership in 1971, its relations with Japan in 1972, and its relations with the United States in 1979.
110. This was the official explanation that the Taiwanese government, then under Chiang Kai-shek and later his son Chiang Ching-Kuo, gave for refusing dual recognition, and was a reference to an assertion by the ancient Chinese philosopher, politician, and general Zhuge Liang. See SIMA, supra note 60, at 3991. Zhuge was maintaining that Shu Han, under whom he was prime minister, and who claimed to be the legitimate successor to the Eastern Han Dynasty, could not co-exist with Cao Wei, who had usurped the Eastern Han throne. See id. The Chiangs claimed, in essence, that since they considered their regime the legitimate government of all of China, that they could not accept continued diplomatic relations with a country that recognized the PRC as the legitimate government of China. This policy has persisted. See, e.g., Taiwan Foreign Minister Rejects “Dual Recognition,” BBC Summary of World Broadcasts, Nov. 10, 1988, available in LEXIS, News Library, Non-US File.
state where the government controlled all aspects of civil life.\textsuperscript{111} If the Taiwanese and Chinese governments were both dictatorial, there was no moral reason to support Taiwan and spurn China diplomatically.\textsuperscript{112}

Much has changed, however, in Taiwan. The ruling KMT in 1987 lifted martial law and permitted opposition parties to organize.\textsuperscript{113} The legislature was reformed in 1991 to make it more responsible to the electorate.\textsuperscript{114} Taiwan has since moved toward a policy of "pragmatic diplomacy," seeking recognition for Taiwan from other countries and international organizations, both officially and unofficially, without regard to the status of those countries' and organizations' recognition of China.\textsuperscript{115} Taiwan thus seeks to assert its existence as a lawful, democratic state through a variety of means;\textsuperscript{116} for example, extensive Taiwanese lobbying led to a Congressional resolution permitting a highly publicized visit to the United States by President Lee in June 1995.\textsuperscript{117} Lee was re-elected with a comfortable margin in the first popular presidential election in March 1996,\textsuperscript{118} and Taiwan can be expected to continue to assert its existence as a democratic state on the international scene.

In order to help end its diplomatic isolation, Taiwan will need to establish a reputation as a law-abiding member of the international community, and this desire will push it toward more effective enforcement of its copyright regime. The Taiwanese government is promoting an education campaign designed to enhance public awareness of copyright laws and to discourage copyright infringement;\textsuperscript{119} that effort has not gone unnoticed by

\textsuperscript{111} See, e.g., \textit{China Misses the Mark Over Taiwan}, \textit{SOUTH CHINA MORNING POST}, Mar. 17, 1996, at 9.

\textsuperscript{112} See Bob King, \textit{Taiwan; Challenging The Giant}, \textit{FINANCIAL TIMES}, Nov. 12, 1987, at 1.

\textsuperscript{113} See id.

\textsuperscript{114} Previously, a majority of the legislature were holdovers from the first legislative elections held after the end of World War II in 1946. The terms of these legislators were set to expire in 1952 but were extended indefinitely by Chiang Kai-shek under the rationale that he needed a legislature that represented the entire China and that reelections on the mainland were impossible due to "Communist interference." The 1991 reforms ended the tenures of these holdover legislators and enforced popular elections of the legislature in Taiwan. \textit{See Books, Ashtrays Fly as Taiwan Legislators Brawl Over Reform}, \textit{L.A. TIMES}, Apr. 13, 1991, at A10.


\textsuperscript{116} Taiwan continues to assert that it is part of China and wishes to be unified with China later, but insists that its own government, as the descendant of the Nationalist regime forced into exile by the establishment of the PRC, is the legitimate government of the entire nation. \textit{See China Sends Taiwan Message Calling for Talks}, Agence France Presse, Aug. 27, 1997, available in LEXIS, News Library, Curnws File; \textit{Lee Pledges to Reunify with China at Taiwan's Kuomintang Congress}, Agence France Presse, Aug. 25, 1997, available in LEXIS, News Library, Curnws File.


the United States, whose trade representative, in response, has removed Taiwan from all watch lists and special mention lists. These moves by the Taiwanese government appear to be calculated, in particular, to contrast Taiwan’s behavior with that of the PRC, which has drawn threats of U.S. trade sanctions lately for its inability to control software, music, and video tape piracy. Taiwan, then, should be expected to strengthen its enforcement of copyright laws in order to help publicize its democratic nature and diplomatic plight.

2. International pressure, particularly from the United States

Recent efforts by the United States threaten to slap tariffs of up to 100% on Chinese products for the PRC’s failure to control piracy within its borders. This outlined the kind of punitive actions the United States could have taken against Taiwan; Taiwan was at one point on the same watch list of the U.S. Trade Representative that China is currently on. A punitive tariff could seriously jeopardize the trade between Taiwan and the United States, which in 1995 amounted to $48.2 billion. While current Taiwanese political and social forces are pushing Taiwan toward compliance with international standards of copyright protection, the threat of U.S. trade sanctions serves as a powerful additional force. Although Taiwan is not currently on any watch list or special mention list of the U.S. Trade Representative, it may still be readily reinstated if it should lapse in its implementation of protections for intellectual property. While there is no comparable direct pressure from other major trading partners, such as the European Union, many countries are also informally pressuring Taiwan into further compliance with international standards. The success or failure of Taiwan’s recent application to the World Trade Organization also appears to hinge partially on Taiwan’s ability to prevent infringement of intellectual property rights. Given Taiwan’s dependence on foreign trade, these formal and informal pressures should be effective at persuading Taiwan of the dangers of not implementing and enforcing its own copyright laws.

121. See Jim Landers & Robert Dodge, U.S. Poised to Slap China with Sanctions, DALLAS MORNING NEWS, May 15, 1996, at 1D.
122. See James Cox, China Takes Piracy Hard Line, Unit Formerly Used Against Dissidents, USA TODAY, June 21, 1996, at 12B.
124. See U.S. BUREAU OF THE CENSUS, supra note 2, at 804.
3. **Pressures from domestic forces**

When the KMT forces arrived in Taiwan in 1949, the island’s intellectual life had not yet recovered from the Japanese colonization, and under Chiang Kai-shek’s regime hardline censorship and fear of opposition further inhibited the development of literary works.\(^\text{127}\) However, as both political and economic forces push Taiwan to develop its own intellectual property works, domestic demands for copyright protection have soared. Taiwan is now a major exporter of musical and audiovisual works to Hong Kong, Singapore, and the Chinese-speaking community in many foreign countries.\(^\text{128}\) Furthermore, there is now a significant domestic industry in software development.\(^\text{129}\) Developers licensed by Microsoft, for example, were able to create Chinese versions of software written for Microsoft’s Windows 95 operating system within months of Windows 95’s release in Taiwan.\(^\text{130}\) Such developers presumably wish to see their works protected. Indeed, local industrial heavyweights Kenex, Acer, and Ta-t’ung, among others, apparently played significant roles in lobbying the Legislative Yuan to pass the 1992-93 amendments to the Copyright Code.\(^\text{131}\) As Taiwan’s own intellectual property-based industries continue to develop, we may reliably predict that they, too, will flex their muscles in trying to gain additional protection for their property.

**CONCLUSION**

Taiwanese copyright law, despite attempts by the Taiwanese government to bring it into substantial compliance with international standards, still differs significantly from American copyright law. American copyright owners can therefore expect to encounter problems when they seek Taiwanese copyright protection. Some of these problems are due to the current structure of the law. Others are due to Taiwanese culture and attitudes, which are influenced by the historical lack of a Chinese concept of copyright.

Despite these problems, however, American authors should still ob-

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tain copyright protection in Taiwan. The Taiwanese copyright protection scheme is improving and should continue to do so. Factors contributing to this improvement include foreign pressure, Taiwan's desire for international recognition, and the increased importance of copyrighted works in the Taiwanese economy. Therefore, in the future, the Taiwanese government and people can be expected to make good faith efforts to rid Taiwan of its reputation for piracy, bringing Taiwan substantially into the established community of industrialized nations in terms of copyright protection. American authors who obtain copyright protection in Taiwan can thus expect Taiwanese law enforcement and courts to gradually become more attentive to their rights. The exploitation of their works in Taiwan will thus likely be much more profitable in the future.

POSTSCRIPT

While this Comment was in the editing process, Taiwan further amended its Copyright Code to bolster its case for World Trade Organization (WTO) membership. The amendments, passed by the Legislative Yuan on December 30, 1997 and promulgated by the President on January 21, 1998, move Taiwanese copyright law closer to compliance with international standards under GATT TRIPs.

The amendments make some elements of Taiwanese copyright law more accessible to foreign authors than before. In particular, the new legislation abolished the copyright registration system altogether. This means that much of the burden of Taiwanese copyright registration is alleviated for foreigners seeking protection in Taiwan. Also, some works that were not previously protected now fall within the scope of the law. For example, derivative works such as musical performances may be protected independently of the original work. These changes further demonstrate how Taiwan is trying to assert its status as a valuable member of the international community and how it is willing to modify its intellectual property laws to reflect that assertion.

At the same time, though, some rights previously granted by Taiwanese copyright law are eroded by the amendments. Economic rights to works for hire, for example, are no longer presumed to belong to the employee; rather, unless otherwise overridden by contract, the employer is presumed to have the economic rights. Also, the authors' moral rights have been somewhat weakened in that they are considered to have been infringed only if the reputation of the author is injured. As discussed above in Section I-C, however, the change in the ownership of economic rights brings welcome clarity to the exploitation of such works. The change in the status of moral rights may be unfortunate, but should not greatly affect the rights of the authors.

With future changes in law and in practice, Taiwan should conform even more closely to international copyright standards. This process of
change may rapidly make this Comment somewhat dated, but is very welcomed by the author.
APPENDIX A

SELECTED SECTIONS OF THE COPYRIGHT CODE

[OF THE REPUBLIC OF CHINA]132

§ 5: The works under this Code are exemplified below:
(1) Literary works
(2) Musical works
(3) Theatrical or choreographic works
(4) Artistic works
(5) Photographic works
(6) Graphical works
(7) Audiovisual works
(8) Audio [recordings]
(9) Architectural works
(10) Computer [programs]

Examples of each of these categories shall be determined by the administrative agency.

§ 8: A work created by more than one person and of which the creative elements of each person cannot be separately exploited is a joint work.

§ 11: Where an employee of a Legal Person133 completes a work planned by the Legal Person under her terms of employment, the employee shall be considered the author of the work. However, if a contract term designated the Legal Person or its representatives as the author, the contract term shall be upheld.

§ 12: Where an [employee or contractor]134 completes a work planned by an investor, except where § 11 is applicable, the employee shall be considered the author. However, if a contract term designated the investor or its representative as the author, the contract term shall be upheld.

132. Translated from Zhu Zuo Quan Fa [Copyright Code [of the Republic of China]], as revised Apr. 24, 1993, collected in COMPENDIUM, supra note 10, at 615. This translation is my own and does not represent an official interpretation by the government of the Republic of China. The original Chinese uses, of course, genderless pronouns, which I have changed to the feminine in all circumstances. The translation was necessary because the Taiwanese government does not have official English translations for its laws. However, private, unofficial translations do exist in some instances for use by attorneys who are not fluent in Chinese. See Telephone Interview with James Chuang, Director for Governmental Affairs, Taipei Economic and Cultural Office (San Francisco) (May 19, 1998). The Taipei Economic and Cultural Office, formerly known as the Coordination Council for North American Affairs, is a semi-official agency of the Taiwanese government which, along with its counterpart, the American Institute in Taiwan, permits both the United States and Taiwan to maintain a technically unofficial relationship with each other.

133. Essentially, an organization or an entity registered with the government to conduct business, with its own legal status distinct from its directors. It is the predominant form under which charitable organizations and think tanks organize in Taiwan.

134. "Shou Ping Ren" in the original.
§ 13: The copyright of a work shall vest in the author at the completion of the work.

§ 15: The author shall have the right to publicly announce her work.

Permission to publicly announce a work shall be presumed when one of the following conditions is satisfied:

1. where the author has assigned the economic rights of an unpublished work to another person or authorized the use thereof by another person, and where a public announcement is for the purpose of exercising or using such economic copyright;

2. where the author has assigned the original of an unpublished artistic or photographic work to another person and where the assignee publicly displays the original of the work;

3. where the work is a masters or doctoral thesis created under the Conferral of Degrees Code, and where the author has obtained her degree;

4. where the producer of an audiovisual work is publicly announcing the work under Sec. 38 below.

§ 16: The author shall have the right to express her real name, pseudonym, or no name on the original of her work or its reproduction or at the time of the public announcement of the work. An author shall have the same right for a derivative work where her work is the underlying work.

The user of a work shall have the right to apply her own cover design to the work and include the name of the designer or the editor, but the right shall not apply when preempted by directions from the author or when it violates the societal protocols for the use of such works.

The name of the author may be omitted when the purpose and method of the use of the work does not create the possibility of detrimentally affecting the rights of the author and when it does not violate the societal protocols for the use of such works.

§ 17: The author shall have the right to keep nature of the contents, format, and name of her work from being altered, but the right shall not apply when one of the following conditions is satisfied:

1. where the use is education under Sec. 47 and where the alteration is a necessary abridgment, paraphrase, or any other non-substantial alteration;

2. where the alteration is a change to a computer program in order to allow the program to be used on a specific computer or a correction of the design of the computer program to correct an error that prevents the pro-

135. This is the best translation that I can think of for “Fabiao,” which is the act of announcing the work’s existence or creation, but not yet actually presenting the contents of the work itself to the public via publication or some other way of broadcasting its contents to the public.

136. This code (Sui Wei Shou Yu Fa) appears to have been subsumed under Da Xue Fa [Universities Code] (1993), See COMPENDIUM, supra note 10, at 1353.
gram from carrying out the purpose of the program;

(3) where the alteration is an addition, remodel, repair, or rebuild of
an architectural work; or

(4) where the alteration is any other non-substantial alteration neces-
sary due to the nature, use, purpose, and method of the work.

§ 18: In the event of the death or destruction of the author, the author
shall be considered to be living or existent for the purpose of protecting
her moral rights, and no one shall infringe on those rights. However, an
infringement shall not be found where the act is due to the nature and de-
gree of the use of the work, changes in society, or any other reason that can
be considered not to violate the will of the author.

§ 19: The moral rights of a joint work cannot be exercised without
the permission of all of the joint authors. A joint author shall not deny
such permission without a reasonable cause. The joint authors of a joint
work may select a representative person among the joint authors to exer-
cise the moral rights.

The limitations of the rights of representation above shall not be used
against a good faith third party.

§ 29: The author shall have the exclusive right to lease her work.

§ 30: The property rights in a copyrighted work shall endure for a du-
ration of the author’s life and fifty years after [her] death except as other-
wise provided in this Code.

The property rights in a copyrighted work publicly announced forty
to fifty years following the author’s death shall endure for ten years fol-
lowing the public announcement.

§ 31: The property rights in joint works shall endure until fifty years
after the death of the last surviving author.

§ 32: The property rights in pseudonymous or anonymous works
shall endure for fifty years after the public announcement of the work. How-
ever, if the death of the author can be shown to have occurred more
than fifty years before, the property rights shall be extinguished.

The rule above shall not be applied if one of these conditions exists:
(1) the pseudonym of the author is publicly known; or
(2) during the term created by the above rule, the real name of the
author is registered according to Sec. 74.

§ 33: The property rights in works authored by legal persons shall
endure for fifty years after the public announcement of the work. However,
the property rights in works that were not publicly announced within ten
years of the creation of the works shall endure for fifty years after the
creation of the works.

§ 34: The property rights in photographic works, audiovisual works,
sound recordings, and computer programs shall endure for fifty years after
the publication of the work.

§ 40: The property rights in joint works cannot be exercised without
the approval of all of the joint authors. Each joint author cannot transfer or encumber her right in the joint work without the approval of all of the other joint authors. Such approval shall not be withheld without reasonable causes.

The portions of the property rights of joint works shall be determined by agreement between the joint authors. When an agreement is not present, it shall be determined by the degree of participation in the work of each joint author. When the degree of participation is not known, the contribution shall be presumed to be equal.

When a joint author abandons her portion of the property right, the other joint authors will assume the rights proportionally to their existing rights.

The above rule shall apply if a joint author dies without an heir or is destroyed without a successor.

The joint authors of a joint work may select a representative among themselves to exercise the property rights of the joint work. The limitations made to this representation shall not be used against a good faith third party.

The above five rules shall be applied to other joint copyright created by other causes.\(^\text{137}\)

§ 65: Whether a particular use of the work [is a fair use] shall be decided by the court taking in all the circumstances at hand, particularly these factors:

(1) The purpose and the type of use, including whether the use was for commercial purpose or for a non-profit educational purpose;
(2) The nature of the work;
(3) The amount of the work used and the proportion of the use and the work as a whole;
(4) The effect of the use on the potential market and the value of the work.

§ 74: The author or an individual designated under Sec. 86 shall file an application for a registration of authorship with the administering agency.

The owner of copyright property rights shall file an application for a registration of copyright ownership, a registration of the date of initial public announcement, or a registration of the date of initial publication, with the administering agency.

§ 75: The [relief] below may not be sought against a third party:\(^\text{138}\)

(1) An injunction against the transfer, authorization, or disposal of a copyright property right; or

\(^{137}\) Such as joint inheritance, perhaps.

\(^{138}\) It is unclear what the statute means here by “third party.” It might be referring to parties that did not directly infringe the copyright owner’s rights but who signed impermissible contracts or other agreements to do so.
(2) An injunction against the encumbrance against a copyright property right, or the transfer, modification, destruction, or disposal of such an encumbrance, except in case of the destruction of the encumbrance due to the destruction of the underlying copyright property right or the underlying obligations creating the encumbrance.

§ 84: The owner of copyright may request an elimination of an existing threat to the copyright and the prevention of such a threat. The copyright owner may request for the destruction or any other necessary actions to prevent the use of such infringing items.

§ 85: An infringer of copyright moral rights is liable for damages. Even if there are no monetary damages, the victim may request equitable monetary compensation.

In case of infringement above, the victim may request a correction of the name of the author or any other equitable judgment in order to regain her reputation.

§ 87: The below shall be considered infringement of copyright except where otherwise determined by this Code:

1. an exploitation of the work in such a way as to damage the author’s reputation;
2. the dissemination or display of an infringing product with knowledge and with desire for profit
3. the importation of a reproduction unauthorized by the copyright owner;
4. the importation of an original unauthorized by the copyright owner;
5. the use of an infringing reproduction of a computer program for profit.

§ 88: One who infringes, either intentionally or negligently, another person’s copyright property right or printing right, is liable for damages. If several persons jointly infringe, then they are jointly liable.

The victim of the infringement may request one type of damages below:

1. The damages as specified by Civil Code Sec. 216. Where the victim cannot prove her actual damages, the damages may be calculated by subtracting, from the expected profits from the profits that would have resulted absent the infringement, the profits received despite the infringement.

2. The profits that the infringer received through the infringement. Where the infringer cannot prove her costs, the entire proceeds received through the infringement shall be considered her profits.

If the victim cannot easily prove her actual damages as articulated

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139. The section limits the recovery to the actual damages and/or lost profits. See Ming Fa [Civil Code] § 216, infra Appendix B.
above, she may request that the court, based on the extent of the infringement, to set a damage amount no less than NT $10,000\textsuperscript{140} and no greater than NT $500,000.\textsuperscript{141} If the infringement is intentional and serious, the damages may be increased to NT $1,000,000.\textsuperscript{142}

§ 91: A person who makes an unauthorized reproduction of a work by others shall be sentenced to a prison term of no less than six months and no more than three years. A fine of up to NT $200,000\textsuperscript{143} may also be imposed. The same penalties may be applied to an agent of such reproduction.

A person who makes an unauthorized reproduction of a work by others with intent to sell or rent such work shall be sentenced to a prison term of no less than six months and no more than five years. A fine of up to NT $300,000\textsuperscript{144} may also be imposed.

\textsuperscript{140} Roughly US $400.
\textsuperscript{141} Roughly US $20,000.
\textsuperscript{142} Roughly US $40,000.
\textsuperscript{143} Roughly US $8,000.
\textsuperscript{144} Roughly US $12,000.
APPENDIX B

RELEVANT SECTIONS OF OTHER TAIWANESE STATUTES

CIVIL CODE: 145

§ 153: Where the parties in question agree among themselves that they had a meeting of the mind, regardless of whether this agreement is explicit or implicit, a contract is established.

Where the parties had agreed on the material terms but not on the non-material terms, the contract shall be considered to be established. When the parties disagree on the non-material term, a court shall determine the term based on the nature of the dispute.

§ 216: The compensation for damages, except otherwise provided for by law or contract, shall be limited to the extent necessary to compensate the victim for her losses and her lost profits.

Civil Procedure Code: 146

§ 277: Where a party submits evidence benefiting herself, the party has the burden of persuasion that the evidence is valid.

COPYRIGHT CODE ENFORCEMENT REGULATIONS: 147

§ 3: The types of registration required by Secs. 74 and 75 of the Code are as follows:

(1) the registration of authorship;
(2) the registration of property rights;
(3) the registration of the date of announcement or publication of the work;
(4) the transfer of property rights;
(5) the registration of authorization or restraining order;
(6) the registration of transmuting property rights as usable collateral, the transfer of such collateral, the modification of such collateral, the termination of such transmutation, or a restraining order against such transmutation (hereinafter registration of property right as collateral).

§ 6: Except where otherwise regulated by these Regulations, an applicant for copyright registration is required to submit the following documents:

(1) an application of copyright registration;
(2) a copy of the work and a documentation of the contents of the work as directed by the administrative agency, or the original work; and
(3) the identifying documents as ordered by law, both the original and one photocopy each.

145. Translated from Ming Fa [Civil Code], as revised Jan. 4, 1982, collected in COMPENDIUM, supra note 10, at 67.
146. Translated from Ming Shi Su Song Fa [Civil Procedure Code], as revised Aug. 20, 1990, collected in COMPENDIUM, supra note 10, at 265.
147. Translated from Zhu Zuo Quan Fa Shi Xing Xi Zhe [Copyright Code Enforcement Regulations], as revised Jun. 10, 1982, collected in COMPENDIUM, supra note 10, at 622.
The copy as specified by subsection (2) above needs to fulfill the regulations as established by the administrative agency.

The original work in subsection (2) and the originals of the identifying documents in subsection (3) shall be returned to the applicant after verification.

§ 12: An applicant for registration of an exclusive authorization of a right or a restraining order\footnote{As I understand it, the restraining order would be the first step toward an infringement suit.} needs to record the following in her application:

1. the name, nationality, date of birth or establishment, and place of domicile of the authorized or restrained person and of the copyright property right owner; and
2. the nature of the authorization or the restraint.

The application above shall include certifying documents of authorization or restraint.

§ 16: If the original or copy of the work cannot be submitted or can only be submitted at great inconvenience due to the special nature of the work, the great size, the fragility, or the expense involved, an application may be made to the administrative agency to waive such submission. [In the case of such waiver,] a detailed description of the work, photographs or illustrations of four, five, or six sides of the work, or other substitutions may be made.

**COURT ORGANIZATION CODE\footnote{Translated from Fa Yuan Zu Zhi Fa [Court Organization Code], as revised Dec. 12, 1989, collected in COMPENDIUM, supra note 10, at 26.}**

§ 57: If [the Supreme Court] shall consider an opinion by the Supreme Court to be one of precedential value in its interpretation of law, the opinion shall be considered by an [ad hoc?] committee on Civil Codes, Criminal Codes, or a committee of the whole of Civil and Criminal Codes, and be reported to the Judicial Yuan\footnote{The supreme judicial administrative entity in Taiwan; it technically does not bind the Supreme Court judicially, however, since it is an administrative agency and not a court.} for examination.

The previous provision shall be applied when the Supreme Court, while making a ruling on a case, considers a change in the interpretation of the law justified.

**TRADEMARK CODE\footnote{Translated from Shang Biao Fa [Trademark Code], as revised Dec. 22, 1993, collected in COMPENDIUM, supra note 10, at 213.}**

§ 22: The same trademark on a similar product or a similar trademark used on the same or a similar product, used by the same person, shall be registered as a unified trademark.

The same trademark used on a product that is neither the same nor similar but related shall be registered as a protective trademark. However, a well-known trademark shall not be limited by the relation between pro-

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\footnote{As I understand it, the restraining order would be the first step toward an infringement suit.} \footnote{Translated from Fa Yuan Zu Zhi Fa [Court Organization Code], as revised Dec. 12, 1989, collected in COMPENDIUM, supra note 10, at 26.} \footnote{The supreme judicial administrative entity in Taiwan; it technically does not bind the Supreme Court judicially, however, since it is an administrative agency and not a court.} \footnote{Translated from Shang Biao Fa [Trademark Code], as revised Dec. 22, 1993, collected in COMPENDIUM, supra note 10, at 213.}
ucts.

At the time of registration for either kind of trademarks above, one which had been registered previously or applied for earlier shall be considered the underlying trademark. When the applications are filed simultaneously, one shall be designated as the underlying trademark.

A change in the type of trademark, not violating the previous three provisions, shall be applied to and approved by the administrative agency of trademarks.

§ 24: The exclusive rights over trademarks endure for ten years from date of registration. The exclusive rights over an unified trademark or a protective trademark shall endure for the same length as the rights over the underlying trademarks.

The exclusive term described below may be extended by an application made under this Code. Each extension shall endure for ten years.