

CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY
TRANSFER LAW (1987). By Zheng Chengsi (with R.D. Pendelton).
Sweet & Maxwell Ltd., London. Pp. v+324 and index. Price £50.

LAWPERSONS IN India, and the SAARC region, have much to learn from this excellent account of the emerging intellectual property and transfer of technology law in contemporary China. The book¹ under review provides more than an introduction to the developing law in these domains. It also offers a very good opportunity for a comprehensive understanding of the evolving Chinese law and jurisprudence.

Thus, for example, we learn that the Interim Rules Concerning Lawyers 1982, define in their very first sentence lawyers as the "legal workers of the State." And the Rules obligate lawyers to act not merely on the basis of "facts and according to the law" but also to remain "true to socialism and the interests of the people".² We also learn that though the Chinese law and jurisprudence are closer to the civil law rather than the common law culture, the Chinese Supreme Court does declare binding law³ (contrary to naive and misleading beliefs concerning the absence of *stare decisis* in the civil law systems) despite the Chinese Constitution's attribution of the law creating capacity and power to the National People's Congress or its standing committee.⁴ And even when influenced by the civil law model, China has been unable to produce codes; the mid-fifties endeavour to draft a civil code met with "Ultra-Left" opposition; the labours begun by experts in 1983 have yielded only in 1986 the Common Rules of Civil Law.⁵

The work under review also challenges the smug notion that protection of industrial and intellectual property is an innovation distinctive only to the history of modern industrialised societies. Trademarks were recognised some 3,000 years ago during the Zhou dynasty; and the "first case to deal with the incident of passing off or unfair competition in China appears in 1736".⁶ Similarly, although origins of printing are dated with Guttenburg in the fifteenth century, China used type printing in the early eleventh century; and in a book published during the Song Dynasty there is clear evidence of copyright protection.⁷ These are not merely antiquarian examples. Rather, they provide valuable correctives to Eurocentric accounts of the history of development of intellectual and indus-

1. Z. Chengsi, *Chinese Intellectual Property and Technology Transfer Law* (1987).

2. *Id.* at 4-5

3. *Id.* at 6-7.

4. *Id.* at 11

5. *Id.* at 17

6. *Id.* at 21.

7. *Id.* at 86

trial property laws. They also suggest a need for corresponding researches in analogues of such laws in other Asian societies.

Of course, more fully fledged laws emerged much later in the late nineteenth and early twentieth centuries. *E.g.*, there were as many as six trademark laws; three prior to 1949 and three thereafter. But these laws "stipulated obligations" rather than conferred rights.⁸ While the Cultural Revolution since 1966 "badly affected the administration trademark laws as well as many other affairs in China"⁹ a "great change in the situation" registers itself with the "open door" policy since 1979. By the end of June 1982, 73,000 trademarks were registered and 9,900 were of foreign ownership.¹⁰ The 1982 Trademark Law, however, is the first modern law in China on this subject.

This law is, of course, not wholly a replica of the Western laws. It is sensitive, for example, to cultural heritage; the title of classical works cannot be used as trademarks in China, nor can names of countries or cities.¹¹ Similarly, all trademarks in three dimensional have been refused, including the protection of the mark in Coca-Cola bottle, although "Coca-Cola" has been registered as a mark.¹² And Chinese enterprises "habitually put the name or title of the pharmaceutical good or pesticide in a most conspicuous part of the package" assigning trademarks a rather marginal place;¹³ this has often caused difficulties for foreign trademark owners.¹⁴ The Chinese law as yet does not register service marks, although what are called "trade names" can be registered and are protected.¹⁵ And although the 1982 law does not automatically protect "famous" Chinese or foreign trademarks, the Trademark Office, in practice, protects such marks, indeed to a point that "very extensive use can overcome descriptiveness within the context of Chinese trademark law."¹⁶

The 1982 law is not a complete code; regulations made before and after 1982 continue to amplify the law. Of particular relevance to us in India is a regulation of 1979, implemented by the State Commission on Economics, which has to designate every year a month called the "quality month." "Quality" awards for high quality products are awarded in this month and such awards stand appended to the trademark in the product.¹⁷ Of equal interest are the 1982 interim regulations on the administration of advertisements, further supplemented by a regulation of 1985. Under these

8. *Id.* at 23.

9. *Ibid.*

10. *Ibid.*

11. *Id.* at 32.

12. *Ibid.*

13. *Id.* at 33.

14. *Id.* at 33-34.

15. *Id.* at 33, 35.

16. *Id.* at 32-33.

17. *Id.* at 35.

regulations advertisements of pharmaceutical and food products have to attach a certificate of health authorities with the advertisement, and the draft advertisement has to be approved by prescribed authorities. Uses of advertising with intention or import to achieve "monopolistic or unfair trading" stands prohibited; and this prohibition applies equally to Chinese as well as foreign enterprises.¹⁸

The 1984 Chinese Patent Law should be of great interest to Asian and comparative lawpersons. *First*, it is distinctive in seeking to protect inventions, utility models and designs in a "single specific law."¹⁹ *Second*, it is also distinctive in protecting what are called "State plan licenses", an arrangement under which, broadly, entities under the ownership of the whole people may designate other entities to work the patent under a system of prescribed royalty to the patent-holding entity. While the notion is clear, it is somewhat difficult for the reader to gather more concrete details of this innovative feature of the Chinese Patent Law from the current work, a defect which we hope will be removed in the second edition.²⁰ *Third*, the duration of patents is lesser in comparison with the First World societies; invention patents enjoy a term of fifteen years, whereas utility models and design patents enjoy a term of five years, renewable by a term of three years.²¹ *Fourth*, the system of compulsory licensing seems to apply only invention and utility patents, though use of working requirement extends to all the three types of patents. *Fifth*, and quite significantly, article 25 excludes from patentability inventions concerning food, beverages, flavourings, pharmaceutical products and substances by means of a chemical process.²³ *Sixth*, in China administrative authorities have the power to deal with patent infringements and to issue orders in the nature of injunction.²⁴ *Seventh*, the limitation period for infringement action is only two years compared with a six year period in the First World countries.²⁵

It is interesting for an Indian reader to find that while the justification for making pharmaceutical products non-patentable is very strong, some Chinese experts recommend the "Indian solution" which provides a shorter term for such patents.²⁶ This reviewer would rather hope that India adopts the Chinese solution overwhelmingly justified by considerations of health for all, a declared policy of the Indian state.

It appears that although at the centenary of the Berne Convention

18. *Id.* at 35-36.

19. *Id.* at 54.

20. *Id.* at 54, note 7.

21. *Id.* at 55.

22. *Id.* at 55, 63.

23. *Id.* at 61-62.

24. *Id.* at 63.

25. *Id.* at 63-64.

26. *Id.* at 81

determination to legislate China's first ever fully-fledged copyright legislation was announced, such a law is still distant.²⁷ The concept of rights nestling within the notion of copyright does not seem to have been as yet fully developed in the current legislative renovation in China. There is a specific regime of regulations and circular concerning piracy in audio-visual works dating since 1982;²⁸ there exist detailed rules concerning remuneration for book writing,²⁹ dramatic works and their performance.³⁰ Chengsi indicates, however, major current concerns in the field, especially centring on the rights of authors of commissioned works and salaried employees.³¹

Perhaps, the most critical part of the book is the one which offers analysis of transfer of technology law in China. The detailed attention to law, policy and administration paid in the last six or seven years in China to technology transfer should be an object lesson to India, where almost every major aspect of technology transfer is largely left to uncoordinated domain of executive discretion. In contrast, the Chinese technology transfer operates under a series of legislative measures. And these regulations relate both to internal as well as external technology transfers, based on the basic premise articulated by the State Commission on Science and Technology that "technology is a sort of commodity" requiring full payment for technology transfer.³²

Internal transfer is organised through country-wide system of "technology markets" who sponsor exchange of technology within China.

Under the commission's circular of 1985 the technology brought to the market "should be complete and mature, and if not complete, sufficiently developed to be used independently;" the supplier must reveal all facts concerning the technology; specific contracts must govern the transaction in all respects, including price, warranties, stages of using technology and obligations and rights of parties; where patents are involved a model contract for patent licensing has been elaborately drawn up.³³ In addition, there exists the 1981 Economic Contract Law which requires all transfer contract to state, among other things, a "feed back clause" and the criteria concerning the capability of the recipient.³⁵

For import of technology, the 1985 Regulations on Administration of Technology Import Contracts prescribe the competent authority, procedures for application and approval. Article 6 of the Regulations requires

27. *Id.* at 130.

28. *Id.* at 90-97.

29. *Id.* at 97-100.

30. *Id.* at 101-105.

31. *Id.* at 109-131.

32. *Id.* at 132.

33. *Id.* at 137-140.

34. *Id.* at 134.

35. *Id.* at 154-155; see for interesting linguistic difficulties, *id.* at 147-150.

that the supplier must, (i) prove competence to transfer technology; (ii) guarantee that the technology is "complete, effective and capable of accomplishing technical objectives". Under article 8, the term of a contract shall not exceed ten years. Article 9 stipulates "nine types of restrictive business clauses which will be refused or amendments be ordered by authority granting approval." From Chengsi's analysis, it would appear that the current Chinese regulations compare well, and comport with, the UNCTAD draft rules on the subject.³⁴

Undoubtedly, there remain critical differences, of history and ideology, between India and China: and to these must be added the juristic mind-set differences in the legal cultures of these societies. To the extent, however technology transfer presents actually similar problems, especially the import of technology, closer attention to the Chinese model of regulation is desirable to ensure greater responsibility and accountability in administration. A legislative framework, as compared with a merely administrative discretionary regime, is indeed preferable in India.

It appears that bio-technology is not as yet as serious a concern for China as it is with India. And yet Chengsi mentions regulation of bio-technology research and manufacture imported by China.³⁷ India has still to develop legislative safeguards in this direction. The book does not even much concern, in a post-Bhopal catastrophic world, with indigenous and imported hazardous technology. One hopes that the future editions of this valuable work will address these critical aspects.

Chengsi has rendered an invaluable service to students of law, society and technology through this painstaking work. It richly repays close study especially from the vantage point of law's role in directing technology to human developmental uses.

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36 *Id* at 155-158; for comparison with EEC Regulations, see *id* at 158-160.

37 *Id* at 87. Also see, *id* at 69 providing on analysis of special procedures for deposit of micro-organisms and regulation concerning Entrance Quarantine for Micro-organism and Patent Procedure

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