Pacific Basin*

I. Australia

A. Copyright Protection for Computer Software

In *Dyason & Ors v. Autodesk, Inc.*[1] the federal court held that copyright protection may apply in Australia to a combined program of computer hardware and software, if the derivative program displays similarity in its expression to the original. Autodesk Inc. developed a mass-marketed "shrink-wrap" program known as AutoCAD, for use with personal computers. Autodesk sought to limit its use to one computer at a time by combining a subprogram within AutoCAD known as Widget C with a new technical device known as the AutoCAD lock. A Mr. Kelly obtained a copy of the AutoCAD program and the AutoCAD lock and, without reference to their internal workings, developed a substitute device known as the Autokey hardware lock. Both locks performed the same function, but their internal workings were different. Mr. and Mrs. Dyason assisted in marketing the Autokey lock.

The federal court held that the AutoCAD lock and Widget C combination, as developed by Autodesk, was a computer program under the Copyright Act of 1984 and thus protected. However, Kelly's Autokey lock was not a reproduction or adaptation of the whole or a substantial part of a computer program. Similarity in the function of the new device was insufficient to ground a copyright claim without a degree of resemblance in substance between the two devices.

B. Enforceability of Arbitration Clauses

Australia has uniform legislation that provides for a stay of court proceedings where the parties to a dispute have entered into a valid arbitration agreement. In recent years, however, this right has been applied inconsistently in different states.

A recent unreported case in Victoria addressed the issue of whether an arbitration clause providing that "either party may give to the other notice in writing" to refer a dispute to arbitration permits the person giving notice to stay court proceedings already commenced. The court upheld the traditional view that no binding arbitration agreement exists prior to the giving of notice in this situation, and that such an agreement becomes effective only when the notice is given. Therefore, the court held that the court proceedings could not be stayed.

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1. 24 F.C.T. 147 (Austl. 1990).

In *Brunswick N.L. v. Sam Graham Nominees Pty, Ltd.*[2] the Supreme Court of Western Australia held that a clause using the same form of words satisfied the requirement that an arbitration agreement be in existence prior to commencement of proceedings. The court sought to protect the parties' contractual right to arbitration from being frustrated by litigation. The federal court recently reversed the decision on several grounds, including a finding that until there was an election by either party to submit a dispute to arbitration no binding agreement existed.[3]

II. China

A. New Copyright Law

1. *In General*

The new Copyright Law of the People's Republic of China was promulgated on September 7, 1990, to come into effect on June 1, 1991. The new law confers protection upon most classes of literary, artistic, and graphic works, including (inter alia) cinematic and audiovisual works, engineering designs, maps, and computer software. Copyright protection may be withdrawn if the exercise of an author's copyright would violate the Constitution or laws of China, or is found to be against the public interest.

Persons entitled to copyright include citizens of China, legal persons,[4] and "nonlegal entities."[5] Such persons can claim copyright regardless of whether their works are in published form. Foreign persons enjoy copyright protection only if the works have been published in China prior to any publication elsewhere. If the work if first published outside China, protection may only be given under reciprocal agreements or treaties to which China is a party. China is not yet a party to the major copyright agreements such as the Universal Copyright Convention and the Berne Convention, but will now be eligible for membership.

The Copyright Law will be administered by the State Copyright Administration of the State Council of the People's Republic. Local provinces and municipalities will have corresponding regional copyright departments.

2. *Extent of Copyright Protection*

Copyright belongs to the author of a work where authorship can be demonstrated. In the case of legal persons or other nonlegal entities, copyright exists where the person or entity has given specific direction and assumed responsibility for the creation of the work, and the work as finished expresses the person's or

2. [1990] 2 W.A.R. 207 (W. Austl.)

3. The 1991 Federal Court decision reversing *Brunswick* has not yet been reported.

4. These organizations satisfy the requirements for recognition as a "legal person" under the General Principles of Civil Law, ch. III.

5. This term refers to entities that do not qualify as "legal persons" under Chinese law.

entity's intent. For a corporation this requirement will usually be met if the work is commissioned and executed primarily at the behest of management or other supervisory personnel.

Works otherwise created by an employee in the course of his or her employment are deemed to belong to the author, but the employer retains the right to use them within the scope of its business. Further, for a period of two years from the completion of the work, the author is prohibited from permitting a third party to use the work in a manner similar to the employer's use without the employer's consent.

In some situations an employee will not obtain copyright protection when the work is of a technical nature. Works such as engineering designs, product blueprints, computer software, and maps are examples of items for which copyright will remain in the employer if the work was completed mainly by utilizing the employer's material support and the employer also commissioned the product. However, in such cases the author still has the right to affix his or her name to such work.

The rights comprised in the exercise of copyright include the following:

(a) An author has the right to affix his or her name to the work, to amend the work, and to protect the integrity of the work. This right is not restricted to a specific term.

(b) The right to publish, use, or seek compensation for the work is protected for the life of the author plus fifty years.

(c) In the case of a legal person or nonlegal entity, the rights in (b) above are limited to an absolute term of fifty years, provided that the work is actually published within fifty years of its completion.

The law provides some limitations on the right to bring suit for use of a work without permission or without payment of royalties. These privileged uses include using the work for personal study and research, quoting a published literary work in an appropriate manner, publishing newsworthy excerpts in a newspaper or periodical, publishing or broadcasting a speech originally delivered at a public meeting, and translating or reproducing a published work for the purpose of scientific research or classroom teaching.

3. *Infringements*

The Copyright Law provides for two categories of infringement:

a. General Unauthorized Reproduction

This category includes reproducing or publishing a work without the author's permission, publishing a cooperative work without the permission of coauthors, falsely representing oneself as the author or distorting the work of another. Such activities may subject the wrongdoer to civil liability and damages. The infringer may also be ordered to cease an ongoing infringement.

b. Commercial Exploitation

This consists of the reproduction or exploitation of a work for commercial purposes without permission. It includes publishing books for which exclusive rights have been granted to others, making audio or video recordings without permission of the performer, or producing literary or artistic works under the name of another. This category may subject the infringer to administrative fines or penalties, including confiscation of resulting profits, in addition to civil liability.

The State Council plans to issue separate regulations for the protection of computer software, and the Copyright Administration of the State Council will issue general Implementation Regulations periodically over the next two years. Works that were created before the new law comes into effect, or before its promulgation, will also receive protection. Acts of infringement which occurred before the effective date of the law will be handled under the then-existing regulations.

B. Foreign Banks in Shanghai

The People's Bank of China has promulgated new administrative regulations to govern investments made by foreign financial businesses in Shanghai banks. The measures became effective on September 8, 1990, and establish a requirement of a minimum registered capital of U.S. $30 million for joint venture banks and minimum operating funds of U.S. $10 million for branches of foreign banks in Shanghai. The business activities of such foreign banks, joint venture banks, or branches thereof should normally be limited to a permitted range of investment activities in foreign currencies only, or to the following: (a) providing services for import and export settlement; (b) acting as an agent for the exchange of foreign currencies and for cashing bills in foreign currencies; (c) acting as an agent for payments against credit cards in foreign currencies; (d) providing custody and safe deposit services; (e) providing credit investigations and consultancy services. All of these activities require the prior approval of the People's Bank of China.

III. Hong Kong

A. Taxation of International Business Profits

The Privy Council's decision in *Commissioner of Inland Revenue v. Hang Seng Bank, Ltd.*[6] clarifies the taxation treatment of overseas trading activities by a business operating exclusively from Hong Kong. The decision establishes that a business based in Hong Kong, which has no fixed presence overseas, may derive nontaxable trading profits from the activities of agents acting on their behalf outside Hong Kong.

6. [1990] 3 W.L.R. 1120 (P.C.) (H.K.).

Hang Seng Bank carried on its general business entirely in Hong Kong, but bought and sold securities through independent brokers in London and Singapore. This trading was controlled and funded from Hong Kong.

Hong Kong's profits tax applies only to businesses carried on in Hong Kong that yield profits having their source in Hong Kong.[7] In general, the source of profits is regarded as the center of operations from which the profits are in substance derived. The Inland Revenue argued here that Hang Seng Bank's profits from the securities trading could not have arisen outside Hong Kong because the bank had not established a separate overseas business through which to act. The Inland Revenue further argued that because some executive decisions relating to the securities trading, such as instructing the brokers and releasing the funds, had been taken in Hong Kong, the profits should be attributed to the Hong Kong business.

The Privy Council held that the profits were derived from activities conducted outside Hong Kong through Hang Seng Bank's agents. To find otherwise would be to ignore the statutory requirement that profits must have a Hong Kong source in order to be taxable. The court also held that the degree of direct control exercised by the bank was not relevant. The proper approach was to identify the profits and decide how they had arisen.

IV. Indonesia

A. United States–Indonesia Tax Treaty

On September 18, 1990, the United States Senate ratified the Convention for the Avoidance of Double Taxation.[8] The Convention was approved by the President of Indonesia in October 1988. The Convention provides that a permanent establishment is deemed to exist when services are provided through employees or other agents, and when the activities continue for more than 120 days within any consecutive twelve-month period, subject to an exemption for a taxable year in which the services are provided for fewer than thirty days. The accompanying Protocol provides that the term "permanent establishment" does not include the mere use of facilities or the maintenance of a stock of goods or merchandise for the purpose of occasional delivery. Permanent establishments are permitted to deduct from taxable profits part of the interest expenses of an office in Indonesia.

The Convention provides for the following withholding tax treatment of payments to nonresidents by way of dividend, interest, or royalty.

7. The tax charge applies to "profits arising in or derived from Hong Kong for that year from such trade . . . ." Inland Revenue Ordinance, Laws of Hong Kong ch. 112, § 14 (1989).

8. 136 Cong. Rec. S13295 (daily ed. Sept. 18, 1990).

1. *Dividends*

Tax on dividends is limited to 15 percent of the gross amount of the dividends actually distributed, except where the recipient company has a permanent establishment and the shares are effectively connected with such establishment.

2. *Interest*

Interest is subject to tax at the rate of 15 percent on the gross amount. Interest includes income from bonds, debentures, government securities, notes, or other evidence of indebtedness, whether or not secured by a mortgage or other security and whether or not carrying a right to participate in profits.

3. *Royalties*

Royalties under the Convention are subject to two distinct rates. The rate of tax is 15 percent on payments made as consideration for the use of, or the right to use, copyrights, patents, designs, models, plans, secret processes or formulae, trademarks, or for information concerning industrial, commercial, or scientific knowledge. A lower rate of 10 percent applies to payments by an Indonesian resident for the use of, or the right to use, any industrial, commercial, or scientific equipment. Such equipment may not include ships, aircraft, or containers for which income is otherwise exempted by the United States.

V. Korea

A. Liberalization of Securities Industry

The South Korean Ministry of Finance issued a Plan for the Liberalization of the Korean Securities Industry on November 30, 1990, that includes guidelines for permitting foreign securities companies to establish branches and joint venture companies in Korea. However, permission for the establishment of subsidiary companies by such investors will not be given.

1. *Branch Operation*

A foreign securities company may now apply to the Ministry of Finance for permission to establish a Korean branch if it can satisfy the following conditions: (a) The applicant must have an office in Korea established for at least two years; (b) the applicant must show that it is financially stable and healthy; it should have been continuously engaged in the securities business for at least ten years, and must not have been fined or had its operations suspended in any way by the appropriate supervisory agency in its home country in the preceding three years; and (c) the country where the applicant resides must permit Korean securities companies to engage in the securities business. The last factor is important in that the Ministry has stated that the existence of reciprocal treatment will be significant in establishing the priority of an application. Other factors include the applicant's general worldwide operational results, its contribution to the Korean securities market, and the general conditions in the market.

The principal types of activities that may be conducted by Korean branches are dealing in securities, brokerage, and underwriting. If a branch is to engage in any one of these activities, it must have an operational fund of at least ten billion Korean won. For two activities, fifteen billion won is required and a minimum of twenty billion won is required to engage in all three.[9]

2. *Joint Venture Company*

Korean resident individuals and companies are permitted to form a Korean joint venture company with a foreign partner. There are certain exceptions, including companies among the top thirty large enterprise groups or affiliated enterprise groups under the Korean antitrust laws, existing designated financial companies or their affiliates, and persons in a special relationship with these prohibited companies.

For an application to succeed, the foreign joint venture partner wishing to engage in the securities industry must satisfy the following conditions:

(a) The applicant must be a securities company or a financial company that regularly engages in the securities business, and must be able to contribute to the development of the Korean securities industry. One requirement is a minimum equity capital of 300 billion Korean won. If the joint venture company is held between two foreign companies, it is sufficient if one company satisfies this condition.

(b) The applicant must show that it is financially stable and healthy, which is interpreted in the same manner as for a Korean branch.

(c) The country where the applicant is resident must permit Korean securities companies to establish joint venture companies or subsidiaries.

(d) The applicant must not have previously established a branch operation in Korea.

The capital structure of joint venture companies is subject to strict rules. Joint venture companies are required to be capitalized at a minimum of fifty billion Korean won. The Korean partner should provide 50 percent or more of the joint venture company's equity capital so as to prevent the company from effectively becoming a subsidiary of the foreign partner. On the other side, the foreign partner is required to provide at least 40 percent of the equity capital to insure the foreign partner will remain actively involved in management and financial support. A variation of the rule provides that if two or more foreign companies wish to invest together in a joint venture company, the company qualifying as the foreign partner must provide at least 20 percent of the capital. If all the above

9. The rate of exchange at the time this article went to press was 731.65 Korean won to U.S. $1.

requirements are met, joint venture companies are permitted to engage in the principal business of a securities company and in business activities incidental thereto.

The Korean Government also intends to implement new rules for direct foreign equity participation in Korean companies to obtain a quotation on the Korean Stock Exchange if certain conditions are met. These proposals are still under discussion and are expected to become effective in January 1992.

B. Foreign Capital Inducement Law

The Foreign Capital Inducement Law has been revised with effect from March 1, 1991, pursuant to an earlier agreement with the United States to implement a series of liberalization measures to encourage overseas investment. A major change is that foreign investors no longer need to obtain Ministry of Finance approval for investing funds, but merely have to notify the Ministry in writing, with the exception of certain restricted industrial sectors, which still require approval. If a notification does not receive a response within thirty days, the application is deemed to have been accepted. Among the reasons that may be given for refusing an application are national security grounds, the fact that the investment would result in monopolistic practices in the domestic market, or other violations of the Korean antitrust laws.

On the negative side for foreign investors is a reduction in the special tax allowances provided in respect of certain foreign investments in the high technology field and in free export zones. Henceforth, qualifying companies are eligible for 100 percent corporate income tax relief only during the first three years following commencement of business, and thereafter for 50 percent during the succeeding two years. Similar reliefs apply to withholding taxes on dividends paid to an eligible nonresident investor (normally 10 percent). Certain other investments in land and other properties still qualify for a 50 percent reduction in transfer taxes, special taxes, and value-added tax for a five-year period.

VI. Malaysia

A. Malaysian Budget

The Malaysian Finance Act 1991 became effective on March 28, 1991. Among the measures that may be of interest to foreign investors are:

(a) a reduced rate of development tax from 4 percent to 3 percent;

(b) a reinvestment allowance where capital expenditure is incurred prior to the end of 1995 by a qualifying Malaysian resident company on an approved project;

(c) a claim for the double deductibility of expenditure incurred on research and development previously approved by the Ministry of Finance;

(d) a 50 percent deduction on income remitted from overseas investments in resource-based manufacturing or the processing of agricultural products;

(e) the abolition of export duties on rubber, pepper, and all minerals, and the abolition of import duties on rubber, pepper, and tin; and

(f) an easing of the threshold above which large manufacturing or service companies are required to issue receipts.[10]

B. New Copyright Regulations

Having amended its Copyright Act to conform to the requirements of the Berne Convention,[11] Malaysia acceded to the Convention on October 1, 1990. On the same day, the government brought into force the Copyright (Application to Other Countries) Regulations of 1990, which effectively extend copyright protection in Malaysia to certain kinds of works first published in countries also parties to the Berne Convention.

The Regulations make a clear distinction between two types of protected work. On the one hand, literary, musical, and artistic works, films, and similar works are given full reciprocal protection under the Convention. On the other hand, sound recordings, broadcasts, and published editions of literary, musical, or artistic works do not receive automatic protection, but will be dealt with on a case-by-case basis. At this stage, the Regulations only provide for the protection of sound recordings made or first published in the United States.

VII. Philippines

A. Foreign Investment Reforms

The Philippine Securities and Exchange Commission (SEC) has introduced a reform package to ease restrictions on foreign investment. The provisions of this package include:

(a) an easing of the requirements for companies that are 40 percent or more foreign-owned to obtain prior approval from the Board of Investments to conduct business in the Philippines. The SEC now proposes to increase this threshold to 49 percent except in the case of certain protected industries;[12]

(b) a uniform control test to establish the nationality of a corporation;

(c) permission for foreign land ownership within industrial estates or designated production areas;

(d) measures to encourage debt-to-equity swaps between investors; and

(e) the simplification of registration procedures for foreign companies carrying on business in the Philippines.

10. For the sale of goods, the turnover threshold increases from M$18,000 to M$150,000, while the provision of services threshold rises from M$12,000 to M$100,000.

11. July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178.

12. Protected industries include ammunition and explosives manufacturing, commodities protected by high tariffs, and nationalized activities carried on under government authority.

With the exception of the adoption of the control test approach, the above proposals have not yet been implemented.

B. TELECOMMUNICATIONS

The recent Supreme Court decision in *Philippine Long Distance Telephone Co. (PLDT) v. National Telecommunications Commission (NTC)*[13] should have a significant impact on the Philippine telecommunications industry. The Court confirmed that NTC is the telecommunications regulatory agency of the Philippine Government with jurisdiction over all telecommunications entities, and held that NTC's discretion serves public interest objectives which override private interests.

The case concerned whether a provisional franchise granted by NTC to Cellcom, Inc. (Express Telecommunications Co., Inc.) in respect of the operation of radio stations and relay stations for transmitting wireless messages on "radio telephony" included an authority to start up a cellular mobile telephone system. One of the conditions of the NTC provisional franchise was that PLDT, the local monopoly for telephone services, would be required to enter into a joint interconnection agreement with Cellcom, which PLDT was unwilling to do.

The Supreme Court held that the mobile telephone system was within the NTC franchise, and that PLDT should be required to interconnect its system with that of Cellcom. It found that any interference with PLDT's proprietary rights was a permitted intervention dictated by governmental objectives intended to insure the efficiency of the public telecommunications service, and that NTC as the regulatory agency of the state was exercising its duly delegated authority. The Court concluded by stating that the decisive considerations were public interest and the need for a modern and efficient telecommunications service. The plaintiff filed a motion for reconsideration of the decision, which the Supreme Court denied on February 8, 1991.

13. GR No. 88404, Oct. 18, 1990.