

China: The Architect's Copyright

By Dr. Christian Gloyer

The Olympic games in China were, with Herzog and de Meuron's 'bird's nest' and Beijing's many other modernistic landmarks, also a feast of architecture. But do the Chinese adequately protect the results of architectural ingenuity? The following article examines how seriously China takes the architect's copyright.

Status quo of copyright protection of architectural works in China

For many years, foreign companies have complained about Chinese competitors violating their intellectual property rights. Architects who are active in China have also suffered similar bad experiences. Typical for the construction industry is the copying of a competitor's designs in an architectural competition, with the (mostly Chinese) copycat winning and the foreigner with the original idea losing the competition or the construction of a building in a very similar building in a different location, city or province, without the author's consent.

Reasons for this are on the one hand the comparatively high efforts to be taken if one chooses to bring China's judicial and administrative authorities into play; on the other hand, the notion of a building as an object which enjoys the protection of copyright laws, has not found unanimous recognition in Chinese society yet.

Principal laws on copyright protection

The Chinese Copyright Law (1991) and its Implementing Rules (in the following: the Implementing Rules) of 2002 form the legal framework of copyright protection in China. These regulations are applicable also to buildings. China is a member state of the Berne Convention, which makes the rules of this treaty regarding the protection of works of literature and art applicable in China.

Protection of Buildings

Buildings have received an express mention as objects protected by copyright rules only since the promulgation of the amended Chinese copyright law in Oct. 2001.

As in Germany, not each and any building is protected, only such buildings enjoy protection which have a certain degree of creative distinction, putting it above the mass of everyday construction.

Chinese copyright regulations expressly require that buildings enjoying copyright protection must have an aesthetic importance. If a given building just serves ordinary purposes, such as housing and working, without any influence on our aesthetic capacity, it does not enjoy copyright protection.

Protection of construction drafts and models

Construction designs and models also expressly fall under the protection of Chinese copyright rules.

Ownership of Copyright

According to German law, the copyright owner is the person who has actually created the work (“Schöpferprinzip” in German, “Creator Principle”). With regard to construction, this implies that the architect is generally to be considered the copyright owner, even if he is an employee of a construction enterprise.

Chinese copyright rules do not follow the Creator Principle in a consistent manner. For example, sec. 11 para 3 of the Copyright Law states:

„Where a work is created according to the intention and under the supervision and responsibility of a legal entity or other organization, such legal entity or organization shall be deemed to be the author of the work.“

Other than with language or artistic works, the author of which will regularly be a natural person, there are very often several people involved in the planning process of a building. In China, architects are supposed to exert their profession in planning bureaus. The bureau is responsible – and liable - for its architects’ works. These legal and economic surroundings of the construction planning process in China bring about that the legal person as an architect’s employer rather than the architect himself will be deemed the author of a work of architecture, hence the owner of the respective copyright.

Content and reach of copyright

Similar to German law, the author of an artistic work has the right of protection of the author’s personality and the right of usage of his work. Protection rights are e.g. the right to have the author’s name mentioned, the right of change and the right of corporal integrity of the work. Such rights are, in China as well as in Germany, inalienable. In contrast to this, the usage rights puts the interest to reap economic benefits from an artistic creation into the foreground, which makes usage rights transferable and limitable in time, in other words, such rights can be ‘cashed in’.

Protection against disfiguring changes of an architectural work

Until now, architects in China are relatively powerless with regard to alterations, even disfiguring ones, of their works. Although Chinese copyright rules give them various protective rights, such rights appear rather theoretical in face of the overwhelming economic power of the huge construction companies.

Right of reproduction

A reproduction of an architectural work can take place in three forms:

- 1.) the simple copying of construction designs
- 2.) the redesigning of an already existing building design and the subsequent construction of a building
- 3.) the replication of a building at a different site

An infringement of an architect's copyright are undoubtedly numbers 1.) and 3.), if the replication of a building is based on illicit use of somebody else's building design.

Difficult to judge – and not only for Chinese courts – are the cases which are in between a simple theft of a third party's artistic creation and an independent creation which might appear to be inspired (consciously or not) by somebody else's work. This question comes close to a similar phenomenon in the realm of technical innovation known as 'reverse engineering'. Does a 'similar' building based on independent planning violate another architect's copyright?

In the so-called 'Porsche-Centre-Case', a Beijing court found that the general appearance of the 'redesigned' building came so close to the original 'Porsche-Center', a luxury carmaker's eye-catching exhibition hall, that an infringement of copyright was assumed.

Registration of copyright

In China as well as in many other countries, copyright protection starts with the creation of an artistic work. Chinese lawmakers did however introduce a system of voluntary registration of copyrights, in order to help copyright owners alleviate their burden of proof, as in most infringement cases it is the copyright owners, who, as claimants, have to deliver full proof of their title, which can be very onerous and in many cases leads to a defeat of the copyright owners due to procedural reasons.

Conclusion

With regard to the commonplace reluctance of Chinese courts and administrative bodies to grant substantial damages to copyright infringement claimants, especially if they are foreigners, there is still a long way ahead for architects and engineers in China until their legal protection can be considered adequate, i.e. up to the standards of Western countries.

More important is legal prevention in the form of clear and feasible agreements regarding an architect's copyright, with all its legal implications. Such agreements should be concluded in a very early stage of cooperation between architects and, e.g., developers. Foreign architects in Particular should verify the seriousness of a competition and the trustworthiness of its client before drafts and designs are submitted.

Remarks:

Opinions expressed in this contribution are those of the author.



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