
China's copyright dilemma

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Penn State University Press

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ABSTRACT. At this critical point in its development as a burgeoning market economy ensconced within a socialist political system, China faces a dilemma in becoming a fully-fledged player in the copyright arena. Over the past two decades, China has made great strides in creating a legal and governmental framework for the administration and enforcement of copyright. But its implementation has left much to be desired, owing partly to inadequate resources of money and personnel, partly to insufficiently harsh penalties for infringement, partly to cumbersome procedures required to bring action against infringers, and partly to a general cultural tolerance for practices that run contrary to cultivating a broad-based respect for copyright. This article proposes that a balance of pressure and encouragement is likely to have the best chances of success in overcoming these problems and ensuring that China will become fully welcomed into the international publishing community.



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Introduction

A trip to China from mid-December 2007 to mid-January 2008 afforded me a unique opportunity to learn more about Chinese copyright law and its functioning within the country's larger political and cultural context. Everywhere I went, I came away with a very strong impression of a society undergoing rapid change and feeling upbeat about its future, despite problems lingering from the past; government policy places priority on creating a larger middle class and a domestic consumer economy that can support sustained growth without so much dependence on external foreign trade. In this country of 1.3 billion people there are still 900 million peasants living in rural areas, where poverty remains a persistent problem, and the middle class currently numbers fewer than 200 million. And the social safety net one might expect to find in a socialist country exists only in fragmented and inadequate form, though efforts are evidently being made to shore it up and extend it to still underserved portions of the population. But make no mistake: this is a country on a determined march to become a fully-fledged market economy, with all its attendant challenges, potential benefits, and social costs, albeit ameliorated by socialist-inspired concerns to keep those costs from becoming as extreme as in some more uncontrolled and less regulated versions of capitalism. China is not likely to emulate the United States' history of 'robber-baron' capitalism.

The special nature of China's market socialism is well illustrated by a memorial in Kaifeng dedicated to the life of Liu Shaoqi, author of the key party text *How to Become a Good Communist*. Liu had succeeded Mao Zedong as head of the government after the disastrous Great Leap Forward of 1958–63, but was hounded out of government as an

advocate of market reform and subjected to severe persecution during the Cultural Revolution, only to be rehabilitated officially in 1980 after Deng Xiaoping had begun to move the country on its path to market socialism. The veneration now accorded this pioneer of Chinese capitalism speaks volumes about the way the government views its past heritage in relation to its current goals.

Even more revealing of current trends, in some ways, is the government's use of the language of classical Chinese cultural values to express its policy aims. One example of many is the policy, first enunciated in 2004, aiming to foster a 'harmonious society' domestically and a 'harmonious world' internationally. In the words of an article from *China Daily* (January 4),

Stemming from ancient Chinese ideas about harmony, the blueprint underlines the need to fine tune relations between different social entities. The idea also appears in the country's foreign policy, particularly in its call for a harmonious world.

This orientation also characterizes the new government policy of 'sustainable development' announced by President Hu Jintao at the inauguration of the country's new five-year plan in 2006. One expert tells me that this combination of new and old in Chinese government rhetoric is of fairly recent vintage, but it betokens a recognition that the earlier Communist efforts to extirpate traditional elements from the Chinese mental makeup have not succeeded, and need to be modified by acceptance of certain ingrained ways of thinking and acting among the Chinese people.

How well this resort to traditional Chinese values will comport with efforts toward increasing the pace of modernization remains to be seen, but it appears to be more than window-dressing and needs to be taken seriously by anyone who wants to engage with China's leaders in government and business today. In a recent illuminating article, Harvard political scientist Elizabeth J. Perry traces the long history of Chinese rulers' emphasis on the collective socio-economic rights of the impoverished masses as underpinning the legitimacy of govern-

ment authority, compared with the dominant civil and political conceptions in the West undergirding individual rights as the safeguard against government tyranny.¹ And a new book by Daniel A. Bell confirms that this resurgence of traditional values is indeed a meaningful force in contemporary China.²

Developments in Chinese copyright law

Copyright law is no exception. Indeed, while the domestic law that came into effect in 1991 and was revised in 2001 has much in common with US law, its distinctive Chinese character is evident in some of the wording and provisions it includes, perhaps most obviously in the requirement for an infringer to offer an apology to a copyright owner (Article 46). The Chinese copyright law is a blend of the European and Anglo-American approaches, with the former emphasizing 'moral rights' and the latter 'economic rights'. Thus, reflecting European influence, the law contains (in Article 10) protection for such rights as the right of authorship ('the right to claim authorship in respect of, and to have the author's name mentioned in connection with, the work') and the right of integrity ('the right to protect a work against distortion and mutilation'). These rights exist in perpetuity, whereas the economic rights of ownership, for the most part, last for 50 years beyond the death of the author. One interesting extra feature of the Chinese law reflecting economic interests, also found in UK law but not in US law, is the right accorded publishers to protect 'the typographical design of the book or the periodical' for a period up to ten years after first publication (Article 35). Chinese copyright law has a number of other distinctive features. For example, 'oral works' and 'acrobatic works' are included among the types of works protected (Article 3). In the case of 'a work created in the course of employment' the real author is designated as the copyright owner, but the employer has for a period of two years 'priority to exploit the work within the scope of its professional activities' (Article 16). A considerable amount of attention is paid to provisions of licenses and publishing pro-

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cesses (Chapter III and Chapter IV, Section 1). For instance, the law specifies the amount of time a newspaper or periodical publisher has to respond to an author after submission of a work (Article 32). Plagiarism is included as an act of infringement (Article 46). There is an ominous warning that 'in exercising their copyright, no copyright owners may violate the Constitution or other laws, nor may they impair public interests' (Article 4). Not least, there is a compulsory license that allows 'passages of a work, a short written work, musical work, a single work of the fine arts or photographic work which has been published' to be used in 'compiling and publishing textbooks for the nine-year compulsory education and for national education planning' without permission from the author 'except where the author declares in advance that use of his work is not permitted' (Article 23). This last provision is reflective of a tendency in Chinese law to give considerable latitude for use for educational purposes (including translation) and even to recognize a right of personal use for 'the user's own personal study, research, or appreciation' (Article 22). Publishers will be more comforted by the law's provision of protections, similar to those provided by the US Digital Millennium Copyright Act of 1998, against 'intentionally circumventing or sabotaging the technological measures' adopted by copyright owners and 'intentionally removing or altering any electronic rights management information' (Article 47). All in all, the law provides the foundation for a sound regime of copyright protection, and it does accord with the doctrine of 'national treatment' in extending the same rights to foreign copyright owners as those enjoyed by Chinese citizens (Article 2).

While the legal basis is solid, its enforcement remains problematic. The International Intellectual Property Alliance (IIPA) devotes 23 pages of its *Special 301 Report on China* to a very detailed analysis of the enforcement problems that plague foreign copyright owners seeking better protection of their works in China.³ The greatest cause for concern now is the extremely rapid growth of Internet piracy. The report notes that

the number of Internet users in China grew to 210 million at the end of 2007, up from 137 million in 2006 – an increase of 53% and almost as many users as there are in the United States.

Mobile phone use has grown even more quickly, with an estimated 480 million users now. Some 1.5 million websites are currently operating in China, 78% more than in 2007, and many of these 'offer streams, downloads, or links to unauthorized files of copyrighted materials (music, films, software, books and journals)'. There are more than a dozen peer-to-peer (P2P) services engaged in illegal activities in the country. And Internet cafés, where much unauthorized use goes on, especially for video games, number 110,000 licensed sites, with about an equal number of unlicensed sites. For book and journal publishers in particular, there has been

a marked surge in Internet infringements over the past year, affecting academic books and commercial bestsellers or trade books scanned and traded or offered for download in PDF form. Perhaps more disturbing, electronic copies of journals are being shared with commercial entities in violation of site licenses. The commercial enterprises then sell the journals at a significant profit in direct competition with legitimate companies.

Out of 120 million titles available in electronic form, only about 140,000 e-books are regarded by the National Copyright Administration of China (NCAC) as legally authorized.⁴

Copyright enforcement

Special Internet regulations came into force in July 2006, and China acceded to the WIPO Internet treaties on 9 June 2007, so the legal wherewithal for prosecuting violations is in place. But for a number of reasons the law has not yet become an effective deterrent. For example, the evidentiary requirements for take-down notices are very cumbersome and burdensome for copyright owners to comply with; it is difficult to identify infringers' IP addresses and to find contact information for websites; Chinese officials are reluctant to allow foreign

copyright holders to conduct their own investigations of infringing activities; and there are insufficient monetary and personnel resources to keep up with the ever-growing wave of piracy occurring throughout the country. Another problem is the low monetary damages that can be obtained through civil suits, combined with the lack of significant criminal penalties for infringement. Regarding the latter, 'copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means'. The IIPA is aware of 'only six criminal cases involving US works brought by China since it joined the WTO in 2001 (all six in 2005–6)'.

The issue of market access is inextricably connected with the problem of copyright enforcement, and it gets major emphasis in the IIPA report. Because of the many restrictions on foreign copyright industries doing business in China, not least their being prevented from having any majority ownership in such business, together with the tight control exercised by Chinese government officials over any content deemed to be sensitive, publishers have limited ability to challenge pirates on their own turf. And those industries, such as music and movies, that live or die by the success of 'hit' and 'hot' new releases, suffer further because of the time-consuming process of official review of the content before release is authorized; this can take months to complete, during which time pirates flood the market ahead of the authorized products. And of course censorship prevents some content from being released on the legitimate market at all, although it may still be available on the black market.

Much of the challenge of creating a culture of respect for and enforcement of copyright in China is rooted in basic attitudes that are not easy to change very quickly. The Confucian focus on loyalty to the family above all permeates Chinese society, and frustrates government efforts to inculcate a more civic-minded morality in which respect for copyright could flourish. But even for the government, the rule of law is a relatively new concept, and laws that succeed tend to carry harsh punishments. So

far, for issues ranging from environmental pollution, to spitting, to traffic violations, to copyright infringement, the fines and sentences have been notably light – so light, in fact, that managers of copyright-infringing companies in China just take these fines to be part of the normal cost of doing business. This low level of civic responsibility combines with another Confucian-derived value to exacerbate the problem even further: Chinese consider copying, not as a disreputable or dishonest activity, but as the traditional way for the individual to learn and gain mastery of a field. In China, students are taught that to become better writers they need to memorize and imitate the language and style of heralded past masters; such appreciation for the achievements of a long cultural tradition is supposed to help them become more creative, too. And it is not just students who are imbued with such ideas. Many of their professors (at least 60%, according to the government-owned *China Daily*) practice plagiarism in the belief that emulation of experts in their fields is the way to advance in their careers. Plagiarism is further encouraged by a system that pays professors based on the number, rather than quality, of the articles they publish.

As if these cultural attitudes were not enough to create a tremendous challenge, Chinese consumers have little disposable income to spend on publications. Their sensitivity to prices, combined with a phenomenal savings rate of 50% (which is a reflection of the inadequate social safety net in the country), makes them reluctant to purchase anything beyond basic necessities. This is perfectly understandable in a country where the average annual income hovers around \$2,000, and where even in Beijing it was only \$4,229 in 2006.

But there is reason for hope, too. The obverse of the acceptance of copying as a part of traditional Chinese pedagogy is the high regard in which the work of scholars and artists is held. This traditional respect for scholarship can potentially serve as a good basis for the development of a modern copyright system. And recent efforts at enhancing respect for copyright have been greatly aided by the actions of Chinese celebrity authors and artist, such as novelist

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Jia Pingwa, in defending their intellectual property in a very public way. The rapid growth of a new middle class is also reason for encouragement. From having virtually no middle class a decade ago, China now has well over 100 million in this class, and the government predicts this will rise to 200 million by 2010. Since the government strongly backs the development of an economy in which growth relies more on domestic consumption than on export and investment, this middle class is the focus of much government support. But for export, too, industries that depend on copyright for their success are being given new priority by the government. To encourage more creativity in its large textile industry, which has succeeded hitherto mainly as a processing business for textiles that are created elsewhere, the government realizes that copyright is important for protecting print cloth patterns and other designs. And in publishing the government is acutely aware of its trade deficit, with imports exceeding exports by a factor of ten to one in units and even more in dollars, and it has stressed 'going out' – the export of Chinese cultural content – as a major prong of its overall strategy to transform the country from a developing nation to a world power. China, as a rapidly growing industrial nation, is now in a position similar to where the US was at the end of the 19th century, when its own needs for development led the federal government to move the country from being primarily a pirate of copyrighted works produced elsewhere (mainly in Britain) to a producer of copyrighted works themselves deserving of protection – hence the 1909 Copyright Act.

Copyright organizations

In this position, of course, China stands to gain by becoming a more respected participant in the world system of copyright. Despite its adherence to virtually all major international copyright treaties, China is not yet seen by all as playing on a level field. The US Trade Representative recently took steps to engage the mechanism of WTO sanctions, to pressure the Chinese government in the direction of greater compliance. But this approach is unlikely to succeed on its own,

especially given the Chinese preference for non-legal approaches to working out problems; there must also be positive incentives for compliance. Article 8 of China's copyright law provides that 'Copyright owners or owners of rights related to the copyright may authorize collective copyright administration organizations to exercise their copyright or rights related to the copyright.' The article also provides for the State Council to formulate 'regulations concerning the way of their establishment, their rights and obligations, their collection and distribution of copyright licensing fees, and their supervision and administration', but it was only in May 2005 that the State Council finally promulgated such regulations, thus setting the stage for collective licensing organizations to enter the landscape of copyright administration in the country. Interestingly, the two organizations that first came into being, the Music Copyright Society of China and the China Audio-Visual Products Copyright Society, sprang up because of the concerns of Chinese copyright owners of music and audiovisual works that their products were being used illegally on a very large scale in the numerous karaoke clubs around the country, and together they joined forces to bring this rampant piracy under control.⁵ For textual works, the China Literature Works Copyright Society, though approved by the NCAC in 2000, is only just coming into existence this year as a functioning entity. There are clear opportunities here for collaboration with the CCC and other foreign collective licensing organizations.

A key player in these developments is the Copyright Society of China (CSC), the successor to the Copyright Institute of China (CIC), which was founded in 1990

to carry out copyright research and academic exchange with the participation of copyright experts and professionals; to promote the establishment of copyright legislative, judicial, and administrative bodies; [and] to publicize and popularize copyright knowledge.⁶

The board of directors of the new organization was elected in May 2002. The stated purposes of CSC are

to adhere to the orientation of serving the people and socialism, abide by the Chinese Constitution as well as relevant laws, regulations, and national policies, follow social ethical standards, unite all organizations and individuals who are devoted to copyright undertakings, propel the implementation of copyright law, organize and push forward the theoretical studies and academic exchange of copyright, and promote the improvement of China's copyright system. CSC will also offer services to copyright proprietors and copyright users, safeguard the legal rights of copyright proprietors, and promote the development and prosperity of socialist culture and science.

Within the scope of its business the CSC intends, *inter alia*,

to launch copyright academic and information exchange [at] home and abroad, to publicize and popularize copyright knowledge and organize copyright training courses, to offer copyright legal consultation and suggestions on copyright policy making, to *push forward copyright collective administration* [my emphasis] . . . [and] to investigate reported right[s] infringement and piracies and safeguard the legal rights and interests of the proprietors.

The Society has both group and individual members. Organizations that are 'devoted to copyright protection' and companies 'engaged in the creation and communication of literary, artistic, and scientific work' are eligible for membership. Individuals who qualify are those who are 'engaged in [a] copyright-related sector, devoted to or support[ive of] copyright protection, and take an active part in anti-piracy and copyright activities', or 'engaged in copyright research and [have] made academic achievements', or 'engaged in copyright work in copyright teaching, judicial, administrative, transactions bodies or other copyright-related organs'.

Conclusion

China's copyright dilemma is not unlike that which the United States faced late in the 19th century, when it had to balance the

advantages of continuing to engage in copyright piracy against those of becoming a respected member of the international publishing community, with all the responsibilities and commitments pertaining thereto. As China is now, the United States was then undergoing rapid industrialization and developing a fully-fledged market economy, well integrated into the international economic system. The pace of change, stimulated by the Internet, is even faster now than it was over a century ago, and the Internet itself poses special challenges for copyright regulation that the United States never had to confront in a purely print era. The Chinese also have strong cultural traditions that conflict in some ways with respect for copyright, but reinforce it in others. The approach best suited to ensuring that China will take its place as a respected member of the international publishing community – just as the United States did when it passed its own Copyright Act of 1909 – will combine pressure from foreign governments for better enforcement of its existing laws with the incentive of various forms of co-operation both with collective licensing agencies and similar non-governmental organizations, and with private businesses.

Acknowledgements

The author gratefully acknowledges the substantial help and information provided to him by Tracey Armstrong, President of the Copyright Clearance Center, and by Shen Rengan, President of the Copyright Society of China and Vice-President of the Publishers Society of China. As editor-in-chief at Princeton University Press, when he was also serving as chair of the Copyright Committee of the Association of American University Presses, the author hosted a visit from Mr Shen in 1985. A chief architect of China's copyright law, Mr Shen was then head of the Copyright Division of the NCAC and later served as Vice Minister of that organization from 1993 until his retirement in 2004, a crucial period for the development of copyright law and administration in China. Mr Shen graciously hosted a visit from the author to the CSC's offices in Beijing on 7 January 2008, also attended by Liu Yicheng, Deputy Secretary General of CSC, and Sun Yue, Deputy Secretary General, who serves in addition as CSC's Executive Editor-in-Chief. Among other gifts, the author was given the dual-language (Chinese/English) edition of China's copyright law, quoted in this article.

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2. Bell D.A. *China's New Confucianism: Politics and Everyday Life in a Changing Society*. Princeton, Princeton University Press, 2008.
3. Filed with the US Trade Representative on 11 February 2008: <http://www.iipa.com>
4. The National Copyright Administration of China (NCAC) is the primary agency responsible for the administration and enforcement of copyright. It operates as the sister agency of the General Administration of Press and Publications (GAPP), which establishes and enforces regulations for all print, electronic, and Internet publications, including screening them for any controversial content, which it has the power to censor or ban. Formerly part of the Ministry of Culture (MOC), the GAPP now co-operates closely with it in the oversight of content carried on the Internet, while the Ministry of Information Industry (MII) concentrates on supervision of the technical infrastructure. An agency with which the NCAC shares interests in protecting copyright is the Ministry of Education (MOE), which is in charge of all aspects of the educational system in mainland China. Policy-making on intellectual property is the province of the State Council, China's cabinet, which reports directly to the Politburo and through its Intellectual Property Working Group is responsible for crafting legislation in this arena.
5. Daniel Bell devotes an entire chapter of his book (see note 2) to the popularity of karaoke clubs, which play a prominent role in prostitution in China.
6. This and the following quotations come from an eight-page brochure (n.d.) available from the Copyright Society of China.

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