Copyright in China: Implementation Issues in Electronic Media

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Paper presented at the 2008 IAMCR conference, “Media and Global Divides,”
Copyright in China: Implementation Issues in Electronic Media

Copyright does not have a longstanding cultural foundation in China. Alford (1995) attributes this primarily to the historic character of Chinese political and social culture. Tracing efforts to regulate printing and publication in Imperial China, Alford argues that the concerns were based on political, rather than economic, factors. The legal emphasis seemed to be more to control the dissemination of ideas than developing a concept of property interests in information goods and services (other than for the state), or promoting authorship or inventiveness. In addition, China’s cultural roots in Confucianism placed an emphasis on having cultural materials widely shared. The lack of emphasis on individual ownership was reinforced by the Communist Party in China when it abolished the existing intellectual property rights system when it came to power. Certainly, until 1978, when it included intellectuals as workers entitled to benefit from their labors, the Party generally rejected the notion of private ownership of cultural materials as a “bourgeois right” (Oksenberg et al., 1996).

As part of its policy of opening economic markets and promoting economic development and trade, China officially joined the World Intellectual Property Organization (WIPO) in 1980 and the Paris Convention for the protection of industrial property in 1984. In support of the changing policies, China implemented or revised a number of intellectual property laws, including the 1982 Trademark Law, the 1984 Patent Law and the 1990 Copyright Law (State Intellectual Property Office of China, 1994 June). The 1990 Copyright Law implements two foundational international intellectual property agreements, the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. In 2001, the year China became a member of WTO, the Copyright Law was revised to not only be in closer compliance with the provisions of Trade-Related Aspects of Intellectual Property Rights (TRIPs), but to also include “network” copyright protection not addressed in TRIPs.

While the governing laws have largely conformed to treaty obligations and international standards, there are still some questions regarding its implementation by the state and the adoption of embodied concepts and principles by the general public. One concern was the lack of a pre-existing regulatory infrastructure. The new laws attempted to create the necessary bureaucratic infrastructure to monitor and enforce intellectual property rights, but they often found themselves in “turf wars” with other agencies and a legal system with little precedent to work with (Oksenberg et al., 1996). A related concern was how rapidly the various sectors would adopt and support the underlying principles of ownership of cultural materials, and how willing the various actors were to change long-held cultural and political approaches to information goods and services. This is a widespread concern outside of Western nations, where cultural materials, in particular, are often held as communal or social goods (e.g., Brush & Stabinsky, 1995; Coombe, 1998; McLeod, 2001). The pace and success of new policies depends more on their underlying goals, and to what degree those goals are accepted by the various publics involved.

And, of course, the effort and direction of intellectual property policy often depends
more on the underlying goals of the policy/regulation rather than the official language of the law (Bates, 2008; Vaidhyanathan, 2001).

Goals for Intellectual Property Rights Policy

A number of goals have been attributed to intellectual property rights (IP) policy, and there are differences in the stated (and actual) goals and priorities of IP policy, both between countries and over time. Still, IP policies in various countries can be generally characterized as following two somewhat divergent paths. First, there is the goal of using IP policy to promote social, or public welfare, through promoting creative efforts and by making products widely available for use. Another goal focuses on using IP policy to enhance the ability to capture the value of intellectual property. These are not necessarily antithetical; a common argument is that increasing the ability to capture value provides more incentive to create information goods and services, with the consequence that society will benefit from the additional cultural materials. Most Western intellectual property rights policy in the 19th and 20th century expressly recognized both goals and, in its early years, could be said to have attempted to balance those values. In recent years, priorities have arguably shifted.

Recent copyright policies have tended to focus more on protecting and enhancing “author” value, often by diminishing what falls into public domain and into the public commons (Vaidhyanathan, 2008; Lessig, 2004). A number of scholars have also noted the risk of impeding future innovation and creativity, and the potential of sharing cultural products to serve public interests (Benkler, 2000; Kranich, 2004; Reichman & Uhlir, 2003; Wagner, 2003). Second, the rules of international trade as Wolfgang Siebeck (1990), with an excellent summary of theoretical literature, argued that there is a complex feedback relationship between the scope of a country’s intellectual property laws and the stage of its economic development. While developed Western countries collectively emphasized the positive benefits of strictly implementing intellectual property rights (Park, 1996; Samuelson, 1998; Maskus, 2000), copyright in developing or underdeveloped countries have been portrayed, to some extent, as “protection for monopolies” since the competitive position of domestic industries can’t avoid giving way to the Western industries (Deardorff, 1990; Vaidhyanathan, 2002; Economist, 2001; Lohr, 2002; Shiva, 2000). It is encouraging that such arguments open a necessary negotiation for mutual understandings on international intellectual property, and there is no denying, however, the more focusing on trade protectionism or unilateral profit, the larger gap will eventually be brought out in economic and technical standing. In an attempt to synthetically take account of China’s copyright issues derived from these two perspectives stated above, this article mainly aims at, both culturally and legally, examining mutual understandings regarding implementation issues in electronic media.

The recent economic boom in China, largely based on the transfer of Western technology and cheap labor, follows the model of developing countries. It has also been burdened with a rampant torrent of copyright infringements over the past three decades (Mertha, 2005). As far as the copyright infringement of U.S intellectual property in China is concerned, according to International Intellectual Property Alliance’s (IIPA) 2008 report, China ranks first on the USTR Watch List due to a piracy rate over 85% (IIPA, 2008). In 1991, the U.S. Trade Representative (USTR), first identified China as priority
foreign country under Section 301 provision of the Trade Act for its failure to protect U.S. copyrighted products (USTR, 1995). 17 years later, it seems little has changed, with the IIPA recommending that the USTR maintain China on the Priority Watch List in 2008 (IIPA, 2008). As the following table indicates, while the piracy rate for business software (primarily unauthorized use of software in government, SOE’s and enterprises) is now 80% of the market, down by 12% since 2003 (and 2% since 2006), the piracy for video, audio and entertainment software continues to range between 90%-95% of the market. The high piracy rate and the size of China’s markets has caused an estimated revenue loss of more than $2.9 billion in 2007 (see Table 1). Taken as a whole, prevalence and scope of copyright infringement in China suggest a social environment where most people show a lack of copyright consciousness, and a general unwillingness of authorities to enforce existing laws.

Table 1.  China: Estimated Trade Losses Due to Piracy and Levels of Piracy
(in millions of U.S. Dollars)

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Considering the general lack of concern about intellectual property, what makes things worse for electronic media is that copyright management in those sectors is also mired in anarchy and confusion about both applications and enforcement. This article will further examine China’s implementation issues of copyright infringement in electronic media from four aspects as follows.

Copyright Issues in Media Practice

In an effort to comply with China’s commitment to a free market, existing industry or market regulation in China has accordingly been positively changed to follow the requirements of WTO; however, it often fails to incorporate provisions for copyright management and enforcement (Wang, 2004). For instance, CCTV did not issue television copyright and management rules and procedures (based on the 1990 Copyright Law) until 2006, and other media institutions in China waited for their lead. The lack of copyright consciousness shown by ordinary people, is mirrored by media institutions confronting issues arising from the use of copyrighted materials. Here we take CCTV and local TV stations (central aspect and local aspect) as examples to show how media institutions, collectively and unconsciously, violate China’s Copyright Law.

CCTV, as the most influential media institution, firstly issued Television Copyright & Management (TCM) in 2006; the initial rules, however, failed to deal with a number of
critical copyright issues, including how to effectively deal with derivative and secondary uses of both broadcasting material and raw footage. Further, the 2006 TCM failed to set standards, or provide mechanisms to deal with a number of practical issues, such as procedures for determining, collecting, and distributing license payments, rules for including copyright notices on archival content, and how to address intellectual property right considerations in standard contracts with talent and program producers. More importantly, the TCM rarely specifies any penalty for infringement, thus looking more like a dead letter. The lack of penalties also reduces the drive to change historical cultural approaches, giving little incentives for firms or audiences to change their copyright consciousness.

The lack of an infrastructure or mechanism to deal with the practical application of IP rights is a critical problem. Information goods and services are noted for being non-standard (Arrow, 1984; Bates, 1988; Lamberton, 1971). For example, CCTV programs fall into five types (based on coverage scope and medium), each of which could arguably benefit from applying different standards rather than one common copyright standard (CCTV, 2007). That’s to say, programs for domestic or internet coverage could enjoy more tolerant restrictions than those broadcast internationally. That’s one reason why a program for domestic coverage so wantonly infringe others’ copyrighted video, such as local television footage, as well as foreign television/television footage. Huayong Zhao, chief of CCTV, stated that CCTV is suffering the most from copyright infringements as well as having the most infringements on others’ intellectual property (CCTV, 2007).

For example, consider the use of music in news programs. Examination of programs aired on News Probe, honored as the most conscientious news program in CCTV, found that nearly half of programs (46%) aired from June 2006 to June 2007 used original film soundtracks without permission or compensation. For example, the programs Kidnapped Children, In the Name of Life, and Sixteen Years Imputation respectively infringed the original soundtrack of films House of Flying Daggers, The Brave Heart, and Happy Together. More generally, Cun Shi, section chief of Legal Affairs Office at CCTV, explicitly noted that copyright infringement exists, to one degree or another, in secondary uses across a range of media formats, such as TV Dramas, Documentary, Music Television, Talk Show, Variety Show, and Reality Show (CCTV, 2007).

Noting that CCTV, the principal state broadcaster, performs awfully in copyright protection, we can imagine what a chaotic status it is for local television stations. According to Baoguo Cui’s (2007) annual Media Industry Report, 75% of local television stations illegally launched “pirate channels” in 2006, often by directly broadcasting movies in full length from pirated DVDs, or relaying the programs hitting high audience rating from CCTV or Province Satellite. Moreover, being outside the central government’s monitoring, local television stations often receive and rebroadcast foreign TV programs without permission. According to Regulations on the Import and Broadcasting of Foreign TV Programming, issued by State Administration of Radio Film and Television (SARFT) in 2004, no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time. Such severe
quotas on the broadcast of foreign content give both local television station and DVD pirates a handle to take possession of the profitable market sector through infringing on foreign program.

Copyright Issues in Digital Media Fields

China copyright law focuses more on the regulations for traditional forms of creative content than the digital fields. There is little consideration given to copyright management issues for IPTV, mobile downloads, digital cinema, streaming media, E-book, etc. Similarly, there is no effective regulation on copyright management in the fields of online communication and online marketing. In IIPA’s 2008 Special 301 Report, internet and mobile piracy continue to worsen and has become a major impediment to the development of the legitimate digital marketplace and commerce in China. According to China Internet Network Information Center’s (2008) report, the number of “netizens” in China has exceeded that of the United States, reaching up to 210 million as of January, 2008. Furthermore, China is currently the world’s largest mobile telecom market, and mobile phone users in China reached 547 million at the end of 2007 (World Finance Report, 2007). Besides rampant piracy in optical disk, there are reportedly 110,000 licensed Internet cafés together with the equal amount of the unlicensed.

While China is often noted for its emphasis on regulating some aspects of the Internet, there is little effective enforcement in China against Internet piracy (Deibert, 2002). and, as a result, China is one of the biggest sources of illegal downloads in the world, where the online piracy rate exceeds 99%, choking the legitimate music market to only $74 million in 2007, less than 1% of global sales. Likewise, the mobile market is less problematic than the online market, given the more closed nature of mobile networks, leading to over 70% of these legitimate sales in the mobile market (IIPA, 2008). While the dearth of digital copyright provisions remain unremedied, this problem is further exacerbated by the lack of power on the part of rights holders to investigate the content or to seize the servers of alleged infringers to preserve the evidence.

As video websites are widely established in China, unauthorized transmission and downloading of television programs is particularly prevalent at Internet cafés. Internet and mobile network has substantially become two of the most piratical rendezvous of television/radio programs. For example, it was reported that 76% of Internet and mobile users illegally visit to watch such video in 2005 (IIPA, 2008). The reason why the right holder refuses to bring a lawsuit against piracy is exactly due to such a tacit understanding among television right holder and ISP: they both are permitted to seek for their respective profit through freely “sharing” others’ work. By interviewing one section chief of Sina.com, the biggest commercial V-blog website in China offering video service for both internet users and mobile users, I was told most television program videos on the list of Sina.com were unapproved and there had been no any lawsuit against their piracy so far. For this reason, television/radio program are rampant disseminated through all kinds of internet/mobile end terminals: FTP sites, WiFi sites, UGC sites, mobile V-blog sites, search engines inducing infringement, and major P2P services.

Copyright Issues in Collective Management Organizations

How can an individual protect his/her intellectual property? An author is not capable of monitoring all use of his works; he/she can not negotiate with every single radio or
television station with regard to licenses and remuneration for the use of his/her works. On the contrary, it is not practical for a media organization to seek specific permission from every author for the use of every copyrighted work. So the very impracticability of managing these activities individually, both for the right holder and for the user, creates a need for Collective Management Organizations (CMOs), whose role is to bridge the gap between them in these key areas. For this reason, Collective Management Organizations, through acting in the interest and on behalf of the owners of rights and related rights, are an important and practical link between creators and users of copyrighted works.

However, China has not yet widely established the Collective Management Organizations or mechanisms necessary to implement copyright licensing and enforcement in relevant industries; only one such organization has been established in China to date, the Collective Management Organization of Music Copyright (CMOMC). This is another important reason why radio and television stations could boldly use copyrighted works, in other words, the fearlessness comes from the impossibility of collective lawsuits by every single author. Taking music television as an example, the establishment of CMOMC, although effectively deterring the infringements against radio stations, can do little with respect to infringements by television stations. Basically, a music work broadcast on television includes two parts of copyright respectively belonging to different right holders: music (music and lyrics) copyright and music television (music video) copyright. Since a Collective Management Organization representing the owners of music television rights, has yet to be established, and the CMOMC is only in charge of the part of audio music copyright rather than of music television copyright, the contention between the owner of music work and media institutions (including television station, internet and mobile service providers, etc.) never called a halt to the practice of using music videos without license.

The issue came to a head in 2006, in what was termed the Karaoke Bar Event. Over time, the contention between music authors and karaoke bar/television stations became more and more irreconcilable, and led to a move to establish the Collective Management Organization of Music Television Copyright (CMOMTC). Following that, the National Copyright Administration of China (NCAC) exercised administrative power to issue a rule that every box seat in karaoke bar should pay 12 RMB (U.S. $1.5) every day to the owner of music rights to be administered through CMOMTC. However, the regulation failed to include any language on the penalty or remuneration regarding infringements of television station and Internet/mobile SPs (NCAC, 2006). Further, despite NCAC’s authorization of the establishment of CMOMTC, and the official submission of an application, to Ministry of Civil Affairs of China (MCAC), to establish the CMOMTC in 2005, the CMOMTC has yet to be formally registered and implemented. Although NCAC’s forceful rule in terms of changing standards arguably helps to arouse copyright awareness, there is a question of its ability to proceed in the absence of CMOMTC.

The above case illustrates some of the difficulties facing the implementation of a IP licensing and enforcement infrastructure in China. The absence of such Collective Management Organizations to implement and enforce a variety of copyright protections, including public performance rights, broadcasting rights, mechanical reproduction rights, performance rights, photocopying rights, and other related rights, makes it difficult for the
owners of rights (authors, composers, publishers, writers, photographers, musicians, or performers, etc.) to protect their intellectual property against media infringements legally and effectively.

*Copyright Issues in Virtual Property Management*

Another implementation issue is how to protect the related copyright, especially in terms of virtual property? Compared with physical “hard goods” products (such as optical disc and cartridge-based formats), the notion of virtual property has encompassed a range of information goods and services. These can include digital file versions of traditional media, programming formats and concepts, even the emerging “virtual property” sector originating from massively multi player online role-playing games where online game assets are traded (and stolen). With the rise of virtual/digital property markets comes concerns about applicability and enforcement of IP rights. There is little current regulation on relevant intellectual property areas, specifically on the copyright of brands and innovation, media/program/planning originality, marketing model, and virtual property and virtual brand in cyberspace, etc.

As far as television program originality in China is concerned, there is a common saying that “CCTV’s program originality directly copies from the U.S.’s; Provincial satellite networks totally follows CCTV’s course; local program heavily imitates Provincial Satellite”. For instance, the most successful “original” Chinese entertainment programs such as *Dance Party*, *Amused Dictionary*, *Special Challenge*, *I Am Champion*, *Tonight*, *Luck 52*, and *Dreaming China*, are respectively modeled on programming developed initially in the U.S. --- *Dance with Star*, *Are You Smarter Than a 5th Grader?*, *Who Wants to Be a Millionaire*, *The Apprentice*, *The Amazing Race*, *The Daily Show*, and *America Got Talent* (some of which are formats “licensed” from other countries). There is no denying that programming is frequently an imitated version of what in the U.S. without any localized improvement. The difference is that the “original” Chinese program rarely mentions or licenses the program concept. Whether due to a failure to specify the provisions with regard to virtual intellectual property in international Copyright Law, or a failure to establish necessary international Virtual Intellectual Property Organizations (VIPOs), media originality, virtual brand, and the mode of media programming against virtual copyright infringements in both virtual world and real world will continue to be a highlighted international contention concerning related copyright protection.

In brief, for failing to effectively deal with the copyright issues in different media areas --- media practice, digital fields, collective management organizations, and virtual intellectual property management --- China’s copyright infringements in electronic media appear to be widespread, if not out of control. From IIPA’s 2008 Special 301 Report, the only way IIPA recommended to solve the copyright issues is to force China to strictly follow a series of international trade agreements and to completely open media market for international access. But such an approach does not address or deal with the more fundamental underlying problem of the lack of social and cultural support for the concept of intellectual property. Admittedly, a legal approach against intellectual property infringements is necessary but is not in itself sufficient to solve the problem of widespread piracy.

As Mun (2003) stated that “these [legal] agreements have not based upon mutual
desire but upon threats of U.S. retaliation and penalties to achieve desired levels of protection” (P. 4), an alternative approach --- cultural perspective with Chinese “characteristics” --- could be more likely to interpret the collective lack of copyright awareness in China. Thus, this article will further analyze the implementation issues of intellectual property protection from both cultural perspective and legal perspective.

A Cultural Interpretation of Implementation Issues

Academic debates on the copyright infringements up to date have been one-sidedly “focusing primarily on the unfair competition aspect” (Yu, 2001, P.93). Based on Bettig’s (1996) argument that “the positivistic and apparently empirical nature of economic analyses makes economists more forceful in the policymaking process than those making predictions or voicing concerns that are based more on an intuitive, philosophical, or even historical basis” (P. 107), copyright protection in China should positively take into account Chinese cultural tradition which has historically been affecting and shaping people’s attitude towards intellectual property and related infringements.

Cultural Tradition towards Property

While copyright is generally regarded as a necessary incentive to protect the author’s special property, what is people’s cultural tradition towards “property” itself in China, and who process such “property”, the state or the individuals? As Steidlmeier (1993) argues that the concept of “property” is a tremendous dynamic depending on its historical sociological stage, it is necessary to historically look back to the model of economic and political system in particular period when it is under study. While many Asian countries such as India, based more on early oral culture, have not focused personal ownership of ideas (Garmon, 2002), the inception of copyright law in the West is further developed with the connection between the rise of capitalism and the extension of commodity relations into the literary and artistic domains (Bettig, 1996). For instance, Bettig (1996) states the concept of intellectual property right has its roots with the bilateral promotion in the fields of printing press under capitalism economic system --- copyright supported the expansion of creative human activities as a commodity, and the granting of rights to printers brought intellectual property rights to capitalism.

Regardless of economic system, feudalism or socialism, wealth and property in China has traditionally belonged to the state rather than private owners, and the basic cultural value is primary characterized as collectivism in stead of individualism (Alford, 1995). Thus, people collectively recognized the reasonableness of the continuing expansion of state power even at the expense of individual interest. In capitalist economic society, private ownership of land is regarded as the first step to legitimize the concentration of private ownership. It is totally a different case in China, for all the fixed assets (including land resources, productive assets, and financial wealth) are owned by the government. According to Zhiwu Chen’s (2008) research, traditional culture is greatly shaped by the authority’s efforts to obtain monopoly control of the social wealth. For instance, as for 115.6 trillion fixed properties in China, the government processed 88 trillion (76%) and the individuals in all only owns 27.6 trillion (24%) (Chen, 2008). In the West, it is impossible to imagine and grant such a “huge” government as what in China, capable of benefiting so greatly from the growth of GDP, over three times than the
individuals. Even if social wealth is extraordinarily processed by the government, people still accept the tenets as a matter of course. That’s to say, the concept of “property” itself, including intellectual property as such, was, is, and plays a minor role in cultural traditions and practices. In short, due to collective psychology historically shaped by a the particular economic and political environment in both imperial and communist China, there is little resistance in the demand for the creative ideas and expressions to be part of the state property. (Alford, 1995). As a result, copyright laws firstly establishing in the Western world are more widely accepted in capitalist regimes than in Communist regimes such as China.

**Cultural Tradition towards Creative Works**

The significance of historical events and traditional value is also capable of effectively interpreting the reason for the widespread lack of copyright consciousness in China. More than 2,500 years’ influence of Confucianism emphasizing the notion of sharing creative works and ideas upon Chinese values has deeply shaped people’s cultural tradition treating creative works as cultural artifacts rather than individually owned property. As Wingrove (1996) argued that “this Confucian emphasis on learning by copying applied to all aspects of life in China … [and] copying, by tradition, is a mark of respect and homage” (P. 6), the copying of works of almost any kind, under the cultural tradition of “learning by copying”, has been largely regarded as “honor”.

Likewise, the concept of learning, closely related to imitating the works of masters evolved a long time ago, even centuries before the growth of modern economy and technology (Mun, 2003). According to Yatsko (2000), “copying enjoys a long tradition in China and does not carry a stigma. Copying a masterpiece was historically considered an art form in its own right, while Chinese students have been taught for centuries to copy their teachers as accurately as possible before attempting to create” (P. 216). This cultural belief originating from Confucianism has been transmitting for more than 2,500 years, and further greatly influenced the current system of intellectual property in China Alford, 1995; Oksenberg et al., 1996). With the particular educational tradition, people would rather use the word “copying” rather than “stealing” to justify their action of casually, or even intentionally, using others’ creative works. On the other hand, for those whose works are copied, they usually regard such “acceptance” as a kind of identifying or recognition of his/her works.

Moreover, Confucian belief has also influenced people’s attitude towards the value and ownership of different forms of property. Steidlmeier (1993) divides property into three forms: (1) private form, (2) common form, and (3) public (government) forms of property. According to Mun’s (2003) interpretation, if we put an emphasis on the Chinese Communist government, the concept of intellectual property is considered as a public property, but in case of Confucianism, its characteristic is close to a common property. Whether as a form of common property, or as public property, people, if only for personal use, are qualified to access the creative works in socialism society where the ownership of public property, as communist government advocates, belongs to the whole nation. In this regard, creative works are not equal to material wealth or individually owned property, not something capable of being evaluated with money, but instead a kind of public products. While China’s Copyright Law largely legitimates creative work as individual
property, people instinctively show a collective resistance to the copyright law which is completely contrary to the established cultural tradition towards intellectual property. That’s the reason why copyright law in a society with weak legal tradition inherently fails to arouse people’s intellectual property consciousness, especially at the very outset.

Cultural Tradition towards the “West”

In China, people’s attitude towards Western intellectual property largely rests on the corresponding cultural tradition towards the image of the West, and relevant ideology. Western cultural carriers, especially the media products, movie, and related Optical Disks, could legally access Chinese market only by going through particular political review/censorship process. As media products have been widely regarded as a kind of soft power capable of “softly” shaping the Other’s value and perception, communist government engages in political censorship on whether the potential value behind a cultural product is in compliance with Chinese established ideology. Meanwhile, the Chinese government tries every means at its disposal to influence the public’s perception towards Western cultural products. Specifically, through performing what Benedict Anderson called “imagined community” as well as “ideological state apparatus” from Louis Althusser’s theory, the state authority strategically works to persuade the public to accept the established ideology. The state, by publicizing the ideology of communist’s superiority over Western political system, the authority successfully legitimates the economic ownership of public property rather than private property in communist regime; through framing Chinese modern history of tears and blood since Opium War in 1840s, the authority directly demonizes the West as enemy; and through operating its particular education and media system, the authority effectively portrays Western cultural products as what Edward Said called “cultural imperialism” and “cultural colonialism” capable of threatening Chinese cultural evolvement, or even national security.

In brief, under powerful “interpellation of the subject” (Althusser, 1972), the “clash of different civilization” is further exaggerated within the socialist economic system through the numerous mass campaigns. When such resistance, called “counter memory” in Michel Foucault’s theory, reaches a climax, what follows is collective aversion to the West, its ideas, and its artifacts. For instance, during the Proletariat Cultural Revolution, the Communist government heavily persecuted scientists, writers, artists, lawyers, and intellectuals who were perceived to possess private property, a symbol of embracing the West (Alford, 1995). The collective resistance watching out for cultural hegemony gradually becomes a negative mentality against Western intellectual copyright.

The emergence of copyright law further adds fuel to the flames of resistance, because it not only culturally shifts creative works from common property to a private property, but also both economically and ideologically facilitates Western monopoly over China which is called “peaceful evolution” in textbook. To be noted, in the Maoist period, “Owning property is tantamount to a sin. Thus, stealing an object that is owned by someone else is less corrupt than owning it outright yourself.” (Tiefenbrun, 1998, 37-38) Now, although the Chinese market is greatly opened to the West, the initiatives of copying Western intellectual property have been, in the name of resisting Western cultural imperialism, publicly justified as some kinds of righteous action related to notions of patriotism or nationalism. Additionally, while the resistance against Western ideology and
value becomes a collective negative mentality, the reason people are still consuming Western media products and movies through various of infringing means is only for sensatory entertainment consuming rather than rational cultural communication. In short, collectively infringements on Western cultural carries are acknowledged both as a necessary revenge against the West and relevant cultural hegemony, and as a patriotic action to break through the private ownership behind copyright blockade and lower the accessing threshold for facilitating public use.

Cultural Traditions towards Public Domain

As for the copyright role furthering global economic developments, Anne Barron (2006) views the whole history from 18th century as a process of legal-conceptual evolution that gradually but inexorably: 1) broadened the range of persons qualifying as subjects of exclusive rights in cultural materials (from writers in the 18th century to e.g. record companies in the 20th); 2) broadened the range of entities qualifying as objects of these rights (from texts in the 18th century to e.g. films in the 20th); 3) lengthened the duration of these rights (to as much as 70 years from the death of the human author); and 4) expanded their scope (from a right to print copies of books to a bundle of rights to control all kinds of reproduction and public communication, including communication through digital networks). The growth of the scope and breadth of intellectual property rights has been “thoroughly entwined with parallel developments in information and communication technologies (ICTs); in the theory, practice and criticism of the arts; in the culture industry, and in the regulation of the public sphere generally” (Barron, 2006, p. 280). In this regard, copyright law, far from being simply the internal logic of a legal doctrine, is implicated with the institutionalization of familiar cultural hierarchies and cultural politics (author/reader, work/text, thing/action, context/power, private property/public domain, etc.). Therefore, in an attempt to situate markets within a wider ‘totality’ of social, political and cultural processes, critical political economists’ focus is not on the sphere of exchange but on relations of production, and how it generates particular configurations of ownership and power. Through copyright enforcement, media/entertainment corporations attempt to circumvent the obstacles these characteristics pose to the valorization of capital. Hence this approach, as Barron argued, “theorizes the past, present and future of copyright law as bound up with the evolution of a distinct sector of capitalist production: the culture industry (P. 280).

If we further examine the rationale for copyright as a device for propelling an independent culture industry domain, and correspondingly alleviating market failure, it substantially impacts on what Habermas called the “public sphere”: a sphere both independent of institutionalized centers of political power, and capable of challenging their political dominance. It has been widely argued that modern copyright system arose with and contributed to the emergence of such press-mediated public sphere: “with its introduction, authors could for the first time hope to earn a living from the sale of their works through independent publishers who stood apart from the censorial arm of the state and the interference of aristocratic and ecclesiastical patrons” (Barron, 2006, P. 282). In this regard, copyright’s primary role was, is and should remain the support of a democratic culture (Netanel, 1996). In China, such kind of “public domain” in China is, on the contrary, largely restricted and/or controlled by political power, which makes it
impossible for an author to easily access so called “public sphere” and to financially support himself/herself with the sale of his/her creative works with the benefit of independent organizations (publishers, dealers, collective management organizations, and so on). By this token, due to both the weak tradition of democratic culture and the weak situation of civil society in China, the author of creative works can do nothing but fall back to the government for the disposing of his/her works in marketplace. Meanwhile, there is also the failure to shift economic action to a separate domain from political power, likewise, to further contribute to a much stronger modern copyright system.

**A legal Approach to Implementation Issues**

Provisions against copyright infringement should not just be listed in Copyright Law, but be significantly accordant with, and identical to, other existing administrative policies and criminal law. In IIPA’s *2008 Special 301 Report*, the higher level of copyright infringement was attributed to the fact that China generally fails to impose deterrent administrative penalties or initiate criminal enforcement against copyright piracy (IIPA, 2008). Additionally, a positive legal system should also include a set of appropriate judicial interpretation effectively identifying and judging the threshold of copyright infringement, as well as a set of necessary industrial standards facilitating “market access” for international trade in the field of electronic media.

**Effective Enforcement of Copyright Law**

Major international copyright laws such as TRIPs are basically divided into two parts: the substantive standards and effective enforcement. Although China is now in compliance with the international substantive standards, it still seems there is a lack of will and power to effectively enforce these provisions of copyright law. The enforcement section of TRIPS, for instance, sets out a general set of obligations, beginning with the following from Article 41: “members shall ensure that enforcement procedures...are available under their law so as to permit effective actions against any infringement...covered by this Agreement, including expeditious remedies...which constitute a deterrent to further infringements.” China's failure, in terms of effective enforcement, centers on its historic and continued reluctance to apply the necessary measures to deter piracy. Jason Berman (2005), Chairman of the International Federation of the Phonographic Industry (IFPI), argued that “Pirates, without facing serious penalties, will simply view raids and seizures as a cost of doing business-and piracy is a very profitable business” (Para. 7). About every two years, Chinese government initiates a so-called “100 Day Campaign” directing at reducing the availability and use of illegal electronic media products; usually failing to achieve the results touted by Chinese authorities. While seizure statistics in 2006 were very high, reports and outside surveys commissioned by industry noted that pirated products remained available throughout the campaign in virtually the same quantities as before the campaign commenced (IIPA, 2008). In some cases, however, pirate products became less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways.

To make a real difference in deterring piracy, three shifts in the approach to IP enforcement are necessary. First, such campaigns should start with a determination of
initiating a sustained campaign rather than a sporadic offensive, since simply putting episodic raids and seizures, no matter how successful, will not result in any notable declines in pirate production; Second, the current infringement situation is fostered by a widespread network of piratical plants (nationally, if not internationally). Current administrative enforcement efforts depend heavily on local copyright bureaus’ resources (some with no more than five employees), which are woefully inadequate in fighting against large-scale piracy in China. Thus, the state needs to make a national commitment, and use national resources to fight copyright infringement, and combat large-scale (regional, national, and international) piracy with the resources of central authority. Third, a commitment to administrative enforcement of Intellectual Property rights should extend beyond National Copyright Administration, to include other relevant agencies, such as Ministry of Culture, Ministry of Commerce, Ministry of Information Industry, Ministry of Public Security, Ministry of Supervision, and China Customs.

**Criminal Prosecutions of Copyright Law**

Rampant copyright infringement contributes to China’s failure to comply with Article 61 of TRIPs, which specifically requires **criminal penalties** “in case of willful trademark, counterfeiting or copyright piracy on a commercial scale”. Although IIPA has continued its efforts to identify Chinese criminal cases brought for copyright piracy, most fail to be very effective, since Articles 217 and 218 of China’s Criminal Law (1998) doesn’t cover all of the types of commercial scale piracy originally included in Article 61 of TRIPs. Examples of omissions include exhibition and broadcast rights, translation rights, and others, where infringement does not constitute crimes even if done “on a commercial scale (IIPA, 2008). As such, on January 11, 2007, the Supreme People’s Court (SPC) of China released to all lower courts in China, the **Opinions on Strengthening All Respective Work on Intellectual Property Trials to Provide Judicial Safeguard for Building An Innovation-oriented State.** Only one of the 26 sections in this document dealt with criminal enforcement and urged the lower courts to treat criminal piracy as an important crime.

Despite China’s repeated emphasis that criminal enforcement is a necessary component of legal enforcement system, IIPA (2008) points out that China does not separately break out criminal cases involving copyright, and copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means. For instance, since China joined the WTO in 2001, China has brought only six criminal cases involving U.S works (all six in 2005-2006) and a few more cases involving the works of other WTO members (IIPA, 2008). Likewise, the 2004 Conference of U.S.-China Joint Commission on Commerce and Trade (JCCT) explicitly pointed out that the thresholds for a criminal prosecution regarding copyright infringement under Chinese law are likely to continue to prove difficult to meet, and it urged China to choose deterrent criminal enforcements rather than only administrative penalties as a tool to address commercial copyright piracy (Berman, 2005). Although Supreme People's Procuratorate (SPP) of China issued new “Guidelines” in 2007 designed to lower the copy threshold of for commercial piracy of Internet content and Optical Disks under Article 217 to 500 copies for the **less serious**, and 2,500 for the **more serious**, penalties, the number is still 30 to 60 times higher than what IIPA
proposed. According to JCCT’s suggestion, only by the aggressive use of deterrent criminal persecution in compliance with WCT and WPPT, already proven to be an effective means to control piracy for other countries, could China significantly reduce the level of copyright infringements.

Judicial Interpretation of Copyright Law

Another reason why China’s Copyright Law has been condemned greatly by the West, refers to its undeterred, and even vague judicial interpretation. Two aspects have proven to be the most problematic: the first relates to how to interpret the threshold for criminal behavior in case of internet infringement, and the other relates to how to judge the vague, equivocal, standards such as “for the purpose of reaping profits”. The new SPP “guidelines”, updated in 2007, do not deal clearly with the issue of online infringement threshold. China's Action Plan on IPR Protection 2007, which contained 276 measures in 10 IPR areas and a number of initiatives to address internet (and “hard goods”) piracy, called for year-long campaigns against online piracy and substantially received a better record than the earlier efforts of the National Copyright Administration of China (NCAC), reported in 2006. It is reported in January 2008, the authority had shut down 399 illegal websites, confiscated 123 pirate servers and meted out RMB 870,000 (US$121,000) in administrative fines since August 2007 (NCAC, 2008). Of these cases, IIPA reported that only 31 were referred by NCAC for criminal prosecution; however, there were no official reports on how many of these cases were actually prosecuted and/or concluded (IIPA, 2008). Without clear evidence of infringement satisfying the internet threshold proposed by IIPA, law enforcement agencies are often difficult to, or even reluctant to, take actions against alleged Internet infringers.

On the other hand, China is one of the only countries in the world requiring proof that the act in question was undertaken with the “purpose of reaping profits,” and is the only country that has a threshold (“gains a fairly large amount” or “when the amount of the illicit income is huge”) for criminal liability calculated based on pirate profits or income (IIPA, 2008). If the “purpose of reaping profits” standard, in any way, has some reasonable interpretation in traditional legal cases, the digital age can do nothing more to accurately and effectively interpret such standard while internet commercial scale piracy can be engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged, or in the case of hard-disk loading where the software might be characterized as a “gift”). For this reason, the criminal provisions also need an update to actively criminalize the circumvention of the WCT and WPPT (WIPO Internet Treaties).

International Access to Copyright Law

In further examining the institutional reasons behind rampant intellectual property infringements, we find that many of the copyright issues related to electronic media is largely due to China’s failure to open its market in any meaningful way to legitimate copyright products (especially CD and DVD), allowing pirates free reign to reap massive profits in the absence of legal competition. While non-media industries protected by copyrights have been largely, even completely, permitted to access China market since China joined the WTO in 2001, the policy on traditional media industries, such as CDs and DVDs as commercial products, still severely limits the ability of Western companies
to engage in developing Chinese marketplaces and distributing relevant products.

Such phenomenon is actually not only an economic issue, but rather, a political issue. As we have discussed above, cultural products, especially the electronic media products, are regarded by the authority as an aspect of Western hegemony and ideology which might threaten the established attitudes and values in China. Compared with other industries, media industries are strictly limited with a variety of ownership/investment restrictions, censorship restrictions, publishing restrictions, and quota restrictions, each of which respectively limits legal access to Chinese markets, while doing little to restrict demand for those media products. This has provided pirates with a largely untapped market, one well worth the risk, considering the potential for profit and the lack of effective legal deterrents under the current copyright law.

Let us consider the implications of media access restrictions in China. First, foreign media companies can, at best, enter Chinese market only as a partner in a minority-share (up to 49%) joint venture with a Chinese state-run media companies. In the television sector, wholly or jointly foreign-owned companies are strictly prohibited. Secondly, all CD/DVD-based foreign media products are subject to review and censorship; only when the content was completely reviewed by the Chinese government, could they get qualified to be released and distributed in China. However, neither pirated products nor domestically-produced products are censored. Owing to the uncertainty of the changing censorship, such discriminatory process between imported products and domestically-produced products will further prevent state-run media institutions from collaborating with foreign media companies. As for publishing restrictions, foreign media companies are desirous of developing, creating, producing, distributing and promoting Optical Disk (OD – for example CDs and DVDs) products by Chinese artists in an attempt to both satisfy Chinese market and export from China. However, onerous Chinese restrictions make it more difficult to engage in such process. When cultural products, especially OD, are brought to the Chinese market, it must be released and distributed through approved state-run “publishing” firm. It usually takes a couple of weeks to go through all the procedures required by censorship, which would give the pirates a crucial head-start in the marketplace. Finally, as far as quota restrictions are concerned, there are strict policies regulating the “maximum”, not “minimum”, quota for foreign films and TV plays accessing Chinese media market. The monopoly import structure and the censorship mechanism go hand-in-hand with the way quotas are imposed and enforced. For instance, SARFT allows no more than 20 foreign revenue sharing films to enter Chinese cinemas every year.

In brief, while Chinese authority has largely, and/or even completely, complied with the letter of its WTO commitments, and opened the market for non-media copyright products, it seems that it is a different story for copyrighted media products, which still suffer from strict, even unfair, restrictions limiting access to Chinese media markets. This provides a strong incentive for pirates, who are willing to run the risk of illegally importing foreign media products for the sake of filling the profitable market sectors. And they have little or no incentive to do so with legal copies.

In view of these media restrictions, IIPA strongly suggests Chinese authority should actively, from the perspective of copyright policy, undertake some necessary IPR reforms
including (1) greatly increasing transparency; (2) eliminating the film quota; (3) permitting full publishing and distribution activities within China; (4) eliminating discriminatory or unreasonable investment restrictions; (5) eliminating the ban on video game consoles; (6) eliminating delays and discrimination (against foreign right holders) in reviewing content under its censorship regime to ensure that legitimate products get to the market before pirate products (IIPA, 2008).

**Conclusion: A Broader Cultural Approach to Implementation Issues**

Admittedly, a legal approach against intellectual property infringements in electronic media is necessary, but not the only solution available for China. Effectively implementing the notion of intellectual property rights must also be based on developing cultural support for the notion of cultural goods and services as property, and for the value of rewarding creators of such products for their efforts. While the cultural traditions and issues lay partly outside the law, there is a Chinese saying (cultural tradition) that “Laws will lose power against majority”. That is, when copyright infringements have become a collective phenomenon, when everyone is willing to risk engaging in such actions, effective enforcement will be difficult, if not impossible. In this regards, development of copyright protection in China should consider current Chinese cultural tradition towards intellectual property, and should not just emphasize more severe enforcement or economic sanctions, but should work towards developing a broadly based copyright consciousness. This should be done in proper sequence, through positively and organically combining policy perspective and cultural perspective, integrating vital components of IP concepts within an appropriate cultural framework, rather than by imposing Western values and approaches through the law. Better efforts at enforcement are needed, but need to be developed within a diffuse infrastructure and support system consistent with Chinese standards and values..

In China, as Alford (1995) argued, it is crucial for policymakers to “move beyond the written rule itself to a consideration of the broader social and intellectual circumstances, and in particular, the political culture within which law arises and within which it must operate.” (119) Likewise, Mum (2003) noted that if the Chinese had not invented paper or enforced its patent on their innovations, the contemporary Western view of copyright might not have been born, or at least could have been quite different. So besides proper developments of legal enforcement and judicial interpretation, a broader cultural approach could be more effective to reach bilateral agreements in terms of copyright issues in China.
Notes

1. Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time (17:00-20:00) on any channel other than pay television, without SARFT approval. Other foreign programming (news, documentaries, talk shows, travel shows, etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming may not exceed 30% of daily animation programming delivered by animation and youth and children channels, and during prime time, foreign animation and programming is banned. To further complicate matters, only producers of domestic animation programming can import foreign animation programming and no more than an amount equal to what they produce.

2. The final statistics regarding “100 Days Campaign” were reported widely in the Chinese press: “China has destroyed nearly 13 million pirated CDs, DVDs and computer software products. Over the past two months, police and copyright officials have investigated more than 537,000 publication markets, shops, street vendors and distribution companies, and closed down 8,907 shops and street vendors, 481 publishing companies and 942 illegal websites.” Xinhua, China Daily, September 29, 2006.

3. In 2004, IIPA proposed 50 copies of software or books and 100 copies of recorded music or motion pictures for criminal liability, and twice this number for more serious offenses.

4. By tracking the changes of USTR’s Watch List in recent years, South Korea, Singapore, Taiwan and Hong Kong are examples of countries where criminal enforcement has been able to significantly reduce piracy levels (IIPA, 2008).

5. In November 2007, the SPP issued “Guidelines” to prosecutors on how to deal with criminal cases regarding online piracy under Article 217. Since the guideline still failed to take up IIPA’s urging copy thresholds, IIPA called for adjustments to specifically meet the thresholds in the judicial interpretations so that internet piracy, when on a commercial scale, is actionable.

6. In 2004, the State Administration of Radio Film and Television (SARFT) issued Act on Introduction, Broadcast and Management of Foreign Programs (the 42 Act) encouraging foreign companies to access Chinese media market under a less than 49% share. While western media companies are preparing to establish joint venture with Chinese TV station, SARFT timely abolished the 42 Act in 2005 substituted by the 43 Act which totally prohibited jointly foreign-owned companies.

Reference:


