

21. The Changing Role of Copyright in China's Emergent Media Economy

Lucy Montgomery and Xiang Ren

Introduction

Copyright, which ‘protects the rights of creators of literary and artistic works, and of those who purchase or otherwise obtain those rights’ (Becker, 2002:3) is deeply rooted in the legal, philosophical and economic traditions of Western Europe and the United States. There is growing recognition among Chinese policymakers and creative practitioners that copyright has the potential to encourage growth in creative and cultural industries and to facilitate market-based reform of the media sector. In spite of this, the integration of copyright into Chinese legal, economic and social norms has often been problematic. Although China's formal copyright law is now similar to copyright laws in any Western jurisdiction, attitudes towards creativity and the regulation of copying continue to be influenced by the nation's own unique history, as well as the transitional nature of its media and legal systems.

This chapter introduces the changing role of copyright in China from a historical perspective. It begins by briefly tracing the history of copyright, from a censorship related system associated with the emergence of the printing press in Imperial China, through modernization during the Republican period, abolition under Communism, and finally to the introduction of the People's Republic of China's (PRC) first copyright law in 1990 and the nation's entry into the World Trade Organization (WTO) in 2001.

As this chapter discusses, copyright failed to take root in Imperial China, in spite of the existence of a vibrant commercial printing industry and awareness among creative entrepreneurs of the value of being able to control copying. Copyright fell on equally hard ground in the first decades of the People's Republic of China (PRC) and was simply not compatible with Communist ideology that opposed all forms of private property. As a result, China remained isolated from many of the developments that gave rise to the emergence of 'copyright industries' in other markets during the twentieth century. Regardless of this slow start, opening and reform have been associated with strident efforts to both recognise and protect intellectual property rights. The PRC now has a comprehensive copyright law and a vast bureaucracy dedicated to its administration and enforcement. As reform processes gather pace and a new generation of media industry entrepreneurs emerges, copyright is taking on an increasingly prominent role in the growth of vibrant, commercially focussed Chinese creative and cultural industries.

Nonetheless, infringement remains rampant and it is taking time for the soft infrastructure needed to support a copyright-based economy to develop. Rather than evolving alongside analogue technologies for copying and distribution, China's copyright industries are, in many ways, being born digital. There are signs that some media firms are finding it more profitable to simply develop new business models than to attempt to apply models that depend on strict enforcement, particularly in a digital environment. Tensions between black-letter law and copyright practices in China provide important insight into the complex ways in which copyright connects to wider commercial, economic, legal and technological landscapes in all markets.

Confucianism and Copyright

William Alford's treatise on the history of copyright in China, *To Steal a Book Is an Elegant Offense* (1995), makes an argument for the determining role of Chinese culture in shaping modern attitudes towards copyright and its enforcement. As Alford observes, during the Imperial period Chinese governments exercised a high degree of control over cultural norms and the circulation of ideas through the promotion of Confucian ideals of thought, behaviour and artistic achievement. Confucian philosophy emphasises the importance of the past and the value of established hierarchies in all aspects of life. The Imperial examination (*keju*) system, established during the Sui Dynasty in 605 and expanded during the Song Dynasty (960–1279AD) examined candidates on their knowledge of a centrally selected canon of Confucian texts in order to select officials for the state's bureaucracy. Copying from an approved artistic and intellectual canon played a key role in the exercise of power over Chinese subjects, allowing the government to ensure that Confucian texts were internalized by scholars throughout the nation. It also ensured that the moral codes, attitudes and values that these texts contained were applied at every level of the political and education system (Alford, 1995: 19–20; Dimitrov, 2009).

Within the Confucian framework morality was defined by tradition (Oldstone-Moore, 2003) and individuals were encouraged to think of themselves as transmitters rather than creators of knowledge (Confucius, 1998:VII:20). People depended on a combination of knowledge of the past and guidance from leaders, teachers and superiors to instruct them on appropriate ways to conduct themselves in all aspects of their lives (Oldstone-Moore, 2003). Just as concepts of 'natural law' formed the basis of legal principles within Judeo-Christian societies, Chinese law relied heavily on

reference to the past to guide judgments about legitimacy, morality and righteousness. In contrast to Western concepts of copyright informed by ideals of individual creativity and genius associated with the European Enlightenment during the seventeenth and eighteenth centuries in Europe,¹ creative works were considered part of a common heritage, rather than as the property of the individual creator. Confucianism's disdain for commerce and commercially motivated creative activity were also incompatible with economic theories of copyright that understood the protection of private rights as a legitimate means of creating incentives for artistic or creative endeavour.

Commercially Driven Creative Cultures in Imperial China

Alford's (1995) work provides important insight into interactions between Confucianism and attempts by international governments to impose a wholly foreign intellectual property system on an unwilling nation. However, his focus on Imperial China's official cultural system neglects important areas of commercially motivated creative and publishing activity that existed alongside the state-sponsored cultural system. Many intellectuals serving within the official system, as well as those who had failed to secure an office for themselves through the Imperial examinations were engaged in a popular creative economy that largely ignored Confucian models of artistic propriety. Less than 5 percent of Imperial examination candidates succeeded in securing a government office through the *Keju* system. Trained scholars sought financially rewarding opportunities to apply their education and creative skill and a

¹ See for example, Kawohl, F. 'The Berlin Publisher Freidrich Nicolai and the Reprinting Sections of the Prussian Statute Book 1794' in Kretschmer, M., Bentley, L. and Deazley, M. (Eds), *Privilege and Property: Essays on the History of Copyright*, Open Book Publishers: Cambridge.

significant body of writers, playwrights, choreographers, composers and painters earned both social esteem and economic reward through flourishing popular outlets throughout the Imperial period. There is evidence that a vibrant commercial publishing industry, enabled by developments in print technology, appeared as early as the Song Dynasty (Zhang, 1989). As developments in print technology continued to make the mass reproduction of texts easy and relatively inexpensive, a prosperous, commercially-driven writing and publishing sector also emerged (McDermott, 2006).

In contrast to the official Confucian system described by Alford, in which successive Imperial governments encouraged the separation of concepts of artistic achievement from commerce through practices of patronage, commercial publishers and literary agents presided over a much grittier world of popular creative production and consumption. Although some of the artists and authors who gained notoriety during this period were born to wealthy families,¹ a significant proportion depended on popular culture for their livelihoods (Mun, 2008). In China, as elsewhere in the world at around the same time, the protection of rights in individual creative works became a key element of a popular creative economy. There is evidence that publishers and authors were conscious of ‘copyright’ and its value during the Song Dynasty² (960-1279) and accounts of book piracy in China can also be dated from this period (Wu, 1998).

Complaints of infringement were made by authors and publishers to the Imperial authorities and Imperial governments issued a number of orders intended to regulate the publishing and printing industries and to address concerns over widespread piracy (Zhu, 2000). The official book publication licence issued by Imperial authorities

during the Song Dynasty clearly stated that unauthorized printing would be severely punished (Ren, 2011). During this period channels for copyright enforcement were predominantly administrative rather than judicial. Government officials enjoyed a high degree of discretion in determining whether infringement had taken place and the severity of punishment warranted. Although commercial activities relating to cultural creation, dissemination, and consumption were not officially encouraged, they remained the subject of government control and censorship. A significant overlap between systems for censoring cultural products and those for protecting rights associated with investments in creative production and publishing existed (Ren, 2011).

China's commercially focussed publishing and cultural markets enjoyed a certain degree of independence from the official cultural system and the Confucian norms that drove it. Just as commercial publishers played a key role in the establishment of copyright protection for creative works in the United Kingdom and Western Europe during the eighteenth century, Chinese publishers, artists and entrepreneurs also made demands for protection of their works against unauthorized copying. However, as the next sections of this chapter discuss, it was foreign rather than local pressure for protection of the right to control copying that resulted in the introduction of formal copyright legislation in the early twentieth century. Furthermore, the conditions that might have made it possible for a culture of copyright protection and business models that depended on it to crystallize were absent. Dramatic changes in government, civil war, invasion and international isolation prevented copyright from taking hold during the twentieth century.

From the Qing Dynasty to the Mao Era

By the beginning of the twentieth century China's Imperial government was in decline. Reluctant attempts were being made to reform the nation's legal system in response to both an urgent need for modernization and the demands of western powers (Alford, 1995:42). The abolition of the Imperial examination system and the adoption of internationally influenced approaches to education associated with the self-strengthening movement created demand for new textbooks — most of which were circulated in pirated form. In the face of rampant piracy the Qing government issued a number of orders forbidding the use of unauthorized copies of textbooks and took measures to enforce the copyright entitlements of foreign publishers. However, international trading partners eager to ensure that the copyright owners they represented enjoyed financial rewards arising from the popularity of their content demanded formal legislation. This resulted in the promulgation of a copyright law in 1910 (Li and Ng, 2008).

The 1910 copyright law accorded with the Berne Convention for the Protection of Literary and Artistic Works. It contained clear definitions of periods of protection, the rights accorded to copyright owners, infringement and prescribed penalties.³

However, the 1911 revolution and the end of the Imperial system of government gave this law little opportunity to take effect. Legal reforms undertaken by the Nationalist Kuomintang government after 1928 were slightly more successful. The development of copyright and patent controls was central to the Kuomintang's efforts to transform China's legal system in accordance with the European civil law model, as filtered through Japan and systematic efforts were made to introduce laws that governed all aspects of copyright, patent and trademark protection. In spite of the promulgation of

formal intellectual property law, this was a tumultuous period and the social and economic stability that might have allowed new norms to take hold was absent. China's invasion by Japan in 1931 and the civil war between the Nationalists and the Communists dramatically interrupted law reform processes.

In 1949 the Chinese Communist Party (CPC), led by Chairman Mao, declared the People's Republic of China (PRC). Within Mao's Communist state the government understood the primary purpose of art as to convey the ideological messages of the regime (Kraus, 2004). A limited system of 'author's rights' (*gaofei*) — royalty payments made to authors and artists — was introduced, following a Soviet model. However, even this was all but abolished during the Great Proletarian Cultural Revolution between 1966 and 1976 (Qu, 2002: 35–39). During the Cultural Revolution the only acceptable purpose of creative works became the veneration of the Communist Revolution, the PRC and the perpetuation of values sanctioned by the Party. As the party-state had a vested interest in ensuring that such works were seen by as many people as possible there was little place for a copyright system aimed at conferring economic advantage on commercially oriented publishing or cultural industries. Under Mao private property rights were not recognised and legal protections for commercial investors in cultural products was unthinkable.

The widest possible dissemination of creative works also accorded with Socialist principles that art should be created for the enjoyment of the masses, rather than individual profit. Just as Confucianism had viewed individual artists as mere transmitters of knowledge and single points in an ancient tradition, under Mao individuals were encouraged to act as 'small screws' in the larger machine of

Communist China.⁴ Originality was neither desired nor encouraged, and the media was viewed as the most powerful means of inculcating the goals of the new society in the consciousness of the masses. The CPC's views on the role of art and the media were compounded by the fact that while the rest of the world was experiencing an explosion in the industries and technologies of mass communication, China had deliberately cut itself off from trade and contact with the outside world. It was thus isolated from international pressure to conform to commercially driven copyright practices and legal norms of the West.

Copyright after Mao

Mao's death in 1976 paved the way for the reinstatement of the formal legal system, market-based reform and closer ties with the international community. In 1978 Deng Xiaoping, Mao's successor, announced the Open Door Policy. Deng recognised that China could not afford to remain aloof from a world that was leaving it behind in both economic and technological terms and believed that if China hoped to free itself from poverty it had no choice but to become part of the international economy. Cast in primarily economic terms, the Open Door policy led to inevitable clashes between the practices and attitudes that were considered acceptable within Chinese society, and those demanded by its trading partners. These differences were particularly evident in relation to intellectual property rights (Li, 2010: 203).

Processes of intellectual property reform overseen by Deng Xiaoping's government were closely linked to wider efforts to strengthen China's trading relationships. The PRC's Trademark Law was adopted in 1982, followed by the Patent Law in 1984. The National Copyright Administration and its regional branches, tasked with

regulating copyright, were founded in 1985. The Copyright Law of the PRC was adopted by the National People's Congress's (NPC) Standing Committee in 1990, and came into effect on 1 June 1991. In 1992, in the midst of aggressive lobbying from the United States, threats of trade sanctions and a danger that the US might oppose China's entry to the WTO, China and the US signed a Memorandum of Understanding (MOU) on Intellectual Property (Newberry 2002-2003:1439). In accordance with this agreement, China became a signatory to the Berne Convention in 1992 and the Geneva Convention in 1993, amending the 1990 copyright law in order to ensure compliance (Newberry 2002-2003:1439). China continued to refine its copyright law and develop institutions for copyright administration and enforcement in preparation for admission to the WTO and TRIPs agreement in 2001 (Newberry 2002-2003:1444). In 2010 the law was revised again as a result of the findings of the WTO Dispute Settlement Body in a case brought by the United States.⁵

Since 2001 China's amended copyright law has been structurally similar to that of most other countries, with some slight variations. The law provides protection for written, oral, photographic, operatic, choreographic, cinematographic, graphic works and computer software.⁶ Copyright owners are accorded standard entitlements, including the right to publication, the right to claim authorship, control revisions or demand that integrity is maintained, reproduction, exhibition, broadcast, communication through and information network, adaptation and translation.⁷ Copyright owners are entitled to authorize another party to exercise these rights and to receive remuneration according to either an agreement or, in the case of compulsory licensing, as specified in the law. Publication and economic rights accorded by the copyright law are protected for the life of the author plus fifty years, unless the author

is a corporation or another entity, in which case rights are protected for fifty years only. In contrast to some other jurisdictions, such as Australia and Canada, where ‘moral rights’ (also referred to as ‘personal rights’) are protected for a limited only, and generally last only as long as the economic rights,⁸ China’s copyright law protects these rights for an indefinite period.

In spite of its broad compliance with international norms of copyright protection, Chinese law frames copyright as a form of statutory right granted by the state, rather than as a form of ‘natural’ right. This approach is consistent with the Socialist principles that underpin Chinese the legal system, and arguably echoes Confucian views of creativity as part of a common cultural heritage.⁹ In attempting to find a balance between the benefits of rewarding copyright owners for their intellectual and financial investment and potential harm to society of restricting access to works, legislators have emphasised the protection of public interests and opposed the absolute privatization of intellectual creations (Qu, 2002: 102).

Limitations on copyright are thus much more extensive in China than in many other jurisdictions. For example, copyright material may be used without permission from a copyright owner in the compilation of school textbooks, provided that remuneration is paid and the name of the author and the title of the work are mentioned. Limitations on a copyright owner’s rights also exist in relation to reprinting by newspapers or periodicals, or re-broadcasting articles on current issues, use by teachers or researchers, amateur live performances, translation into minority languages and the publication of Braille versions (*Copyright Law of the People’s Republic of China*, 1990).

Civil, administrative and criminal routes to enforcement have all been created.

Administrative complaints can be filed with local authorities to stop the distribution of infringing material. Local branches of the National Copyright Administration, the State Administration for Industry and Commerce and customs authorities have powers to seize infringing goods and in some cases to impose fines. Equipment used for the production and distribution of offending material may also be seized in order to prevent further infringement (Tang, 2011: 101–102). Remedies for infringement include monetary damages, injunctions, public apology and the destruction of offending products. Statutory damages up to RMB 500,000 (approx USD 79,000) are provided for and criminal penalties of up to seven years imprisonment also exist.

While copyright owners now enjoy a comprehensive range of legal entitlements and avenues for remedy in China, asserting these rights remains complex, bureaucratic and often confusing. The existence of a number of channels for copyright enforcement: Civil, administrative and criminal and the growth of extensive bureaucracies around each has resulted in what Dimitrov (2009: 20) calls ‘interbureaucratic competition’. Dimitrov (2009:16–17) observes that, for copyright owners, this has resulted in a frustrating paradox: In spite of the fact that ‘no country in the world devotes as many resources to IPR enforcement as China does’ China remains ‘one of the largest IPR pirates in the world’.

It is beyond the scope of this chapter to explore the reasons for this paradox in detail. However, it seems likely that many of the current difficulties associated with enforcement are a product of the transitional nature of China’s economic, political and

legal systems. As the next section discusses, there is evidence to suggest that as domestic stakeholders are becoming more aware of the value of copyright, market based reform processes gather momentum and legal infrastructure continues to develop, the conditions necessary for a more orderly copyright-based economy to form are emerging.

The Rise of Domestic Pressure for Copyright Protection

There can be little doubt that aggressive lobbying by foreign trading partners, particularly the United States, has played an important role in the rapid development of China's copyright system since 1990. However, as processes of media reform described elsewhere in this book have gathered pace and commercially focussed cultural and creative industries have gained traction, local voices have joined the chorus of international groups calling for stronger copyright protection in China. Although trade relations remain an important factor, international pressure is no longer the only driver of copyright's development. There are signs that China's policymakers are becoming more conscious of the value of copyright in creating legal frameworks capable of supporting domestic creative and cultural industries and promoting the interests of local stakeholders.

By the end of 2012 three drafts of the proposed third amendment of the Copyright Law of the PRC had been circulated by the National Copyright Administration in advance of eventual submission to the National People's Congress.¹⁰ Proposals for stronger penalties against online infringement, an expanded role for collective rights management organizations, and fair use¹¹ have sparked heated debate among right owners, media firms, Internet service providers and the public.¹² Debates on proposed

amendments to the law are being played out in the state-owned media and the blogosphere, very much resembling debates on copyright reform taking place elsewhere in the world.¹³ The consultative approach adopted by the government and its willingness to allow debates about the law's amendment to occur so publically suggest that copyright reform is now about much more than a desire to placate international trading partners. China's policymakers appear to be turning towards the much more complex task of managing the interests, demands and conflicts of domestic stakeholders in a media economy that is being transformed by new technologies, commercial opportunities and growing awareness of the opportunities and costs associated with expanding copyright (Xue, 2012).

The transformation in attitudes towards and the role of copyright within China's creative economy that has taken place since the creation of the PRC's first copyright law in 1990 has been remarkable. As the next section of this chapter explains, the growth in awareness of copyright and rise of domestic pressure for a stronger copyright system is closely connected with wider processes of market driven reform across China's media system. As the role of the market within the media system has increased so has demand for legal frameworks capable of facilitating trades in creative and cultural products. However, in China as in other markets, new technologies are challenging creative and cultural industries to re-conceptualise the value of content and the relationships between copyright owners and audiences.

Media Reform and the Emergence of Chinese Copyright Industries

As discussed in depth elsewhere in this book, Deng Xiaoping's Open Door policy ushered in a period of profound transformation from a planned economic model to a

market-based system. An important element of China's economic reform process has been the marketization, privatization, and deregulation of large parts of the media. As government subsidies for state-run media companies have gradually been withdrawn, advertising and subscription revenues have become vital to the ability of many media organizations to survive. A growing number of both private and international actors have also been granted space to operate, particularly in the distribution and co-production of content. Although the Chinese government continues to maintain tight control over media censorship and ownership, entrepreneurial collaboration between the state and private and foreign investors has become an important element of China's contemporary media economy (Akhavan-Majid, 2004).

The film industry has been engaged in a process of commercialization and reform since the early 1990s. There are signs that policy changes are resulting in higher levels of private investment in film production needed to compensate for the withdrawal of funding from state-owned film studios (Hui, 2006: 63; Montgomery, 2010). Similarly, China's music industry has made a remarkable transformation from a system dominated by state-funded cultural troupes dedicated to writing and performing a limited repertoire of propaganda songs during the 1980s (Kraus, 2004: 9) to the vibrant, digitally driven, contemporary music scene that exists today (Montgomery, 2010). Reform of the publishing industry has been slower. Official approval for many of the practices widely adopted by publishers over the last thirty years remains a legal grey area. Television has experienced two fundamental reforms: The separation of broadcasting and production in 1999, which allowed private companies to produce more entertaining programmes and then sell them to state-run

TV stations; and the establishment of competition within a national market between central and local TV stations through cable and satellite TV networks.

Firms operating in all of these areas have been faced with the challenge of developing business models capable of monetizing popular products. In this context, copyright has taken on an important role as a device capable of turning creative works into products that can be traded in a commercial market. In a post-reform era, copyright attaches property rights to creative works, allowing them to be acted on in an entrepreneurial fashion: To be bought and sold, to generate income and to form part of a wider creative economy. As Chinese entrepreneurs and creative professionals are becoming more conscious of the value of their creative assets and the intellectual property rights that help to define them, their willingness to act proactively to protect these assets has increased. This is evident in the rise in formal copyright registration that has taken place since 1995. Although copyright registration is optional in China, it can make seeking enforcement simpler. In 2010, the NCAC held records for 359,871 formally registered creative works,¹⁴ compared with just 2,915 in 1995 when the service was first launched.¹⁵

Producing economic growth in a market-capitalist system demands much higher levels of individual freedom in relation to production and consumption than existed under a planned economy. However, media reform in China has not led to a system that is wholly based on either the freedom of the market or rule of law. In reality, copyright enforcement remains weak, government-protected monopolies persist, and state intervention and censorship remain real factors for creative producers and consumers. China's media economy remains transitional and important differences

between the ways in which cultural and creative businesses operate in this market and the strategies of their counterparts in mature markets exist. State protected monopolies, in particular, are limiting the extent to which copyright is able to operate as a mechanism for rewarding investments in creativity and large portions of what are often regarded as ‘core copyright industries’ remain centrally controlled in China.

Although impressive progress in relation to the growth of a copyright culture has been made, unauthorized use of creative content is common, both among media firms and the public. A clear example of this can be found in the publishing industry. Until very recently, international bestsellers and reference titles were regularly translated and published without authorization from or payment to their foreign copyright owners. The Nobel Prize winning novel *One Hundred Years of Solitude* has been in print in China since 1985, selling millions of copies and assuming a place as a literary classic for both Chinese readers and writers. This is remarkable, given that a Chinese publisher first acquired translation rights for the book in 2011.¹⁶ Chinese textbook publishers, who preside over an enormous market, regularly fail to pass on royalties to authors.¹⁷ In the music industry hit songs from Hong Kong and the United States are regularly translated and performed by Chinese artists without the authorization of copyright owners¹⁸ and television broadcasters air foreign films and other content without permission.¹⁹

This culture of unauthorized reuse has spilled over into the habits of media firms with access to the wealth of user-generated-content now available online. Blogs, amateur video content, music and photos are all regularly published and broadcast through traditional media channels without authorization from or payment to authors.

Copyright is proving troublesome for even the largest Chinese media firms.

According to Huayong Zhao, CEO of China Central Television, his organisation ‘...is one of China’s biggest victims of copyright infringement, as well as one of the biggest infringers of others’ intellectual property’ (Liu and Bates, 2008: 5).

A key challenge for the growth of a culture of respecting copyright in China relates to the power of copyright owners in a system where content production has largely democratized but distribution channels remain tightly controlled. Content distributors such as bookshops, cinemas, digital portals and television stations in China are often government owned, either wholly or in part and enjoy powerful state protected monopolies. They are thus difficult to hold to account and able to dictate their own terms to smaller players in the value chain, extracting large profits while taking few risks. In the case of the digital music industry, copyright owners receive less than 3 percent of the revenue generated by digital music portals.²⁰ Even the largest Chinese film studios receive only about 40 percent of the box-office return their films generate.²¹ A widespread lack of infrastructure for reliably auditing sales also makes it difficult for copyright owners to ensure payment of negotiated shares of revenue. In this context, individual creators have very little hope of negotiating favourable terms of use or obtaining the meaningful enforcement of copyright.

China’s booming market for pirated content is deeply troubling for businesses and policymakers in nations that rely on copyright as the basis upon which content can be exported, such as the United States. However, grey distribution channels have also provided Chinese consumers, artists and the next generation of media professionals with access to international films, music, literature and computer software at

affordable prices much earlier than official reform processes might have allowed. The rich availability of content has helped to speed the development of the nation's emergent hardware industries, creating domestic demand for DVD players, e-book readers, computers, smart phones, and tablets. It has also helped to provide Chinese creative professionals and audiences with semiotic tools to build upon as they make the shift from propaganda machine to market driven entertainment industry with aspirations to both reverse cultural import deficits and to begin exporting Chinese creative and cultural products.

Business Model Innovation

The challenges of enforcing copyright in analogue contexts are colliding with the need to find business models capable of functioning profitably in open and networked digital landscapes. China is now home to the world's largest population of Internet users: 457 million people.²² There are also 1.06 billion mobile users, 183.8 million of whom have 3G services.²³ The International Intellectual Property Institute estimates that 99 percent of music accessed online in China is 'pirated'²⁴ and local commentators estimate that the illegal online literature industry is ten times larger than its legally regulated counterpart (Ren and Montgomery, 2012).

In addition to attempting to prevent unauthorized digital distribution, Chinese businesses are actively experimenting with business models that do not depend on copyright enforcement or user subscriptions. The absence of strongly enforced copyright in digital environments in China is also allowing new players to draw on creative investments made by others and to experiment with different ways of charging for their value, for example by offering streaming services that draw on

pirated content. Although this form of activity is undoubtedly illegal, it is arguable that a lack of effective enforcement may, in fact, be fuelling processes of innovation and change in China's rapidly evolving digital economy (Litman, 2006; Montgomery and Potts, 2009).

In the mid-2000s Websites like Tudou and Youku developed very large user bases by offering free online video streaming (mostly without permission from copyright owners) and were able to monetise their services through the sale of advertising.

Around 2009 both of these businesses began using their advertising revenues to invest in the acquisition of content distribution licenses and removing unauthorized content from their catalogues.²⁵ Today these sites, which continue to deliver free content to viewers and generate revenue from advertising, are major digital players and a powerful legal distribution channel for Chinese content. Distribution via Tudou and Youku produces licensing income equal to and often greater than fees paid to copyright owners by 'mainstream' buyers: TV stations or cinemas.²⁶

This development trajectory will not be unfamiliar to those acquainted with the history of digital distribution in other markets, where a number of services were developed and became popular as 'pirate' sites, before making a transition to become legal distribution portals.²⁷ Nonetheless, it is difficult to imagine that the scale of unauthorized distribution undertaken by large, highly profitable firms in China could have occurred in more closely regulated markets. Furthermore, now that these free to end user models have achieved a dominant market position it has become all but impossible for subscription models for online content distribution to take hold. This represents a marked difference from the development of online content markets in

jurisdictions where copyright-based models were established *before* digital technologies became widely available, and where subscription based services such as Netflix and iTunes have become the norm.

Chinese online literature, which crowd sources ‘born digital’ fiction is also finding ways to monetize fan bases and readerships associated with unauthorized digital distribution. Advertising and converting online popularity into products that can be sold through non-digital channels are two important elements of this model. Although authors and digital literature portals remain conscious of copyright, it is often simply more profitable for them to find ways to trade on popularity than it is to attempt to prevent digital piracy. *Startled at Every Step (Bu bu jing xin)* provides an example of the complex role that intellectual property rights are playing in this highly innovative area of China’s publishing industry. *Startled at Every Step* is a born digital, serialized novel that became a bestseller in 2005. It began life online and was available to readers at a price via an online portal, which had licensed distribution rights from the author. The book was also made available as a physical novel. Although both the physical and digital versions of *Startled at Every Step* were pirated heavily, its author and legitimate digital distributor were able to capitalize on the novel’s popularity by selling television adaptation rights, as well as rights to smart phone applications, the production of collectors edition print versions and other merchandise. The popularity of the *Startled at Every Step* television series in turn helped to propel the novel to bestseller status again in 2011 (DoNews, 2011).

These two examples suggest that Chinese firms are finding business models capable of capitalizing on the public’s desire to engage with creative works in an environment

in which controlling distribution and preventing copyright infringement can be very difficult. However, this is not to say the established stakeholders in China are not, like their counterparts in the United States and the United Kingdom, also attempting to prevent unauthorized copying, distribution and access to content. In 2011, Chinese courts dealt with 35,185 lawsuits on copyright, up by 42.34 percent from the year before.²⁸ This compared with just 7,263 cases in 2007²⁹ and 1,122 in 2002.³⁰ The widespread adoption of digital rights management technologies and lobbying for stronger protection for copyright in digital environments are now major focal points for copyright owners in China, just as they are for copyright industries in other markets. The music industry is attempting to reassert control over Internet based distribution, through the establishment of a compulsory subscription model and agreement among record companies, digital portals, and governmental regulators.³¹

Unauthorized distribution has become a threat, not just to the profitability of international copyright owners, but also to Chinese content industries. Aside from direct economic losses associated with lost sales of content (which can be difficult to calculate), the scale of unauthorized distribution means that those operating within the bounds of the legitimate system are being forced to compete with free or very cheap, uncensored, material for audience time, attention and spending power.³² Moreover, access to affordable copies of the latest audio-visual productions from all over the world has greatly increased the media literacy of Chinese audiences, raising standards for local producers who remain bound by the censorship system. The reluctance of Chinese audiences to pay for low quality domestic films is evident in the proportion of box-office accounted for by Chinese productions, which dropped from 53.6 percent in 2011 to 34.8 percent in the first half of 2012 in spite of protectionist policies and

strident efforts to promote local films.³³ Chinese content producers thus have a very real interest in the better enforcement of copyright — if only because piracy is a powerful source of competition.

Conclusion

As this chapter has discussed, there is evidence that commercially motivated Chinese entrepreneurs have been aware of the value of controlling copying since at least the Song Dynasty. However, the failure of copyright to take root in China until very recently highlights the extent to which copyright depends on wider economic, political and legal conditions in order to function. An economic system capable of allowing markets based on copyright to form, a desire to engage with international trades in content and culture and recognition of copyright's value as a tool for facilitating investment, innovation and the growth of creative industries have been key factors in the copyright's growing prominence in China since 1990.

The PRC's copyright law is now broadly similar to copyright laws in most other jurisdictions. Although enforcement remains problematic and 'born digital' content industries are developing innovative business models that do not depend on an ability to prevent unauthorised distribution. Chinese policymakers, creative professionals and businesses are also becoming more aware of the value of recognising and protecting intellectual property rights. While international pressure undoubtedly played an important role in the creation of China's 1990 copyright law, pressure from domestic stakeholders is helping to embed the law within local practices and business models. Copyright entitlements that are valued by domestic stakeholders and the government's desire to encourage the growth of internationally competitive creative industries

engaged in the export of content will play a decisive role in the growth of a culture of copyright protection in China over the next decade.

References

Akhavan-Majid, R. (2004). 'Mass media reform in China', *Gazette*, 66 (6): 553–565.

Alford, W. (1995). *To Steal a Book is an Elegant Offence*. Stanford: Stanford University Press.

Becker, L. B. and Vlad, T. (2002). 'The effects of international copyright laws on national economic development', in *Copyright and Consequences: Central European and US Perspectives*. New York, NY: Hampton Press.

Confucius (1998). *The Analects*, trans. D. Hinton. New York: Counterpoint.

Copyright Law of the People's Republic of China 1990, promulgated on 7 Sept. by the 7th National Peoples' Congress, amended at the 24th Session of the Standing Committee of the 9th National People's Congress on the 27 October 2001.

Dimitrov, M. (2009). *Piracy and the State The Politics of Intellectual Property Rights in China*. Cambridge: Cambridge University Press

DoNews (2011). *The copyright work "Bu Bu Jing Xin" by Shengda Literature becomes super bestseller (Shengda wenxue banquan zuopin bu bu jing xin chuangzao*

wuge diyi). Retrieved September, 7th, from
<http://www.donews.com/net/201109/621083.shtm> (in Chinese).

Fitzgerald, A., & Fitzgerald, B. (2004). *Intellectual Property in Principle*. Sydney: Lawbook Company.

Hui, D. (2006). Study on the Relationship between Hong Kong's Cultural and Creative Industries and the Pearl River Delta, . Hong Kong: Centre for Cultural Policy Research, University of Hong Kong.

Kraus, R. (2004). *The Party and the Arty in China: The New Politics of Culture*. Oxford: Rowman & Littlefield.

Li, W., & Keane, M. (2011). *How Creativity is Changing China*. London: Bloomsbury Publishing

Li, Y. (2010). Copyright Reform in China. *Intellectual Property Journal*, 22(2), 203-221. from ProQuest Central database.

Li, Y., & C. W. Ng. (2008). Understanding the Great Qing Copyright Law of 1910. *Journal of the Copyright Society of the U.S.A.*

Litman, J. (2006). *Digital Copyright* (2d ed): Prometheus.

Liu, T., & Bates, B. J. (2008). Copyright in China: Implementation Issues in Electronic Media. Paper presented at the *the 2008 IAMCR conference "Media and Global Divides"*. Stockholm, Sweden.

McDermott, J. P. (2006). *A Social History of the Chinese Book: Books And Literati Culture in Late Imperial China*. HK: Hong Kong University Press.

Montgomery, L. (2010). *China's Creative Industries : Copyright, Social Network Markets and the Business of Culture in a Digital Age*: Edward Elgar Publishing.

Montgomery, L., & Potts, J. (2009). Global reuse and adaptation in the creative industries - Three further arguments against intellectual property based on lessons from China. In P. L. Jayanthi (Ed.), *Creative Commons: International Perspectives* (pp. 185-217). Hyberidad: ICFAI University Press

Mun, S. H. (2008). *Culture-related Aspects of Intellectual Property Rights: A Cross-cultural Analysis of Copyright*. Austin: The University of Texas.

Oldstone-Moore, J. (2003). *Understanding Confucianism : Origins, Beliefs, Practices, Holy Texts, Sacred Places*: Duncan Baird Publishers.

Qu, S. (2002). *Chinese Copyright Law*. Beijing: Foreign Languages Press.

Ren, X., & Montgomery, L. (2012). Chinese online literature: creative consumers and evolving business models. *Arts Marketing: An International Journal*, 2(2), 13.

Ren, Y. (2011). Copyright Protection in Song Dynasty (*Lun song dai de banquan baohu*). *Law Review (Fa xue pinglun)* (5) (in Chinese).

Tang, G. (2011). *Copyright and the Public Interest in China*. Cheltenham: Edward Elgar.

WIPO (2012). WIPO Studies on the Economic Contribution of the Copyright Industries http://www.wipo.int/ip-development/en/creative_industry/pdf/economic_contribution_analysis_2012.pdf.

Wu, S. (1998). Conditions of the Judicial and Administrative Protection of Copyright in China. *Duke Journal of Comparative & International Law*, 241(1998-1999)

Xue, H. (2012). One Step Ahead Two Steps Back: Reverse Engineering 2nd Draft for 3rd Revision of the Chinese Copyright Law. *PIJIP Research Paper, American University Washington College of Law no. 2012-09*.

Zhang, X. (1989). *The History of Printing in China (Zhongguo yinshua shi)*. Shanghai Shanghai People's Publishing House (in Chinese).

Zhu, S. (2000). The usurp edition and edition protect in Song Dynasty (*Lun song dai de tushu daoban yu banquan baohu*). *Documents (Wen xian)*, 2000 (1) (in Chinese).

¹ For example, Ni Zan (1301–1374) was ‘third of the four masters of the late Yuan. Also a poet, calligrapher and landscape painter. From a wealthy family in Jiangsu province, he gave up his fortune to lead a simple life on a boat. He is famous for his dry ink brushwork executed with a slanted brush, and for his sparse dots of intense black’. Quoted from <http://www.visual-arts-cork.com/east-asian-art/chinese-painters.htm#dynasties>

² There is evidence suggesting the exercise akin to copyright in the publishing industry during the Song Dynasty (960-1279). For example, in the book, *Stories of the East Capital*, a specific ‘copyright page’ states ‘Printed by Cheng of Meishan, who applied protection from the superior, any reproduction is prohibited’ (Wu, 1998:241).

³ See “China’s first copyright law was born in late Qing Dynasty (*Zhongguo diyibu banquanfa dansheng yu qingmo*)” by Min J. at <http://jds.cass.cn/Item/20549.aspx> (in Chinese)

⁴ For a wonderful graphic example of this see: <http://chineseposters.net/themes/mao-cult.php>. In particular, the discussion of the ‘spirit of a screw’ (*luosiding jingshen*).

⁵ The WTO Dispute Settlement Body found that China’s failure to accord copyright protection to works that had not been submitted for censorship approval in China constituted a breach of the nation’s obligations under several international conventions, which China accepted. See: Mara K. “Parties Accept WTO Dispute Settlement Report On China IP Protection” <http://www.ip-watch.org/2009/03/24/parties-accept-wto-dispute-settlement-report-on-china-ip-protection/> Also “China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights” http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

⁶ Article 3, Chapter I of the copyright law explicitly protects: Written works; oral works; musical, dramatic, quyi, choreographic and acrobatic works; works of fine art

and architecture; photographic works; cinematographic works and works created by a process analogous to cinematography; graphic works such as drawings of engineering designs and product designs; maps; sketches and model works; computer software; and other works as provided by laws and administrative regulations.

⁷ Article 10 accords copyright owners the right to: Publication; authorship; revision; integrity; reproduction; distribution; rental; exhibition; performance; presentation; broadcasting; communication through an information network; cinematography; adaptation; translation; compilation and annotation.

⁸ This is the case in Australia. See, for example: An Act relating to copyright and the protection of certain performances, and for other purposes, 27 June 1968. Available at: <http://www.comlaw.gov.au/Details/C2006C00142/Html/Text#para2.4043> [accessed 13 June 2013].

⁹ According to Qu (2002: 106):

Under socialist copyright law, any intellectual creation is achieved on the basis of accumulation of cultural heritage. Therefore, copyrights over intellectual works cannot be absolute or unrestricted. In order to accommodate the interests of both copyright holders and the general public, certain limitations of copyright have been provided by law for economic or cultural reasons (e.g. Education) since the copyright system first emerged.

¹⁰ See ‘Introduction to 3rd Revision Draft of China Copyright Law’ at <http://www.chinaiplawyer.com/introduction-3rd-revision-draft-china-copyright-law/>.

¹¹ See ‘A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law’ by Hong Xue: <http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf>.

¹² For example, see intense criticisms from music industry at ‘Music Copyright Draft Amendment Arouses Controversy’ by Yang Y. at

<http://english.cri.cn/7146/2012/04/13/2702s693150.htm>.

¹³ See for example: ‘Knowledge Capitalism gone wrong’ by Birgitte Andersen at

<http://www.guardian.co.uk/media-network/media-network-blog/2012/dec/18/knowledge-capitalism-gone-wrong-ip-innovation>.

¹⁴ See ‘Statistics on Chinese press and publishing industry in 2010: part 2(2010 nian zhongguo xinwen chubanye qingkuang er)’ at

<http://data.chinaxwcb.com/epaper/2011/2011-09-07/14116.html>. (in Chinese)

¹⁵ See ‘Statistics on Chinese copyright trade, business, and administration: 1995-2002 (Quanguo banquan xingzheng guanli gongzuo he banquan maoyi gongzuo tongji:

1995-2002)’ <http://file.lw23.com/f/f7/f70/f703b86a-b95c-45ea-b572-14824d4047a9.pdf>. (in Chinese)

¹⁶ See ‘copyright dispute over One Hundred Years of Solitude (Bainian Gudu de banquan jiujiie) by Quan Hailong at

http://www.sipo.gov.cn/mtjj/2011/201107/t20110715_611351.html; also see ‘The

Chinese copyright for One Hundred Years of Solitude has been sold (Ma er Kesi Bainian Gudu zhongwen banquan yishou’ by Jiang Yan and Zhou Ziyang at

<http://book.sina.com.cn/news/a/2010-09-15/1045273290.shtml>. (in Chinese)

¹⁷ See ‘People’s Education Press paid RMB 800 000 to authors via China Written Works Copyright Society (Renjiaoshe shandeng zuopin shou piping, weituo

wenzhuxie fafang 80 wan gaofei)’ at

<http://www.chinanews.com/cul/2012/05-23/3909660.shtml>. (in Chinese)

¹⁸ See ‘Unlike in the West, the copyright dispute of remixing old songs increased in China (Xiangbi oumei, zhongguo laoge fanchang banquan jiufen buduan)’ by Du Bohong at http://www.zhiyiwang.com/news/show_8506.html. (in Chinese)

¹⁹ See some examples of Hollywood blockbuster ‘the Next’ was unauthorized aired at <http://www.chinanews.com/yl/dyzx/news/2008/12-10/1481860.shtml>; Chinese blockbuster ‘Promise (Wuji)’ was unauthorized aired at <http://ent.sina.com.cn/m/c/2005-12-23/0250938212.html>; also see ‘Regarding unauthorized airing, copyright owners can do nothing; copyright protection needs to be enhanced (Yingshiju daobao youkou nanyan,banquan xu jianquan shichang jizhi)’ by Cang Shujun at http://news.xinhuanet.com/zg/jx/2008-12/05/content_10460006.htm. (in Chinese)

²⁰ See ‘Record industry was pessimistic over user-paying download of digital music, only 2% of revenue went to copyright owners (Changpianye dui yinyue fufei xiazai taidu beiguan, fenzhang bili jin 2%)’ by Wu Yuanyuan and Li Jianbin at <http://www.techweb.com.cn/internet/2012-11-16/1255656.shtml> (in Chinese); also see ‘A record tailspin in music industry’ by Yang Yang at http://www.chinadaily.com.cn/cndy/2012-06/30/content_15538349.htm.

²¹ See ‘Top five film studios collectively ask cinemas to increase the proportion of box office sharing, while cinemas declined’ at <http://ent.sina.com.cn/m/c/2012-11-16/02393789083.shtml>.(in Chinese)

²² See ‘The China Internet Network Information Center (CNNIC) Report’ at <http://it.sohu.com/s2011/cnnic27/>. (in Chinese)

²³ ‘According to the Ministry of Industry and Information Technology, mobile phone users in China reached 1.06 billion by the end of July, 2012, of which subscribed to

3G network services.’ See http://www.chinadaily.com.cn/business/2012-08/28/content_15713316.htm.

²⁴ See ‘IIPA special report on copyright protection and enforcement: China (PRC) section’ at <http://www.iipa.com/rbc/2012/2012SPEC301CHINA.PDF>.

²⁵ See ‘Online video sites fight over copyright’ by Chen Limin at http://usa.chinadaily.com.cn/business/2012-01/09/content_14405688.htm; ‘Genuine Copyright Dilemma for Video Sharing Websites’ by Zhou Yi at <http://www.chinaipmagazine.com/en/journal-show.asp?id=490>; ‘Online video industries will improve copyright performance within three years (Shipin wangzhan zhengbanhua sannian hou jiang mingxian gaiguan)’ by Cai Wei <http://it.people.com.cn/GB/42894/196085/12753930.html>.

²⁶ See ‘China's video websites spending more on TV rights’ at <http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1104&MainCatID=11&id=20110905000046>.

²⁷ See, for Example, James Allen Robertson’s discussion of Napster in *Digital Culture Industry: A History of Digital Distribution* (London: Palgrave Macmillan, 2013).

²⁸ See ‘the number of lawsuits continued to increase in 2011 (2011 nian quanguo fayuan zhishichanquan anjian shuliang chixu xunmeng zengzhang) at http://www.procedurallaw.cn/fzrd/201204/t20120418_845002.html. (in Chinese)

²⁹ See ‘the number of lawsuits regarding online copyright increased at quickening pace this year (Jinnian wangluo zhishichanquan anjian shuliang zenzhang fudu jiaoda)’ by Chen Jinchuan at <http://ip.people.com.cn/GB/141383/177175/10620601.html>. (in Chinese)

³⁰ See ‘the new development of legal protection of copyright in China (zhongguo zhishi chanquan sifa baohu de xin jinzhan)’ by Lei Shijun at <http://www.chinavalue.net/Finance/Article/2010-3-3/190581.html>. (in Chinese)

³¹ See ‘Free online music deadline revealed’ at http://europe.chinadaily.com.cn/china/2013-03/20/content_16325654.htm.

³² See ‘China's piracy hurting its own industries’ at http://www.msnbc.msn.com/id/13617619/ns/business-world_business/t/chinas-piracy-hurting-its-own-industries/#.UI-tc4ZafgE.

³³ See ‘China’s film box office report in the first half of 2012 (2012 nian shangbannian zhongguo dianying piaofang shouru)’ at <http://www.acmr.com.cn/newsletter/201208i/view003.html>. (in Chinese)