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Learning to love the market: Copyright, culture and China

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Abstract

This paper examines the role of industry development in the uptake of copyright law in China with examples drawn from the film and television sectors. At present copyright protection is rarely used as a basis for commercial activity in either of these industries. Copyright represents a point of convergence between political, social, cultural and economic forces. Current attitudes to copyright have historical precedents that date back to the Tang Dynasty. The public ownership of culture under socialism retarded the development of a modern cultural market based on exchange value. In light market based reforms copyright has gone from being redundant to essential. But what form should it take? Stronger laws and penalties alone cannot build an effective IP system in China. While legal developments are beginning to make new business models possible, altering established industry practices is more difficult. As long as legal rights are perceived as irrelevant by domestic stakeholders, they are unlikely to succeed -- no matter how vigorously they are pursued by international right owners.

Key words:

Copyright, China, Cinema, Television, Creative Industries, WTO

Learning to love the market: copyright, culture and China

Introduction

This paper examines recent copyright developments in China's film and television industries. While copyright development in the film industry is stymied by censorship and distribution bottlenecks, intellectual property is assuming increasing importance in television drama production. Copyright reform represents a point of convergence between political, social, cultural and economic forces. Moreover, while a legal framework of intellectual property rights is a necessary prerequisite for business models based on intellectual property, law alone cannot ensure change.

The first section of this paper discusses the development of cultural industries policy in China, focusing on the period leading up to World Trade Organisation (WTO) accession in 2001. The paper then discusses business models currently operating within China's film and television industries and investigates the role that copyright is playing in development.

The beginnings of copyright awareness: the cultural industries

China's audio-visual industries are struggling to deal with copyright protection – a concept that remains largely incidental to prevailing business models in these sectors.

Considering that copyright relates to a particular modern, capitalist concept of property, it is not altogether surprising that China's communist government did not enact a copyright law until 1990. Chinese Communist Party (CCP) attitudes to the role of culture have also had a profound impact on the development and implementation of copyright law.

However, recent developments are prompting China's leaders to acknowledge intellectual property rights and to make some attempts to manage these. Integration into the global economy is stimulating the growth of a national cultural economy, the significance of which is now evident to both Chinese policy makers and cultural industry participants. The 'normalisation' of China's trade status following WTO entry has begun to foster more rights focussed business models. However, the slow pace at which copyright has been incorporated into the production and distribution of film and television in China is a reflection of the domestic political and ideological agendas that have prevailed since 1949.

The CCP view of intellectual property as common property, that is, a public good that offered the greatest benefits to society if used and shared without restriction, has done little to contradict or displace traditional Confucian notions that copying directly from the work of others was a compliment to the author, rather than an infringement of his or her 'natural' rights. As a result free copying from the work of approved authors and artists was not only tolerated but encouraged, particularly under Mao Zedong, who led the People's Republic of China from its founding until his death in 1976 (Alford 1995). Preventing the publication of unauthorised materials has been a major goal of publishing industry regulation in China since the invention of mass printing techniques during the Tang dynasty (618 - 907 AD) (Alford 1995). Controlling content, rather than protecting

the interests of authors or promoting creativity and innovation, remained the main goal of publishing industry regulation until very recently. Content control continues to play an important role in policy formation in this area.

The Marxist view of cultural production adopted by the Chinese Communist Party in the 1940s (see Holm 1991) rendered copyright irrelevant. According to Marxism, the material base - the mode of production of material life - determined the shape of culture, not the other way around. In the standard Marxist account, cultural forms are expressions of class relations, although the Great Helmsman Mao Zedong had no problem in inverting the dialectic in order to use cultural agitation to reshape class struggle during the Cultural Revolution (1966-1976). The key point, however, is that artistic forms were not valued in terms of exchange but for their 'utility'. This 'utility of culture' model translated in turn into public ownership of culture and ideas, although the ideas sanctioned were determined by central government officials who had little cause to allow common people to think outside the framework of revolutionary class struggle.

In addition, under the Maoist command economy the value of all cultural products (including literature and art) was decided by the state. Following Deng Xiaoping's economic reforms, which began in 1979, allocation of value by the state was superseded as the socialist market came into contact with economic fundamentals of supply and demand. Under the impetus of economic reforms the value of commodities was now determined by the capitalist exchange mechanism. By the early 1990s, when the first recorded surge occurred in commercial cultural production (Zha 1995; Schell 1995; Huot 2000), revisions were hastily being made to Marxist orthodoxy so as to accommodate the market mechanism. In a 1993 article called 'Cultural producers need

market exchange', the author Liu Guangyu argued that there are those artistic and cultural forms that have a definite material form (books, painting, sculpture) and those that have a non-material form (drama, song and dance, folk art performances). What happens, he asked, when the latter category are transformed into material forms through mass production? Here we see the beginnings of an understanding of the intangible exchange value, an opening of the door to allow intellectual property discourse to enter into policy discussion (Liu 1993).

Another important reason for the slow assimilation of copyright into industry business models in China has been the structure of China's predominantly state owned cultural sector. This is discussed in more detail later in the paper. The post-Mao government recognised the market's ability to increase efficiency and productivity in areas relating to science, technology and production in the early 1980s, when patent and trademark laws were passed. Culture, on the other hand, was viewed as a much more politically and socially sensitive area and the government has been much slower to allow reform of the sector. Despite widespread acceptance of the benefits of a commodity economy during the 1980s, official statements on the productivity of culture still referred to culture in terms of its use value.

The 1990s witnessed a gradual commercialisation of culture. The models of cultural production that exist today are to a large extent a legacy of the process of engaging with the 'economic laws' of supply and demand, or more specifically in the case of audio-visual industries, the function of the cultural market (*wenhua shichang*). In 1990 China finally passed its first copyright law. By the early 1990s the term 'cultural market' had begun to appear in official discourse. In the *PRC Yearbook of 1991*, hitherto

a listing of official public-funded cultural activities and achievements, it was announced that 'As the reform and opening effort deepens and the socialist market economy grows, the country's cultural market is radiating from the south-eastern coastal region to the inland, from commercial cities to the surrounding rural areas, with repercussions even in remote border regions' (PRC Yearbook 1992). In July 1991 the Ministry of Culture convened a conference in Qingdao to address the regulation of cultural industries in China. Other major reforms followed Deng Xiaoping's visit to the south in January 1992 and the 14th Party Congress' official formulation of the 'socialist market economy'. A 1993 document, *The Main Points of Propaganda Work*, proclaimed to government cultural workers and administrators that, 'Economic policies regarding culture should be further protected and implemented'. According to the document, the 'economic front' ranked second in nine tasks confronting propaganda workers that year, behind the education of party members, in Deng's master plan of 'building socialism with Chinese characteristics' (Main Points 1994).

During the 1990s the cultural market grew rapidly - and in the opinion of many observers, including international content owners - much too haphazardly. The process of 'opening to the outside world' brought an unprecedented influx of foreign content and entertainment products. This influx was accompanied by the rise of the private economy. One aspect of the growing 'cultural market' referred to in policy documents of this period was the appearance of entrepreneurs selling pirated film and music products. From the mid-1990s this had become a serious issue for the Chinese government, which became the focus of persistent pressure to crack down on piracy from the United States. Rising incomes, loosening government controls and growing access to cheap electronic

equipment also created a market for satellite and cable connections, particularly in the south-east. During this period China's growing trade with developed nations was making it more vulnerable to pressure to reform domestic laws and practices in accordance with international norms. The United States Trade Representative's practice of placing nations in the region on its official 'watch list' and threatening formal sanctions unless action was taken to protect the intellectual property interests of its citizens is a clear example of this process.

In 1998 the Ministry of Culture advanced another step in its regulation of the cultural market by establishing a Cultural Industries Department within its management apparatus. This initiative followed on from the 15 year plan instigated in 1995, whereby the government officially declared cultural industries to be a component of national development. These changes spawned a steady stream of articles and books focusing on development strategies to transform and regulate China's burgeoning but largely inefficient cultural economy in the lead up to WTO accession, a moment acknowledged as the next stage in liberalisation. *The Blue Book of Chinese Culture*, published by the Social Sciences Documentation Publishing House since 2003, has systematically mapped and analysed China's new cultural sectors. Meanwhile a Cultural Industries Research and Innovation Centre was established at Jiaotong University in Shanghai. In 2003 the Ministry of Culture also gave the go ahead for the formalisation of a second institute, this time located in Beijing University -- the State Cultural Industries Innovation and Development Research Institute (Keane 2004).

The official term now used to describe China's evolving culture and entertainment marketplace is 'cultural industries' (*wenhua chanye*). The term has

gradually superseded *wenhua shiye* - cultural institutions. This is more than just a semantic shift; it indicates a decisive trend towards the recognition of enterprise. During the mid-1990s the idea of 'enterprise management' was introduced within China's state-owned cultural work units, referring to the goal of commercialising the previously invisible or incalculable value of cultural goods and services. For instance, new modes of management within China Central Television have allowed the formation of 'profit centres' within departments, creating scope for legitimate entrepreneurial activities among producers, including the practice of earning commissions from advertising and sponsorships.

Widespread references to 'cultural industries under threat' appeared during the period leading up to, and immediately following WTO accession in December 2001. Although the effects of this step have not been felt evenly across the cultural industries, there is general consensus that new methods of management need to be learnt and applied if China is to become a 'player' on the global stage. Institutional impediments are being recognised by policy makers and industry players. Many cultural entrepreneurs are eager to see China move further away from a centralised model of 'cultural production' in favour of a more commercially focussed, rights conscious industry.

It is difficult to measure the value of China's cultural economy. Statistics are hard to disaggregate because the cultural industries are a relatively new concept and new industry classifications have not been developed. However, Ministry of Culture figures tell us that the value of the cultural sector increased from 1.21 billion yuan in 1990 to 8.37 billion yuan in 1998, a six-fold increase; the number of registered organisations increased from 68,000 to 92,000 an increase of 35%; while unemployment increased

46%' from 495,000 to 721,000. Most significantly, the number of private enterprises rapidly increased. In 1990 the private cultural sector numbered less than government cultural units. By 1998 private enterprises constituted 2.7 times the number of public units and the level of employment and the value of output was 1.5 times that of the official public cultural sector (Ministry of Culture 2003). When we consider that China's media industries are state-owned, the dynamism of the new 'independents' (film producers, advertising and post-production companies, multimedia firms) and other associated private cultural enterprises (distributors, suppliers, market analysis companies) becomes even more apparent.

Official recognition of China's cultural economy coincides with the development of creative industries policy agendas in other parts of Asia. Nonetheless, 'creative industries' remains a distinctly foreign term. 'Creative industries' shift the emphasis of culturally related sectors away from the moral, social or political benefits they may offer society and focuses on the economic benefits that these sectors provide. Instead of viewing 'culture' or 'the Arts' as areas that should be supported financially by governments because they are somehow 'good' for society, 'creative industries' emphasises the potential for business, entrepreneurship and profit that such sectors offer. The term creative industries was coined by the United Kingdom's Blair government in 1998 as a result of initiatives to map the UK's existing creative economy and to identify policy measures that would promote their development (Hartley 2005; Flew 2002). While this term has been adopted in countries such as Australia, New Zealand and Singapore, as well as Hong Kong, it has not yet been taken up widely in China.

The shift in emphasis from the social, moral, and in China's case, political benefits of these industries to their commercial potential is an important innovation. The cultural industries model that has prevailed in China in the past has seen these sectors promoted in terms of their capacity to influence society, to provide positive role models, and to assist in the political, ideological and moral development of the state. In this context financial support by the government is viewed as both necessary and worthwhile: these are areas too important to trust to the vagaries of laissez-faire capitalism. In contrast to arguments for support of the cultural sector common in liberal democracies, the Chinese government's concern has not so much been that culture might fall victim to market failure, but that control of the sector will be lost.

The cultural industries model's failure to recognise culture's economic potential makes it difficult for the sector to be managed in ways that promote capacity building and value creation. In short, the persistence of the centrally driven 'cultural industries' view disadvantages China's audio-visual industries at a time when globalisation and market reform are having an enormous impact. One example of this has been the over regulation of the film industry. The government's reluctance to adjust its ideas about the role of film away from the moral and ideological is coinciding with a flourishing black market distribution system for foreign products. As a result, not only is the government's ability to manage the sector diminished, the profitability, sustainability and relevance of China's own film industry is threatened.

In contrast to China, which has so far shied away from officially adopting the term creative industries, Hong Kong's government has taken steps towards embracing the concept and consciously nurturing the city's creativity index (Florida 2002). In 2003 the

Hong Kong University Cultural Policy Unit published the *Baseline Study on Hong Kong's Creative Industries*. According to the study:

The rise of the creative sector concurrently underscores the deep-seated transformation of economic domain from manufacturing based economy to consumption-based economy, by which culture is re-discovered as one of the most important resources for economic development.

(*Baseline Study on Hong Kong's Creative Industries* 2003:6).

The role of technology

Nonetheless, there are signs that China, like Hong Kong, is beginning to recognise the value-adding potential of service industries, particularly marketing and advertising. Although service industries currently play a relatively minor role in China's economy, globalisation has had an enormous impact on the context in which development must be negotiated. The strength of China's electronic manufacturing sector makes affordable television sets, VHS, VCD, CD and, most recently, DVD players available to domestic consumers. The hardware required for content consumption has achieved an extraordinary level of community penetration. For every 100 households in China there are estimated to be 110 colour television sets and 41 VCD players. In cities such as Shanghai these figures are estimated to be 153.6 colour TVs for every 100 households,

and 56.5 DVD players. As the cost of this technology has fallen levels of ownership have grown: DVD player sales expected to approach 15 - 18 million in 2004. Home theatre systems, recordable DVD players, digital television and WAP enabled 3G mobile devices are also flooding into China's market (Ke 2004) .

The film, television and music industries in China have demonstrated that access to the hardware necessary for the consumption of audio-visual products can stimulate a content market, but not necessarily a content industry. More film and music products are being watched and listened to in China than ever before. But production, distribution and regulatory systems' failure to keep pace with technological change has meant that the domestic film and music industries have experienced few positive outcomes from this. The domestic music industry is caught between extremes of state supported 'cultural troupes' on the one hand and avant-garde, politically divisive, and ultimately unprofitable modern/alterative rock on the other (Kraus 2004). At the same time the film industry is also caught between strict controls on content, limited legitimate distribution systems and a flourishing market in pirated, uncensored AV products. It is clear, then, that mechanisms capable of linking increases in consumption with domestic production are not only a necessary aspect of economic development, they are absolutely essential to the emergence of sustainable creative industries.

Cultural industries that are directly connected to the exploitation of intellectual property are also among the categories of industry most advantaged under the international trading framework being put forward by the World Trade Organisation. China is still heavily dependent on manufacturing for export income. In spite of this, it has formally agreed to protect the intellectual property rights of its trading partners in

exchange for reciprocal treatment. Unless China is able to begin producing and exporting significant quantities of intellectual property of its own this will remain a very one-sided deal. By fostering its own creative industries China may be able to engineer a situation in which it benefits from the enforcement of intellectual property rights.

There are signs that creativity is already being valued in economic terms in some parts of the PRC. Central and Western areas are still struggling to modernise agriculture and view attracting manufacturing industries as the key to their prosperity. However, the consumption of cultural products is playing a significant economic role in cities such as Beijing, Shanghai and Guangzhou. In these relatively prosperous commercial centres growing disposable incomes have led to unprecedented demand for entertainment products and experiences. Karaoke, VCDs and DVDs, online gaming, ring tone downloads and the Internet are all 'must haves' among privileged urban elites. While it is estimated that in 2003 the cultural industries contributed less than 1% to China's gross domestic product (GDP), the contribution made by this sector in Beijing was about 5% of GDP, and in Shanghai it was as high as 7% (Chen 2004). Given that this level of economic activity has been generated without strongly enforced intellectual property rights, the potential for growth in the sector as legal and distribution frameworks develop is impressive.

Film: caught between two worlds

Until the 1980s, China's media was wholly dominated by the state. Films were produced by state run studios and were understood as primarily pedagogical, rather than

as a creative or commercial medium. Audiences had little or no power to decide what films they would watch or, in the case of propaganda films watched by entire work units, even whether they would watch them. With the exception of Russian propaganda movies, ordinary citizens had no access to foreign films until the 1980s. Although the situation has changed dramatically for Chinese consumers, the government's view of film's role has been slower to shift. China's film industry has undergone extensive commercial reforms over the past twenty years, and the 'Hollywood model' of high budget blockbusters supported by vertically integrated production and distribution systems is beginning to play a role. Nonetheless, intellectual property rights remain poorly understood by many film industry workers. Navigating the bureaucracy surrounding film production remains more important for filmmakers than legal entitlements or rights management. In short, the political and ideological context in which China's filmmakers must operate is preventing copyright from playing a larger role in the film industry's value chain.

Since the 1980s China's film industry has undergone a steady process of commercially driven reform. As government funding for film production has been withdrawn, filmmakers have been forced to find other sources of production support. This situation has created a clear need for mechanisms capable of facilitating commercial investment - including formal intellectual property rights that can be incorporated into the film business model. Since passing its first copyright law in 1990 China has made significant progress in this direction. However, developing a court system, educating judges, producers, consumers and bureaucrats, and changing established patterns of copying behaviour takes time.

Under China's communist model of film production copyright played no role in the business model available to producers. Revenues and audiences were guaranteed in the sense that the state was the only purchaser of film products and the only source of finance. Free copying from the work of other approved authors and artists was not only tolerated but encouraged (Alford 1995). Restrictions surrounding publication or dissemination of works, including film, were aimed at suppressing dissident views and ensuring that works that were published accorded with the preferences of the state, rather than protecting the rights of individual property owners (Qu 2002). As a result the commercial business models that grew up around film elsewhere in the world did not operate in China. Instead, filmmakers learned to navigate highly complex, often unstable bureaucratic systems - reading the political weather, satisfying production quotas, genre requirements and censors' tastes in order to secure survival (Berry 1993).

The decision to enact a formal copyright law in 1990 represented a major shift in the government's attitude to the role of media and recognition that intellectual products, including film, exist within a commercial context. This step compounded the decision to redefine film as a 'cultural industry' rather than 'a propaganda institution for the (re)enforcement of party ideology' in 1984 (Zhu 2003). As Ying Zhu observes, the Chinese government has withdrawn much of its financial support for the film sector, formally accepted that intellectual property rights should be applied to film products, and called for better commercial outcomes from filmmakers. However, film is still burdened by its political role and extensive government interference persists in film content. These problems are compounded by an official distribution system that is incapable of meeting consumer demands, low levels of copyright law enforcement and ubiquitous piracy.

Copyright continues to be separated from the core problems of filmmaking in the minds of many Chinese directors. While the development of strong creative industries, including film is closely linked to the existence and enforceability of intellectual property rights, copyright law must operate in conjunction with other highly complex economic and regulatory factors impacting on film. The film and television industries remain the subject of more censorship and production regulation than any other media industries in China (Kraus 2004). The relationship between production, popularity and consumption, that is, between producers and the market, is so heavily mediated by the state that for many filmmakers being pirated is the least of their worries:

... the biggest problem is not piracy but the system of censorship, and the second is that there is not a film market. It makes great difference: film as an industrial product or as a tool of political propaganda. As an industrial product, it needs a market; but now in China it is a tool of political propaganda-all cinemas belong to the government.

(Li 2004).

The impact of pre-production censorship

According to Kraus (2004) pre-production censorship of film effectively turns political risks into economic risks - all the greater for poorly funded studios. Even if filmmakers obtain permission to shoot, there is no guarantee that they will receive

permission to release the film through the state owned distribution system. China's Film Bureau, the body responsible for supervising the film industry, possesses absolute power to either approve or axe any work. Filmmakers and their studios have no legal rights to challenge or appeal these decisions.

State-owned studios are being made financially accountable to free market tastes in an environment in which they are handicapped by onerous censorship and content regulations. These regulations introduce powerful 'unknowns' into the revenue income equation and are capable of completely negating the value of intellectual property rights. Wang Zhebin, a female producer from one of China's most prominent state-owned studios discussed this problem with particular anguish. According to Wang, in 2001 her studio entered into a co-production agreement with a French studio for the production of *Balzac and the Little Chinese Seamstress*. The film received pre-production approval from the Film Bureau. The major part of The Forbidden City Film Studio's benefit from this agreement was the right to distribute within mainland China. However, once the film had been completed, the Film Bureau refused to approve it for viewing by domestic audiences. The censorship board's decision meant that in spite of their considerable investment in the production the Chinese studio could not legitimately recoup any of their money (Wang and Wang 2004).

This situation was made even more painful by the fact that the studio was approached by a pirate distribution group who offered to pay them one million RMB for the 'right' to distribute the film on the mainland. For this money Wang needed only supply them with a master copy of the DVD and the promotional materials that accompanied the film. She chose not to do this and the film eventually made its way into

mainland DVD stores via Hong Kong. However, according to Wang this type of offer is common, and many studios do in fact choose to sell master copies to pirate distributors. It is also widely reported within the industry that Chinese directors not specifically banned from distributing through the cinema nonetheless choose to sell the 'right' to distribute their film on DVD to a pirate group for a lump sum in order to recoup some money from the practice.

The complex black market that exists alongside legitimate trading of intellectual property rights in Chinese film presents a stark contrast to the highly organised, commercially driven business models surrounding film production and distribution in more developed markets. Janet Wasko (2003) describes the Hollywood production model, as one beginning with an initial concept and progressing through manager/agent, producer, studio executive, development deal, studio president/chairman, and finally green light for production. In order to professionalise and compete against international content providers there is recognition at the strategic policy level within both film and television industries that Chinese studios should attempt to emulate this model of production more closely.

Internationalisation of the film industry is helping to drive a rights trading model forward. One example of this process is the film *Ink Stone* (*Yanshi*, Feng Xiaoning, 1996), the first Chinese film to be purchased by a Hollywood Studio. *Ink Stone* was made by Baoan, a Guangzhou-based electronics company, which purchased a production quota from China Children's Film Studio. In a process that mirrored the rights transactions of the most developed film producers, China Film purchased *Ink Stone's* distribution rights, sold European rights to Twentieth Century Fox and executed a deal

for Taiwan rights (Zhu 2003). The success of foreign imports at the box office has also prompted bidding wars for first-run rights among Chinese theatres. The auction for first-run rights of a Hollywood blockbuster in China was held in 1998. The seven theatres owned by winning bidder, The Grand Theatre, paid 1.72 million yuan (US\$215,000) for the right to screen *The Game* (Fincher 1997; Zhu 2003). This type of rights-driven commercial activity is seriously undermined by problems with the distribution system such as false box office reporting. Xie Jin, for example, estimates that his epic *Opium Wars* should have earned 140 million yuan (US\$17.5 million), rather than the 70 million yuan that was actually reported (Zhu 2003). Authorities have begun work on a new film law intended to clamp down on practices such as piracy, copyright violation, and false box-office reports (Zhu 2003). The law was expected to make its debut in 2005 (Zhu 2004). Although the creation of a legal framework independent of political intervention for the film industry represents a definite step forward in terms of legislative development, legislation alone will not resolve the industry's difficulties.

The Film Bureau's ability to negate the value of intellectual property rights undermines the significance of copyright in the film industry's business model. The risk that a film will be censored, combined with distribution bottlenecks reduces film's attractiveness to investors and limits the tradability of copyright licences. Furthermore, from the point of view of Chinese filmmakers who are unable to find legal distribution mechanisms for their work within China, copyright violation in the form of piracy is not necessarily viewed as a problem. For some artists simply having their work watched or heard within China is extremely important. The challenges facing China's film industry are a direct reflection of the transitional nature of the nation's political and economic

system. Although copyright law formally exists, its role in the business model of the film industry is minimal. The sensitive role of film and the complex bureaucracy surrounding production and distribution make copyright a minor factor in film production and finance. The power of personal relationships, experience in navigating a highly complex political and bureaucratic landscape, and government funding are all much more important for legitimate filmmakers.

Television: from barter rights to rights consciousness

In markets such as Australia networks derive the bulk of their income from the sale of advertising rights. Advertising revenue is generated on the basis of audience ratings. In most international systems the content and advertising sectors of the business operate separately. While intellectual property rights are the bread and butter of the content market, ratings are the currency of advertising. From the time of the first television broadcast in 1958 to the present day Chinese television producers have had little use for copyright. For four decades programs have been exchanged among stations or traded for advertising time. Now, in the wake of technological convergence and increased competition, the Chinese television industry is reassessing its future.

Television represents a massive industry in terms of its sheer scale, and it employs an army of people. The industry is characterised by a few highly profitable media organisations - mostly in the big cities of Beijing, Shanghai and Guangzhou, a small number of entrepreneurial provincial networks, and a multitude of low-value loss-

making provincial, city and county level stations. The low value of the impoverished multitudes impacts on the bottom lines and business models of the fittest. A lack of copyright awareness and a widespread disinclination to use broadcast rights as a basis for accruing value are consequences of industry structure and the prominence given to advertising revenue.

Structure

Rather than replicate the competitive oligopoly model that characterises capitalist media economies, China's socialist regulators justified massive industry expansion during the 1980s as a means to ensure that information and propaganda reached all segments of society, in the process institutionalising a logic that rewarded non-competitive behaviour.

With a massive but not necessarily affluent domestic market, television development has been a tale of miniaturisation and duplicate construction. Miniaturization has constrained the growth of the industry and made copyright largely irrelevant (Gore 2000). This term refers to the practice of multiple small-scale commercial enterprises unable to grow into champions in their own right because of limited access to capital. The low value of production inputs makes it difficult to produce programs of any recognisable quality. 'Duplicate construction', on the other hand, describes the process by which enterprises replicate each other's activities, even including infrastructure, resulting in a fragmented marketplace typified by a great deal of parasitic localization and little real innovation. The emphasis is on growing local

industries rather than national or international networks. While essentially a neoclassical model of growth, duplication and miniaturisation encourages 'capital-less capitalists' (Gore 2000) who do not bear the whole risk of failure.

The state ownership of media enterprises has exacerbated non-competitive risk-averse behaviour among Chinese television networks and has negated the importance of an IP rights model. However in the past few years a more professional approach is evident with stock exchange listing becoming a means of raising quick finance. The most successful commercial venture to utilise the stock listing model of raising finance has been the Hunan Television Broadcast and Media Company (*Hunan dianguang chuanmei*) network in southern China. Hunan TV, a provincial station, controlled 75 per cent of in-province advertising revenue by the late-1990s and subsequently used this advertising base to set up a shell company and list on the Shenzhen Stock Exchange market. The company issued 50 million A shares before its float on March 25, 1999. It was the first Chinese media company to incorporate private capital from the stock exchange into its funding structure. The stock issue raised some Rmb459 million (Zhang and Fang 2004).

Advertising as an alternative to rights

The flow of investment capital into the television industry increased as the market expanded in the 1990s, a decade when television became the leisure pursuit of choice. In comparison with the film market, television is shaped by domestic consumption and broadly supported by multiple forms of advertising and sponsorship. Investment in

Chinese television is tied to the advertising industry with many production companies moonlighting as advertising production agencies.

During the 1980s, and for most of the 1990s, the integration of production and broadcasting within television stations meant there was no effective marketplace to regulate the value of product. Each station had its own drama or documentary production unit. The rights to broadcast programs were held by the 'mother station' and more often than not programming was bartered at television 'markets' which closely resembled trade fairs, held in Sichuan, Shanghai and later, Beijing. In addition, the central government allocated an amount of funds to stations each year to produce politically correct documentaries and dramas that rehearsed the history of the nation or the virtues of reform.

To understand how the Chinese advertising industry has impeded the development of a rights model, we need to bear in mind that for the past two decades Chinese television stations have sought good programs but lacked the capital to produce these in-house -- that is, within their own production units. For producers, the main strategy to ensure a production budget, over and above production funding allocated by the station, has been the pre-sale of advertising packages. In effect this is an upstream content model. Program production is assured by the broadcaster, not in the provision of capital but through the allocation of advertising time, usually a 'package' of one or two minutes that the producer (or agent) can subsequently re-sell. In this model, the onus is on the producer to tap into his or her support networks and even to provide the finished commercials for the station. This strategy emerged in the 1980s when foreign programs were first sighted on Chinese television. It was adopted by Chinese producers as a means

of guaranteeing a budget. For instance the producers of the 1993 hit TV series *Beijingers in New York* (*Beijing ren zai Niuyue*) managed to secure a loan from the Bank of China on the basis of having previously on-sold their advertising packages (Yin 2002).

While this practice is not unique to China it has evolved along with product placement as perhaps the leading financing strategy in the post-subsidy period. A further stimulus to market competition is the growing *ad spend* as China's consumer market develops. Television advertising has moved ahead in leaps and bounds, attracting more than 40 per cent of advertising revenue in 2002 (ACNielsen 2002). Increased advertising revenue has had a dual effect: it consolidates existing practices of using advertising time among the less competitive networks, but more importantly it ascribes value to quality productions through ratings. The better productions, which are often promoted by producers as 'quality works' (*jingpin*), can compete for a different category of buyer -- that is, a buyer willing to offer hard currency for broadcast rights.

Developments: promoting an investors market

As long as advertising packages continue to be viewed as the cash cow of television production, intellectual property will play a minor role. However, with the television industry now undergoing technological transformation and increased competition, it is inevitable that a broadcast rights model will evolve. The issue key is how deep this model can penetrate within the Chinese television industry. The post-WTO consolidation of China's television broadcasters into mega-conglomerates (echoing the

formation of film corporations) has introduced international economies of scale into the formerly fragmented marketplace. Outsourcing to independent companies and paying directly for program rights are two of the more important developments. It is interesting to observe that within the changing investment environment the standard is not being established by China Central Television, China's sole national broadcaster, but by provincial broadcasters. CCTV has resolutely held on to uncompetitive practices such as bartering and paying minimum prices (notably, in the case of Chinese football broadcast rights). The more entrepreneurial provincial stations are now willing to pay directly for broadcast rights in order to secure quality programs.

New models are being tested in the marketplace. Links between television drama production and the film industry are becoming more important. The purchase of film broadcast rights, particularly by Pay TV movie channels, is an example how intellectual property rights can provide valuable film industry funding. In 1998 China Central Television's film channel paid Rmb 160 million (US\$2.1 million) to Chinese film studios for the rights to broadcast feature films (Zhu 2003). Larger networks such as CCTV and Shanghai TV are increasing the value of their cable and pay-TV channels, not only by buying more diverse offerings, but by investing in co-productions, made for television movies, and new dramas. In 2004 CCTV established a new initiative for the production of television drama: four producers, Yu Shengli, Lian Zhenhua, Zhang Lujie, and Wu Zhaolong were assigned a 'studio' (*gongzuoshi*) under the umbrella of the Television Cultural Development Company (Wing 2004). This experimental initiative is designed to incubate and produce new and interesting quality television drama, with an emphasis on independence from existing marketplace practices such as bartering content

for advertising space, the constraints of trading exclusive rights to CCTV, or having to include product placements for a range of sponsors. According to reports the four studios will comprise three persons: a producer, a studio president/ chair, and a person responsible for scripts. What we observe in these initiatives is a move to professionalise production by integrating international practices. The objective of a studio approach is to increase the quality of the product so that rights can be sold rather than traded for advertising time. Furthermore, there is no obligation on the part of the producer to sell exclusive rights to CCTV if more lucrative offers are made. This development increases pressure to clarify rights management issues, particularly in the context of co-production deals.

Investors in the first of these studios include Huayi Brothers, whose production investment company, Huayi and Taihe Film Investment Company, produced Feng Xiaogang's 1993 hit movie *Cellphone*. Feng, the director of several big commercial hits - including *Big Shot's Funeral* (2001) and *Be There or Be Square* (*bujian busan* 1998) - is certainly no novice when it comes to securing money 'from society' (the private sector). Feng was associated with the successful television dramas *Scenes from an Editorial Office* (*bianjibu de gushi* 1991) and *Beijingers in New York* (*Beijing ren zai Niuyue*: co-director 1993). These productions opened the door for new investment models such as product placement. Feng's dramas largely covered their production costs by using the advertising package exchange mechanism. In 2003 Feng's hit movie *Cellphone* (*shouji*) adopted a novel rights strategy, one which may provide a way forward for film production finance in the face of heavy piracy. *Cellphone* received investment finance from a number of sources with major contributions coming from Motorola, China

Mobile, BMW, and Mtone (a Chinese internet content provider). Sponsors received product placement and visible recognition in the film promotional messages. Music copyright delivered 8 million I2MB. In addition to securing financial support, the production company, incidentally the advertising agent for China Mobile, sought to ensure returns on investment by working with a Guangdong-based DVD maker to produce cheaper legitimate versions in efforts to limit piracy (Yang 2004).

Copyright in the courts

As the examples above illustrate there are moves afoot within the film and television industries to nurture rights consciousness and a hard currency downstream market. Two further examples demonstrate how copyright is coming into sharper focus. In 2003 a television drama series *Pink Ladies* (*hongfen nulang*) drew the attention of viewers in the Shanghai market. According to the series producer, the concept was adapted from a cartoon series *Hot Ladies* (*Se nulang*) by Taiwanese artist Zhu Deyong. Zhu himself acknowledged the provenance although he claimed no royalties, happy to draw attention to his own medium. Despite the acknowledged association with the comic version, the series had close similarities with HBO's *Sex and the City*. Within a few months of the breakout of *Pink Ladies* another variant was in the pipeline, this time with a Beijing flavour. While again acknowledging the Zhu Deyong origin, the new series *City of Desire* (*haoxiang haoxiang tan lianai*) had to fend off claims of plagiarism. The lawyer for the plaintiff, Qixinran Audiovisual Company, had argued that the owner of the

successful script was a person Li Qiang, whose version was optioned to the company where he was working as an editor. At the time the Assistant Manager of Qixinran, Ms Tan Lulu, had offered the project to the Beijing Television Arts Centre - a high profile production house. Four months before the option lapsed, Tan set up her own company, the Tongle Media and Zhongshi Company, and produced the series (Beijing Morning News 5.1 1.2003). The lawyers for Qixinran asked for Rmb 500,000 in damages and a stop to the series. The attempt to secure damages was however unsuccessful.

Other examples of producers resorting to the courts to protect their property have surfaced in television formats, The Netherlands-based company, Endemol, had threatened legal action against Hunan Economic Television station for their alleged deliberate copying of the *Big Brother* format. In Hunan this production carried the more soporific title *Perfect Holiday*. Japan's TBS also took steps to protect its format *Happy Family Plan* (*mengxiang chengzhen*), which was licensed to Beijing Television, being copied by Sichuan and Fujian television stations (personal interview producer *mengxiang chengzhen*, July 2004). Owing to the difficulty of defining what a television format constitutes in terms of copyright, the producers were only successful in registering a trademark on the logo and the name (Keane *et al* 2005).

Concluding remarks

Three years have passed since China's WTO accession and there has been slow progress in the implementation and enforcement of copyright. Intellectual property rights

continue to mean little to most domestic producers. Copyright's lack of relevance for those working in the 'copyright industries' highlights the complexity of the problem. In China copyright represents the convergence of several highly sensitive areas: media, law, economics, politics and ideology. In addition to the practical issues of developing a court system and overseeing enforcement, the Chinese government is struggling to transform heavily subsidised state-owned sectors into profit-driven entertainment industries. In the course of doing so it must resolve sensitive issue of its own relationship with the media.

China's cultural sector is in a state of transition. Legislative developments have made copyright law available to producers and financiers and examples of rights focussed business models are beginning to appear. However, as the film industry demonstrates, copyright currently plays a relatively minor role in commercial decisions made by film producers. Censorship and distribution irregularities prevent copyright from functioning more prominently within the industry's business model. The Film Bureau's ability to negate intellectual property rights seriously undermines their value and makes film less attractive as an investment sector. Entrenched distribution monopolies, outdated modes of rights trading and payment and failure to enforce existing laws are all undermining copyright's role. Pervasive piracy means that distribution on DVD is barely worth considering as a revenue stream. At the same time unlikely champions of intellectual property integration are emerging. Television - still regarded by Chinese Communist Party stalwarts as a propaganda industry - is leading the way in terms of developing quality production models that capitalise on the tradability of intellectual property rights.

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