

Copyright and the Creative Industries in China

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Abstract:

The rise of a global information economy has brought China under heavy pressure to protect copyright. Since passing its first copyright law in 1990, China has been engaged in the steady construction of a copyright system that accords with international standards. However, striking a balance between encouraging economic activity through the protection of intellectual property rights and creating an environment in which the needs of consumers are respected and creativity and innovation are not stifled is an ongoing challenge. This paper briefly discusses the role that copyright law might play in the development of China's creative industries, with reference to China's own legal and creative traditions, as well as the experiences of people working in today's domestic film and music industries. The scope of the present law is outlined and the relevance of alternative protection models such as 'open content licensing' is considered.

Introduction: China, the WTO and IP Law

On 27 October 2001 the National People's Congress of China approved amendments to the Chinese Copyright Law that brought it closer in line with the Agreement on Trade Related Intellectual Property Rights 1994 (TRIPS) and the Berne Convention on Literary and Artistic Works of 1886. Since enacting its first copyright law in 1990 China has been engaged in the development of a copyright regime that accords with international practice. The PRC has now acceded to almost every major international treaty on the protection of intellectual property rights.¹ Accession to the WTO in December 2001 and associated amendments to the Copyright Law mark the latest step in the steady construction of an internationally aligned intellectual property regime.

This article will outline Chinese copyright law as it exists today, comparing it with the law that exists in other countries. It will then proceed to analyse the extent to which the formal provisions of the law have permeated Chinese culture and practice in the Creative Industries.

Background: "Transmit Rather than Create"

The history of Chinese Copyright Law and Intellectual Property Law more generally is a delicate one in which a culture of intellectual sharing² and more recently socialist legal

¹ Thomas Pattloch, 'China' in Christopher Heath (ed), *Intellectual Property Law in Asia* (2003) p.40

² William Alford, *To Steal a Book is an Elegant Offence*, Studies in East Asian Law (346.048A389t ed, 1995)

doctrine,³ have meant that individualised notions of property in intellectual product have had a somewhat uneasy fit within Chinese law and culture. As mentioned above, however, since the 1980s there has been a series of pronouncements and legal reforms that have moved the legal position much closer to the Western model of Intellectual Property.⁴ Some have lamented that in an era where many scholars in the West are asking for more flexibility and more fair-use in sharing of certain types of content, that China should forsake such a model for a much more individualised and commercialised notion of intellectual property rights and exploitation.

China faces a dilemma: until it establishes some system of intellectual property rights within its creative sector and some method of controlling exploitation of those particular creative products, it will be at a significant disadvantage in a WTO world where other countries have very well established and effective intellectual property regimes that protect creative output and provide a basis for its exploitation and commercialisation in the market place. The most likely scenario it would seem is that as China and its creative industries develop further they will embrace a traditional Western style approach to copyright in creative products. However the point needs to be made that in making this move to satisfy its obligations under TRIPS China should not forget the way in which cultural products have been shared and incorporated as cultural practice in the absence of strict intellectual property laws in the past. These principles of ‘opening’ information are becoming an important aspect of IP systems in the West.⁵ China may have much to gain by incorporating its own scholarly traditions and historical experiences within the intellectual property system it is now committed to building.

Confucianism and then Socialism or Communism have provided a rich tapestry for Chinese Intellectual Property lawyers to draw upon as they seek a balance between strict enforcement of individualised rights and mapping out limitations or exceptions to those rights as well as promoting alternative models for managing copyright in certain sectors or spaces, such as Creative Commons and Science Commons models.⁶ It has been argued that China’s Confucian traditions focussed on the transmission or passing down of creative works for others to build on, rather than learning or creation as in individualised activity.⁷ The Confucian statement: “I transmit Rather than Create – I believe in and love the Ancients”⁸ is often referred to as an example of this approach. China’s Confucian traditions have been thoroughly interrupted by the political and ideological changes that have taken place since the end of the Qing dynasty. Nonetheless, the CCP’s approach to intellectual property after 1949 – which emphasised society’s need to access material rather than an author’s right to profit from his creations,⁹ did not represent a radical break from Chinese traditions of sharing and copying.

³ Sanqiang Qu, *Chinese Copyright Law* (First Edition ed, 2002)

⁴ *China to Make Strides in Copyright Protection* (2001) Xinhua News Agency <<http://www.comtexnews.com>> at 5 March 2003, Gayle Feldman, 'China Adopts its First Copyright Law' (1990) 237(38) *Publishers Weekly* 12, Cohan Lazar, 'Protecting Ideas and Ideals: Copyright Law in the People's Republic of China' (1996) 27(4) *Law and Policy in International Business* 1185

⁵ Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (2002); John Howkins, *Intellectual Property Wrongs* (2004) Cultural Commons: The Meeting Place for Culture & Policy <<http://www.culturalcommons.org/comment-print.cfm?ID=15>> at 10 December 2004

⁶ For an excellent overview of the history of Chinese Copyright Law see: Sanqiang Qu, *Chinese Copyright Law* (First Edition ed, 2002)

⁷ William Alford, *To Steal a Book is an Elegant Offence*, Studies in East Asian Law (346.048A389t ed, 1995)

⁸ Confucius, *The Analects* (1998)

⁹ Sanqiang Qu, *Chinese Copyright Law* (First Edition ed, 2002)

How long and with what effect can this long established, open approach to creative work survive the introduction of TRIPS inspired copyright law? The recognition of individual proprietary rights in creative works when the 1990 Copyright Law was created marked an historic shift – on paper at least - away from notions of transmission, rather than creation of knowledge. Although there can be little doubt that traditional attitudes have come under significant pressure to give way to a more Western individualised property based notion of culture and copyright, the reactions of the individual creators and consumers to this pressure remains critical. It seems logical that the opportunities for profit generated by copyright protection will appeal to a new, upwardly mobile generation of Chinese creators, as well as associated commercialisation agents such as publishers and recording companies. Nonetheless, technologies that make sharing faster, easier and more affordable than ever before are prompting the reconsideration of intellectual property approaches all over the world. In an age of downloading, sampling, remixing and re-versioning statements such as “I transmit rather than create” may take on new significance.

What can Copyright do for the Chinese Creative Industries?

Information in the form of creative content is a nonrivalrous good, that is, unlike physical property it cannot be exclusively controlled. Instead we use the law or technology to build a fence around it through innovations such as Intellectual Property Law and in particular Copyright Law. This allows us to control its exploitation in the market place. Without this (legally or technologically constructed) fence it is argued (and not all agree on this point) that the value of the investment in creative output would be stolen by others in an act of “free riding”.

Copyright Law is seen as vital to stimulating and producing creative innovation. It is seen as an incentive for creators and commercialising agents to invest in creative production and recover a reward on their investments. The dilemma for creators is that copyright can be used to help commercialise and gain revenue for creative content. Yet on the other hand, copyright can restrict the ability of the creator to take, sample and remix existing culture. This tension is important to understand and one that is at the heart of the balancing process that copyright law must undertake. Not only must it allow the creator to lock up, fence off and commodify for the purpose of exploitation in the market place, but it must also allow that same creator broad scope to be able to utilise other copyright material so that the next generation of copyright innovation can be undertaken.¹⁰

How does Copyright Law work?

China’s Copyright Law as amended in 2001 is structurally similar to that of most countries in the world,¹¹ with some slight variations. According to Keller (1994) the fundamental principle of Chinese legislative drafting is that primary legislation should be both “general”

¹⁰ On western theories of copyright see: Anne Fitzgerald and Brian Fitzgerald (eds), *Intellectual Property in Principle* (2004) Brian Fitzgerald, 'Digital Property: The Ultimate Boundary?' (2001) 7(47) *Roger Williams University Law Journal*; Brian Fitzgerald, 'Theoretical Underpinning of Intellectual Property: "I am a Pragmatist But Theory is my Rhetoric"' (2003) 16(179) *Canadian Journal of Law and Jurisprudence*

¹¹ Luke Minford, *PRC - the Revised Copyright Law - What Does it Mean for Right Holders* (2002) Rous & Co. International <<http://www.iprights.com/publications/articles/article85.asp?articleID=158>> at 2 November 2004

(yuanzhexing) and “flexible” (linghuoxing).¹² The Copyright Law of the PRC operates in conjunction with the ‘Regulations for the Implementation of the Copyright Law of the PRC’.¹³ The State Council also created ‘Regulations on Computer Software Protection’ when it enacted the Copyright Law in 1991, amending them in 2002.¹⁴ China’s Copyright Law sets out the subject matter of copyright, explains who owns copyright and then explains what economic and moral rights are possessed by creators and owners of copyright. It also explains the duration of the copyright (term) and the limitations upon that copyright. The Implementing Regulations acts as an extension to the main law and provides clarifications of subject matter, rights, exceptions and presumptions of the main copyright law.

In terms of subject matter copyright protects the expression of the idea but not the idea itself. Therefore if I write a history of Beijing and include many facts in that history, a second person can come along and write a history of Beijing and draw upon the factual information in my book so long as they express it in a different way. Ideas and facts on their own are not copyright, but as long as we express those in a particular form copyright law will apply. Article 6 of the Regulations on Computer Software Protection specifically states that “the protection of software copyright under these Regulations shall not extend to the ideas, processing, operating methods, mathematical concepts or the like used in software development.”

Subject matter

Article 3 Chapter II of the Chinese Copyright Law deals with subject matter, namely “works”. It defines “Works” as:

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.

Details of the meanings of each of the works referred to in Article 3 of the Copyright Law are provided in Article 4 of the Implementing Regulations. For example, while Article 3 of the copyright law simply lists ‘written works’ as one of the types of work protected, Article 3 states:

Written works are works expressed in written form, such as novels, poems, essays and theses;

Article 3 of the Regulations on Computer Software Protection add definitions of “computer program”; “documents”; “software developer”; and “software copyright owner”

¹² Perry Keller, 'Sources of Order in Chinese Law' in Alice Erh-Soon Tay and Gunther Doeker-Mach (eds), *The American Journal of Comparative Law* (1994) p.282

¹³ Regulations on Computer Software Protection (2002)

¹⁴ For a discussion on the role of administrative regulations in Chinese law see: Perry Keller, 'Sources of Order in Chinese Law' in Alice Erh-Soon Tay and Gunther Doeker-Mach (eds), *The American Journal of Comparative Law* (1994)

Copy Rights

The rights attached to CH II works are dealt with in Article 10 which provides that the term copyright shall include the following personality rights and property rights (this includes economic and moral rights):

Publication; authorship; revision; integrity; reproduction; distribution; rental; exhibition; performance; presentation; broadcasting; communication through an information network; cinematography; adaptation; translation; compilation and annotation

Article 8 of the Regulations on Computer Software Protection provides that software copyright owners shall enjoy: 1. the right of divulgation, that is, the right to decide whether to make software available to the public; 2. the right of developer-ship, that is, the right to claim developer's identity and to have the developer's name mentioned in connection with the software; 3. the right of alteration, that is, the right to supplement or abridge the software, or to change the sequence of instructions or statements; 4. the right of reproduction, that is, the right to produce one or more copies of the software;. 5. the right of distribution, that is, the right to provide the original copy or reproductions of the software to the public by selling or donating; 6. the right of rental, that is, the right to authorise others to use temporarily and onerously the original copy or reproductions of the software, except where the software itself is not the essential object of the rental; 7. the right of communication through information network, that is, the right to make the software available to the public by wire or wireless means so that members of the public may have access to the software from a place and at a time individually chosen by them; 8. the right of translation, that is, the right to converse the natural language of the software into another natural language;

Ownership

Generally, is not necessary to register in order to gain copyright protection, although it is possible to do so.¹⁵ Article 7 of the Regulations on Computer Software states that a software copyright owner may register, and that a registration certificate issued by the relevant authority is preliminary proof of copyright ownership.

Ownership for CH II "works" is covered by Article 9 which says that the term copyright owner shall include:

- 1) authors
- 2) other citizens, legal entities and other organisations in joint copyright in accordance with this law

More specifically Article 11 provides that:

Except where otherwise provided in this law, the copyright in a work shall belong to its author. The author of a work is the citizen who creates the work, where a work is created under the auspices and according to the intention of a legal entity or organisation, which bears responsibility for the work, the said legal entity shall be deemed to be the author of the work. The citizen, legal entity or other organisation

¹⁵ Thomas Pattloch, 'China' in Christopher Heath (ed), *Intellectual Property Law in Asia* (2003) p.62.

whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.

Under article 12 "Where a work is created by adaptation, translation, annotation or arrangement of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adaptor, translator, annotator or arranger, provided that the exercise of such copyright does not prejudice the copyright in the pre-existing work." Article 13 provides that "Where a work is created jointly by two or more authors, the copyright in the work shall be enjoyed jointly by the co-authors. No co-authorship may be claimed by anyone who has not participated in the creation of the work." Copyright in compilations under Article 14 resides with "the compiler, provided that the exercise of such copyright does not prejudice the copyright in the pre-existing works." Under article 15: "Copyright in cinematographic works ... shall be enjoyed by the producer of the work, while its scriptwriter, director, cameraman, lyricist, composer and other authors shall enjoy the right of authorship therein and shall be entitled to receive remuneration in accordance with the terms of the contracts concluded between them and the producer." Importantly, Article 18 legislates a "first sale" doctrine providing that the "transfer of ownership of the original copy of a work of fine art or other works should not be deemed to constitute a transfer of copyright." Articles 9 to 13 go into further detail about the owner of a piece of computer software. According to article 9: "Except where otherwise provided in these Regulations, the copyright in a piece of software belongs to its developer." Article 11 sets out that where a piece of software is developed upon commission, the copyright ownership shall be agreed upon in a written contract between the parties. In the absence of an explicit contract or agreement relating to ownership, the commissioned party shall enjoy copyright in the software. Article 13 deals with the creation of a piece of software in the course of employment. According to the article, the legal entity or organisation shall enjoy copyright in a piece of software if: 1. the software is developed based on the development objective explicitly designated in the line of his service duty; or 2. is a foreseeable or natural result of his work activities in line of his service duty; or 3. the software is developed mainly with the material and technical resources of the legal entity or other organisation;

The term or duration of rights

'Moral Rights', also referred to in Article 10 as 'personal rights' include: publication, authorship, revision and integrity. Pursuant to Article 20, the moral rights of authorship, revision and integrity held by the author are unlimited in time. This is different to some other countries such as Australia where moral rights are limited in time and will normally last only so long as the economic rights.¹⁶ Article 21 provides that publication rights and the economic rights listed in art 10 (5)-(17) exist for the life of the author plus 50 years and where the work is of a corporation or another entity or a cinematographic film or photographic television or audiovisual broadcast radio or television program then under Article 21 they have a duration of 50 years. Article 14 of the Regulations on Computer Software Protection stipulate that software copyright shall exist from the date on which its development has been completed. In the case of software copyright by a natural person, the term of protection shall be the lifetime of the person, plus fifty years. In the case of joint software, the term of protection shall expire 50 years after the death of the last surviving developer. In the case of copyright by a legal entity or other organisation, the term of protection shall be 50 years after the first publication

¹⁶ An Act relating to copyright and the protection of certain performances, and for other purposes (1968)

of the software; if the software has not been published within fifty years of the completion of its development, it will no longer be protected.

Limitations on rights

The limitations or exceptions to the rights outlined above are dealt with extensively in Article 22 and 23. They provide limitations for:

- Personal study, research or appreciation;¹⁷
- Appropriate quotation from another person's work in one's own work for the purpose of introducing or commenting on a certain work, or explaining a certain point ;
- Unavoidable inclusion or quotation of a published work in the media, such as in a newspaper, periodical and radio and television program, for the purpose of reporting current events;
- Publishing or rebroadcasting by the media, such as a newspaper, periodical, radio station and television station, of an article published by another newspaper or periodical, or broadcast by another radio station or television station, etc. on current political, economic or religious topics, except where the author declares that such publishing or rebroadcasting is not permitted;¹⁸
- Use of a published work by a State organ to a justifiable extent for the purpose of fulfilling its official duties;
- Reproduction of a work its collection by a library, archive, memorial hall, museum, art gallery etc. for the purpose of display, or preservation of a copy, of the work;
- Gratuitous live performance of a published work, for which no fees are charged to the public, nor payments are made to the performers;
- Copying, drawing, photographing or video recording of a work of art put up or displayed in an outdoor public place;
- Translation of a published work of a Chinese citizen, legal entity or other organisation from Han language into minority nationality languages for publication and distribution the country;
- Transliteration of a published work into Braille for publication.

¹⁷.On the notion of self entertainment see: Lucy Montgomery, 'Online Music Markets in China' (2005) *Indicare Monitor* <http://www.indicare.org/tiki-print_article.php?articleId=141>

Under international law all limitations must be in compliance with the so called "Three Step Test" under Art 9 Berne Convention:

"(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

See also Art 13 TRIPS; Art 10 WCT; Art 16 WPPT; Art 17.4.10 (a) Australia-US Free Trade Agreement; WTO Decision, United States – Section 1110 (5) of the US Copyright Act WT/DS 160/12 (15.1.01) <www.wto.org>

¹⁸ For an interesting discussion of the relative emphasis placed on the needs of society, rather than the needs of individual copyright owners in relation to use of copyright material by the media see: Sanqiang Qu, *Chinese Copyright Law* (First Edition ed, 2002), pp. 101-104.

CH IV Subject matter

Chapter IV subject matter provides for protection of performance, sound-recording, video-recording and broadcasting for 50 years, with the ownership, duration and limitations on these rights dealt with in Articles 29-45.

Anti –circumvention

Article 47, the anti-circumvention provision provides:

- Civil and administrative remedies for any act of intentionally circumventing and damaging technical protection measures put into place by the copyright owner without the copyright owner's consent;
- Remedies for deleting or altering electronic rights management information without the copyright owner's consent

Article 24 of the Regulations on Computer Software states that it is a liability to 'knowingly circumvent or sabotage technological measures used by the copyright owner for protecting the software copyright' and 'to knowingly remove or alter any electronic rights management information attached to a copy of the piece of software'.

Enforcement and Remedies

Civil and administrative remedies are provided for by way of monetary damages, injunctions, public apology and destruction of offending products. These are provided for in Articles 46, 47, 49 and 50 of the Copyright law, and Articles 23 and 24 of the Regulations on Computer Software Protection. Statutory damages up to 50,000 RMB (approx US\$6200) are provided for in Article 48. There are criminal penalties of up to seven years, including imprisonment which is dealt with in the Criminal Law of 1997. The onus of proof of copyright authorisation rests with the alleged infringer under Article 52.

In the Chinese legal system there are civil, administrative and criminal sanctions:

Civil: the traditional individualised justice between private litigants

Administrative: the State enforcing public policy

Criminal: more extensive enforcement of State power as seen by the exercise of criminal jurisdiction.

It is also important to understand that Digital Rights Management (DRM), that is the distribution and enforcement of rights through technology, will become increasingly important in Western jurisdictions and as well as China. DRM is reinforced by the anti-circumvention law and management rights alteration provisions in Article 47 which make it unlawful to circumvent or interfere with technological protection measures.

Industry Experiences and Case Studies

Having outlined the reform that has occurred at the formal legal level we would now like to give some indication of how this is being internalised on the streets and in businesses and communities throughout China.

Background: A Culture of Piracy?

The 1990s and the first half of the early 2000's have been marked by a seemingly endless stream of largely foreign media products being made available to Chinese consumers at ever more affordable prices.¹⁹ Today it seems that pirated CDs and VCDs can be found on almost every street corner of China's major cities. In strong contrast to their continuing control of official film distribution channels, such as cinema, China's authorities do not appear to be particularly worried about enforcing censorship policies in relation to CDs and VCDs being sold illegally.²⁰ The appearance of large foreign chains, such as Wal-Mart and Carrefour, in China's bigger cities is beginning to establish an important channel for the distribution of legitimate audio-visual products. Nonetheless, the sale of products without permission from or payment to the copyright owner – 'piracy' remains a serious problem.²¹ China's illegal distribution networks are well established – offering an impressive range of products and levels of service.

People working in China's film and music industries generally estimate that piracy rates remain at between 80% and 95% of market share. The consensus within China's creative industries is that levels of CD, VCD and DVD piracy are not going to change quickly. Many are doubtful that this situation will change at all.²² Faced with such high levels of illegal distribution, two creative industries that depend heavily on copyright, film and music, are being forced to find new ways of surviving. Although the present situation is still far from ideal from the point of view of creative industries development, the business model solutions that film and music companies are discovering demonstrate that businesses have a number of options when it comes to generating income from creative products. China's creative industries are struggling to negotiate a rapidly changing social, economic, technological and legal environment. As in other countries, decisions about how formal legal intellectual property rights can best be incorporated into successful business models are being informed by environmental factors.

Since 1980 copying film and music products has continued to become cheaper and faster. At the same time, the technology required to enjoy these products at home has become ever more affordable to ordinary Chinese citizens.²³ Inexpensive tape recorders, televisions, CD and VCD players have flooded onto the market²⁴ as China has assumed its role as a global centre for manufacturing electronic goods. Increasing numbers of Chinese citizens are also gaining access to the internet, the latest development in large scale instant sharing of copyrighted products. By June 2004 the number of mainland Chinese with internet access had reached 87 million. Bandwidth in China had increased more than 190% in a 12 month period. The

¹⁹ Shujen Wang, *Framing Piracy* (2003) pp. 49 – 56

²⁰ Zhebin Wang and Xingdong Wang. (2004). Interview with Lucy Montgomery, Beijing.

²¹ Graham Chynoweth, 'Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen its Copyright Laws' (2003) 3 *Duke Law and Technology Review*
<<http://www.law.duke.edu/journals/dltr/articles/2003/dltr003.html>>

²² Leah Xu. (2005). Interview with Lucy Montgomery, Beijing; Daming Chen. (2004). Interview with Lucy Montgomery, ; Jerry Chillout. (2005). Interview with Lucy Montgomery, Beijing; Beaker Huang. (2005). Interview with Lucy Montgomery, Beijing; Song Ke. (2005). Interview with Lucy Montgomery, Beijing; Li Yang. (2004). Interview with Lucy Montgomery,

²³ Shujen Wang, *Framing Piracy* (2003)

²⁴ Richard Kraus, *The Party and the Arty in China: The New Politics of Culture* (2004), p.13.

numbers of users shopping online is also on the rise.²⁵ The internet, mobile phones and other ICTs are emerging as ever more important channels for the distribution of copyright content.

While these developments have had obvious benefits for Chinese consumers, China's film and music industries are struggling to compete with the mass of imported, low cost copyrighted material and to develop reliable sources of income. Institutional mechanisms formerly responsible for funding China's cultural sector have been substantially reduced since the 1990s. Film makers and musicians are now under pressure to build commercially sustainable businesses and to find their own sources of funding.²⁶ Complicating matters is the fact that levels of piracy in China mean that it is difficult for royalty based business models that dominate other markets to function effectively. In recent interviews conducted with a number of Beijing based film and music companies a number of distinct strategies for dealing with the problem of copyright and making money in what all agree is an extremely difficult market were identified. These will be discussed briefly.

1. ENFORCING LEGAL ENTITLEMENTS THROUGH THE COURTS

In spite of China's achievements in establishing a complete legal framework for intellectual property protection over the past twenty three years, high rates of infringement remain a serious problem for copyright owners.²⁷ Li (2005) argues that

*"Nowadays the main problem China is facing is to lack of laws and protecting measures, but lack of confidence and trust, among the whole society and ordinary people, in judicial judgements. Anti-counterfeiting remains the field of government."*²⁸

Nonetheless, there are signs that legislative changes and the central government's considerable investment in equipping courts and training legal professionals is beginning to have a positive impact on experiences and perceptions of copyright protection. Between 2000 and 2004 Chinese courts handled 1710 intellectual property cases, an increase of 56.42 percent over the preceding three years.²⁹

Interviews conducted recently in Beijing suggest that improvements in China's legal system and the government's focus on intellectual property rights are beginning to have a positive impact on the experiences of Chinese copyright owners, at least in major cities.³⁰ When interviewed in 2005, music industry executives, in particular, expressed genuine optimism about the state of China's laws, and the effectiveness of the legal system.³¹ Although levels of education about the particulars of copyright within the film and music industry are mixed,

²⁵ CNNIC published the "14th Statistical Survey Report on the Internet Development in China" (2004) China Network Information Centre <<http://www.cnnic.net.cn/html/Dir/2004/07/22/2406.htm>> at 26 2005

²⁶ Ying Zhu, 'Chinese Cinema's Economic Reform from the Mid 1980's to the Mid-1990s' (2002) 52(4) *Journal of Communication* 905

²⁷ Hua Li, 'Major Problems of IPR Protection in China: A View of Civil Procedure' (2005) (8) *European Intellectual Property Review* 285

²⁸ Hua Li, 'Major Problems of IPR Protection in China: A View of Civil Procedure' (2005) (8) *European Intellectual Property Review* 285

²⁹ '1,710 IPR Violations Handled Since 2000', *China Daily* 22 December 2004,

³⁰ Localism remains a serious issue for China's courts. See: Andrew Evans, 'Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws' (2003) (31) *The Georgia Journal of International and Comparative Law* 587

³¹ Simon Chu. (2005). Interview with Lucy Montgomery, Hong Kong; Beaker Huang. (2005). Interview with Lucy Montgomery, Beijing; Song Ke. (2005). Interview with Lucy Montgomery, Beijing; Qi Shan. (2005). Interview with Lucy Montgomery, Beijing; Daniel Zhao. (2005). Interview with Lucy Montgomery, Beijing.

legal entitlements are playing an increasing role in business strategies and copyright owners are becoming more active in seeking legal redress through the courts. One record label executive, interviewed on the condition of anonymity, has been involved in the prosecution of more than two hundred cases since 1989. As a result, he has earned himself a nickname within Beijing's legal circles: 'the renowned suer'.

According to this executive:

'Although China's legal system still has many shortcomings and loopholes, I am extremely grateful to it. We have received a great deal of support in our efforts to prosecute. Without this kind of support it would have been impossible for us to have won the several million RMB in compensation that we have been awarded. I am optimistic about the future of the Chinese legal system.'³²

While the 'renowned suer' has been very pleased with his experiences of the judicial process, he remains frustrated and angry about levels of political and bureaucratic involvement in China's illegal disc copying industry. As he points out, changes in formal legislation and the development of a judicial system are positive steps. But the persistence of high levels of piracy in China makes it clear that on their own they are not enough. Bureaucratic, political and social factors continue to play an important role.

In the case of the 'renowned suer' at least, his company has been able to derive a significant income from its legal action. The renowned suer has successfully represented himself in court, a fact that suggests that the legal system is relatively simple to deal with – at least where straight forward cases are concerned. Although the damages awarded by the court are not equal to those that might have been enjoyed if piracy did not exist, they have served as a valuable income stream for the company. Nonetheless, the renowned suer remains adamant that it will be impossible for China's music industry to develop while piracy rates remain so high.³³

2. FILM AS A VEHICLE FOR ADVERTISING: HUAYI BROTHERS USE OF PRODUCT PLACEMENT:

Huayi Brothers are a privately owned, mainland film company that have taken China's film sector by storm in recent years. After establishing itself as an early success story in the mainland's advertising industry, Huayi moved into the film business in 1999.³⁴ Since then, the company has produced twenty feature films and annually produces more than two hundred hours of television drama. It also continues to maintain one of Beijing's biggest advertising agencies and runs a major Chinese talent agency.³⁵ Huayi have succeeded where few other mainland film studios have been able to - producing privately funded films that have, almost without fail, made money.

Huayi are unrelenting in their view of their activities as commercial, rather than artistic or ideological. According to Wang Zhonglei, director

³² Anonymous. (2005). Interview with Lucy Montgomery, Beijing.

³³ Anonymous. (2005). Interview with Lucy Montgomery, Beijing.

³⁴ Zhonglei Wang, 'The Day' in Zhong Jun Wang (ed), *Huayi Brothers and Taihe Film* (2003)

³⁵ Arthur Jones, *Brothers Rock Indie Sector* (2005) Variety.com

<<http://www.variety.com/article/VR1117923038?categoryid=1907&cs=1&s=h&p=0>> at 27 July 2005

‘We believe that not obeying ... basic business principles is the biggest obstacle that prevents Chinese films from entering into the free market. Even today in this field, people still mix so called art films and so called commercial films together. Because they often use the excuse that their film is an ‘art film’ they can then deny responsibility for not making high quality films. We understand that if we want to survive we had better change our attitude towards production quality. Because we know very clearly that we are first of all a business. Seeking a good profit on our investments is our basic purpose.’³⁶

Huayi’s success has, in large part, been the result of innovative approaches to financing, marketing and distribution. Every effort is made to prevent pirates from obtaining early copies of their productions. In the absence of fully developed electronic ticketing systems in Chinese cinemas, Huayi pay a small army of auditors to manually supervise ticket sales when major commercial releases are made. In order to prevent the common practice of underreporting ticket sales in order to avoid royalty payments, Huayi staff stand at the doors of cinemas and count the number of people who walk in. Perhaps more controversially, Huayi also admit to paying distributors to ensure that they only deal in legal copies of Huayi films.³⁷ The price of legitimate copies of their products has been dropped to around 15RMB – between 5 and 8 RMB more than the going rate for regular pirate disks. Even so, Leah Xu, vice president of Huayi Brothers Film Investment estimates that piracy rates remain above 90%.³⁸

One aspect of Huayi’s business model that has been given particular emphasis in the light of the difficulty of preventing pirate distribution of films has been product placement. Leah Xu, Vice President of Huayi’s film financing company, estimates that approximately 50% of total film revenue is derived from product placement by major international advertisers, including BMW and Motorola. Huayi Brothers have been able to combine the company’s extensive advertising experience and contacts with carefully selected scripts to break new ground with this film financing model in China.

Although it is arguable that in other markets product placement in films and advertising ‘tie ins’ are as old as the industry itself, the use of these kinds of commercial techniques by China’s film industry is a new development. The industry’s past role as a source of state funded propaganda did not allowed much time for commercial techniques of film financing to develop. Nonetheless, product placements are proving enormously valuable in today’s highly competitive film market. In the same way that radio and television stations ‘give away’ entertainment in exchange for ratings, which they are then able to sell on to advertisers, advertisers whose products appear in Huayi Brothers films do not really care whether the films featuring their product are distributed legally or illegally. As long as people watch them and are exposed to the product that is being advertised, companies that have paid money to help develop a brand profile are satisfied. This strategy helps take pressure off royalty payments as the only source of income for film producers.

3. THE INTERNET: NEW POSSIBILITIES

Illegal disc copying is just one form of copyright infringement affecting the music industry. In China, as in other markets, the internet is becoming an important source of music distribution. Last year Huayi brother also made industry history by selling the first Chinese film to an

³⁶ Zhonglei Wang, ‘The Day’ in Zhong Jun Wang (ed), *Huayi Brothers and Taihe Film* (2003)

³⁷ Leah Xu. (2005). Interview with Lucy Montgomery, Beijing.

³⁸ Leah Xu. (2005). Interview with Lucy Montgomery, Beijing.

internet service provider for online distribution.³⁹ The Chinese government's policy of maintaining strict control over the internet and registering websites⁴⁰ makes taking action against illegally posted music relatively simple. Copyright owners have also been successful in cases against internet search engines such as Baidu <http://www.baidu.com> and ChinaMP3.com <http://www.chinamp3.com> which post links to sites where MP3 files can be downloaded.⁴¹

The record executive mentioned earlier, the 'renowned suer' has successfully taken over thirty cases of internet piracy to court. Senior Vice President of Universal Music, Simon Chu (2005), cites the government's commitment to controlling the internet as a major incentive for international labels to enter China's market.⁴² According to Chu, while traditional business models are being challenged in other markets, the Chinese government's internet policies are creating an online environment where copyright will be easily controlled. Other members of the industry, such as Taihe Music's managing director, Song Ke, are less optimistic. Song believes that not only is peer to peer filesharing already popular in China's cities, its impact on the Chinese music industry will be similar to its impact elsewhere in the world.⁴³ This view is shared by others working in the industry, including Jerry Chillout, manager and producer of the independent label Newbees Music Production.⁴⁴

In spite of anecdotal evidence that supports suggestions that peer to peer file-sharing is catching on in China,⁴⁵ ringtone downloading currently serves as a major income stream for mainstream labels – including that of the famous plaintiff mentioned earlier. Taihe Music also suggests that new technologies will be key to the future business model of the industry.⁴⁶ Sending music directly to mobile devices, music, content streaming and finding ways to capture some portion of the online market through major ISPs such as Sina.com have all been mentioned as important emerging trends.⁴⁷

Taihe Rye Music is a division of one of China's biggest entertainment companies. The Taihe group include artist management, film and financing and investment operations and represent China's number one male musician.⁴⁸ As such, they have the financial and corporate resources required to make cutting edge, technologically based distribution strategies a realistic option. This position is a stark contrast to that of labels such as Newbees. Newbees are a small player. They possess few financial resources and must wait for other companies to develop new distribution technologies and services. Although China's law has formally been amended to allow small music companies to nominate group collecting agencies to take action on their behalf, in reality the government offices in charge of administering the licenses for such industry associations have not yet been established. At present, the Music Copyright Society of China remains the only officially sanctioned society responsible for collecting

³⁹ Leah Xu. (2005). Interview with Lucy Montgomery, Beijing.

⁴⁰ 'Internet Filtering in China 2004-2005: A Country Study' (OpenNet Initiative, 2005)

⁴¹ Stuart Biggs, 'Baidu violates copyright, court finds' (2005) *South China Morning Post*

⁴² Simon Chu. (2005). Interview with Lucy Montgomery, Hong Kong.

⁴³ Song Ke. (2005). Interview with Lucy Montgomery, Beijing.

⁴⁴ Jerry Chillout. (2005). Interview with Lucy Montgomery, Beijing.

⁴⁵ Jerry Chillout. (2005). Interview with Lucy Montgomery, Beijing. Song Ke. (2005). Interview with Lucy Montgomery, Beijing.

⁴⁶ Song Ke. (2005). Interview with Lucy Montgomery, Beijing.

⁴⁷ Simon Chu. (2005). Interview with Lucy Montgomery, Hong Kong. Song Ke. (2005). Interview with Lucy Montgomery, Beijing. Qi Shan. (2005). Interview with Lucy Montgomery, Beijing.

remuneration for music copyright.⁴⁹ Small labels such as Newbees find themselves forced to rely on existing distribution options, such as CDs and the internet. The paltry income that can be derived from these sources leaves them with artist management and live events as their most significant sources of revenue.⁵⁰ While groups such as Taihe have the critical mass required to seek technological solutions to their copyright management problems, small independent groups are in a much more vulnerable position.

Open Copyright Models

In the West we have seen a reaction to overly restrictive copyright management and exploitation in the form of alternative copyright (or open) management models. These will no doubt have a role to play in China as part of broad spectrum of copyright management strategies.

The use of copyright in software code, e.g. free software, or content, e.g. Creative Commons (CC), to require downstream users to share is a form of alternative copyright management. The copyright owner uses their copyright to leverage open access to their material rather than simply closing it off for economic exploitation. One of the great insights of the free software and open access movements has been that we can manage copyright not only in a closed manner, but also in an open manner.

Creative Commons aims to build a distributed information commons by encouraging copyright owners to licence use of their material through open content licensing protocols and thereby promote better identification, negotiation and reutilization of content for the purposes of creativity and innovation. It aims to make copyright content more “active” by ensuring that content can be reutilized with a minimum of transactional effort. As the project highlights, the use of an effective identification or labeling scheme and an easy to understand and implement legal framework is vital to furthering this purpose. This is done by establishing generic protocols or license terms for the open distribution of content that can be attached to content with a minimum of fuss under a CC label. In short the idea is to ask copyright owners – where willing - to “license out” or distribute their material on the basis of four protocols designed to enhance reusability and build out the information commons.

Music, film or books can be shared through a Creative Commons licence which will ask the downstream user to attribute me - while most people will ask that there be non-commercial use of the material and that improvements be shared back to me and the broader community – share alike. What Creative Commons is designed to do is to create a space in the online world where people can share, access and reutilise without fear of being sued for copyright infringement. In essence the system works by giving permission in advance to copyright material on certain conditions. These generic protocols allow people to better understand what rights they have in the digital environment to a particular piece of creative content. For interesting examples go to the creativecommons.org website or look at the opsound.org website where you can download an enormous amount of music that has been donated to the Creative Commons by musicians. Look at the song “My Life” and the way it has been remixed by people coming to the site, remixing the song, posting it back to the community, and innovating upon that without fear of law suit, through permission given in advance – through attribution non-commercial share-alike type Creative Commons licences.

⁴⁹ Thomas Pattloch, 'China' in Christopher Heath (ed), *Intellectual Property Law in Asia* (2003) Also see sec Article 8 of the Copyright Law of the PRC

⁵⁰ Jerry Chillout. (2005). Interview with Lucy Montgomery, Beijing.

Over 53 million objects have already been released under CC licences and the support for Creative Commons both here and overseas continues to grow. The following are notable examples of how the Creative Commons licences are being used or are proposed to be used –

- Online digital music hosting services GarageBand.com, Dmusic.com and Soundclick.com and alternative record label Opsound.org offer Creative Commons licences as an optional tag for all songs uploaded to their websites. As a result, a large portion of the music content hosted on these sites is licensed under Creative Commons licences.
- In their November 2004 issue, Wired magazine gave away a CD which features 16 songs released under Creative Commons licences by artists such as the Beastie Boys, Talking Heads frontman David Byrne and Brazilian artist Gilberto Gil.
- The producers of the anti-Fox News Channel documentary “Outfoxed” have released some of the unedited footage under a Creative Commons licence.
- The Public Library of Science licences its publications under Creative Commons licences.
- The Australian Creative Resources Online (ACRO) website contains a range of content (such as audio tracks and still images) which are licensed for use under Creative Commons licences.
- In the UK, the British Broadcasting Corporation (BBC) have adapted the Creative Commons licensing model for use by the BBC Creative Archive, which will allow people to download clips of BBC factual programs for non-commercial use. See <http://creativearchive.bbc.co.uk>
- The OYEZ Project, founded in 1989 by Jerry Goldman, a professor of political science at Northwestern University, is an archive of recorded oral arguments and bench statements in the Supreme Court of the USA. In June 2003 the OYEZ Project released hundreds of hours of MP3 versions of their archived audio files under a Creative Commons licence.

The notion of peer production where lots of people will team together to produce creative content is facilitated by Creative Commons style open access licensing. It allows people to collaborate and innovate with a broad distributed online world. Wikipedia www.wikipedia.org an online encyclopaedia that has and continues to be created by thousands of contributors is the most obvious example of peer production. Wikipedia uses the GNU Free Documentation Licence as the method for sharing content.

A common question is “why would people want to share digital content?” Some reasons are:

- Ideologically and financially this may be acceptable – the most compelling example in Australia is government where information is ultimately owned by and for the people
- Open contenting one version of your material e.g. a draft (E Print) or a chapter may in fact be a strategy for enhancing the commercialised version of your content
- A wish to share with others for creative and educational purposes – peer production
- Publicity – what the free and open software movement calls “egoboo” or reputation within the open community which in some cases will be exploited commercially down the track
- Negotiability – through technologically implemented generic protocols that can be utilised with the click of a mouse

- “What is junk to one may be gold to another” – the idea that the off cuts or digital junk of one person may be the building blocks of knowledge and creative genius for another
- “Indirect appropriation” – money, design and use of end product, pleasure or social profile gained through involvement in peer production (Benkler, 2002).

The Project Leader in China is Dr Chunyan Wang who is an Associate Professor of Law at the Renmin University of China in Beijing.

Conclusion: The Road Ahead

What this article highlights is that while a comprehensive copyright law is now on the statute books in China, its implementation and enforcement is still only beginning to seep into the consciousness of most people. If history is an indicator, there seems little doubt that as China further develops a vibrant and sustainable creative industries sector the call for greater enforcement of copyright will gather force. At present, pressure for enforcement is still to a very large extent driven by foreign mainly US interests that wish to see their intellectual property protected. Once this motivation is more directly related to China’s own creative sector it might be expected that copyright law and enforcement will be more closely scrutinised and invested in by government and local businesses. That will be a significant shift for government, business and society more generally and will present a monumental challenge for a country that has fostered a thriving industry of unauthorised copyright products and a deep rooted tradition of sharing for the common good. However the consumption of creative products by the upwardly mobile urban middle classes in cities such as Beijing and Shanghai and examples such as the mobile phone ring tones industry suggests that with a combination of pricing, local product, technology and legal enforcement, such a cultural shift may not be impossible.

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