CHINA’S COPYRIGHT POLICY IN THE ERA OF GLOBALIZATION:
A CHANCE TO RESTORE THE PUBLIC’S INTEREST

A Thesis in
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by
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Abstract

This dissertation examines the development and implications of China’s copyright governance within the context of China’s integration into global capitalism. The purpose of this study is threefold. First, to shed light on the process of neo-liberal globalization in general by focusing on the power dynamics surrounding global copyright governance, in which the complex “antithesis-alliance” relationship between the transnational corporate interest, the nation-state and local industries is played out. Second, to critique the dominant discourse on copyright that prioritizes private property rights over preservation of commons, commercial interest over public access, and production over diffusion. It emphasizes that copyright is neither exclusively a property right as defined by corporate copyright holders nor a trade policy issue as framed by dominant copyright exporters. It is instead a developmental strategy that can be utilized by the state to stimulate economic growth and also a communication policy that has critical ramifications on the flow of information and the basic human right to communicate. Third, this study aims to deepen the understanding of the Chinese copyright regime per se by taking into consideration the unique political, economic and cultural conditions in China. On one hand, a careful analysis of local factors reveals the injustice and impracticability of harmonizing copyright regulation at the global level. On the other hand, concerns are raised about how ever-tightening global copyright governance will adversely affect the public interest in China.

After answering the research questions of why China adopted the current copyright regime and what are major characteristics as well as implications of the regime, I argue that a more inclusive and just information society needs a balance between private
interest and public interest, between production of knowledge products and the diffusion
those products, and between regulation and open access. With this in mind, I make
several propositions for guiding China’s future copyright policy.
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Chapter 1

INTRODUCTION

1.1 The Information Society and Intellectual Property

It has now become commonplace to refer to the contemporary era as an information age, in which new communication technologies have greatly increased the interconnectedness of our society, and the production and circulation of information are key aspects of economic activities. On the one hand, informational inputs are contributing significant value to material products; on the other hand, there has been an astonishing growth of the information industry itself—equipment, programming, processing, transmission, distribution, storage, and retrieval. Another term that is often associated with “information society” is “knowledge economy”, which can be defined as “production and services based on knowledge-intensive activities that contribute to an accelerated pace of technological and scientific advance” (Powell & Snellman, 2004, p.200). From Daniel Bell’s (1973) assertion that theoretical knowledge “has become decisive for the organization of decisions and the direction of change” (p. 21) to Manuel Castells’ (1996) emphasis on “informationalism” as the primary motor of late twentieth century capitalist society, to the 1999 World Development Report (World Bank, 2000) declaring that knowledge has become the most important factor determining the standard of living, various theses on the information society seem to share the view that control over information and knowledge has replaced control over matter as the crucial source of wealth creation as well as political power.
The emergence of a knowledge-based society propels the current trend of globalizing intellectual property rights (IPRs). IPRs are legal and institutional devices to protect creations of the mind, such as inventions, works of art and literature, and designs. Just like the property rights of tangible products, IPRs not only assert the enforceable legal ownership right of excluding others from accessing certain resources but also express the legal benefits associated with such ownership, including the right to charge rent for use, to receive compensation for loss and collect payment for transfer or sale. Thus in a more and more integrated world where information and knowledge are accorded increasing significance, it is not surprising that intellectual property rights become a prominent economic as well as political issue at the global level. For those dominating IP-intensive industries like software, pharmaceutical, chemical, biotechnological and entertainment industries, a strong IP regime assures the power to control intellectual products; yet for most developing countries that desire access to knowledge in order to achieve further development, the ever-expanding IPRs severely limit the availability of intellectual resources.

1.2 The Case of China copyright Law

On November 10, 2001, China finally was approved for its WTO membership after fifteen years’ of negotiation. This is an historical event that will have a strong impact on both China and the rest of the world. The WTO Agreement is premised not only on significant tariff cuts and elimination of quotas and licenses for both agricultural and industrial products imported to China, but also on commitments to eliminate most foreign equity restrictions in all service areas. Moreover, what is equally important as these
provisions for facilitating “free trade” are the legal obligation China assumes with respect to the “free flow of information” upon signing the Agreement on Trade-related Aspects of Intellectual Property (TRIPS), which is part of the WTO framework. In anticipation of WTO and TRIPS membership, China promulgated numerous amendments to its copyright laws in order to meet international standards. These amendments codify the expansion of the subject matter of copyright, clarify copyright owners’ economic rights, criminalize copyright infringement, etc (Xue & Zheng, 2002). With China’s further opening up, while the boundary for the exchange of material products is supposedly dissolving, more boundaries are being set up to regulate the circulation of a certain type of intangible goods, namely, information and knowledge.

Historically, restrictions on the use and unauthorized reproduction of certain books, symbols and products have been no stranger to the Chinese (Alford, 1995). However, it is a peculiar modern Western achievement to view and give universal expression to such privileged use as a person’s property right, and to enforce such rights by “broad analogy to property rights in tangible movables” (Cornish, 1996, p.3). China did not enact its first copyright law until 1991\(^1\), yet within a decade China acceded to all the major international treaties on copyright\(^2\). Such swift transplantation of a legal system that was alien to the Chinese society has inevitably caused tensions at various levels. First, for a regime that declares itself to be socialist, it is a very challenging task to justify the private ownership of intellectual products. So far, China’s constitution only provides conditional

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1 Although China’s 1902 Mackay Treaty with Britain and the 1903 treaty with the United States promised copyright protection on registration, the sketchy and vague provisions of these agreements left a lot of vital questions unanswered. Thus none of these early treaties can be considered as an equivalent to copyright law. For more detailed discussion of China’s historical experience with intellectual property, see Alford, 1995.

2 These include the Berne Convention for the Protection of Literary and Artistic Works, which China joined in 1992; the Universal Copyright Convention, which China joined in 1992; and Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, which China joined in 1993; and the TRIPS Agreement, which China joined on 11 December 2001.
protection to private property, thus the extent to which copyright can be protected is also a contentious issue. Second, becoming a signatory of international copyright treaties will greatly restrict China’s access to existing knowledge and advanced technology that are vital to its development, as a large portion of such information has been privatized by intellectual property owners in developed countries. Third, in an authoritarian state that utilizes censorship to exert information control, how can the private interest of copyright owners and the interest of the state be reconciled should any conflict occur between these two? All these tensions point to the difficulty of establishing the legitimacy of copyright law in contemporary China, and maybe to an even broader question of how the legitimacy of the state itself could be either undermined or reinforced through its effort to tackle these tensions.

This study addresses the copyright law of China in the context discussed above. It reviews how the complex “antithesis-alliance” relationship between transnational power and domestic forces played out in the arena of copyright with China’s integration into globalization. Given the unique political, economic, cultural and social environment in China, it also examines how the legitimacy of copyright is established/problematised in the Chinese context and how post-WTO copyright governance is influencing information access in China. The relevance of this study lies in the insights it provides for our understanding of globalization, of copyright law and of China’s modernization. Since the establishment of the Chinese copyright regime is very much in accordance with the pace of China’s integration into the global system (Xue & Zheng, 2002), various tensions surrounding the copyright law—those related with political sovereignty, economic development and information flow—epitomize problems with globalization in general.
Second, the short history of Chinese copyright law is a better indication of the
contstructedness of copyright than the cases with most developed countries, where private
ownership of intellectual products has been taken for granted for centuries. The
conceptualization of copyright law in this project is predicated on two important
assumptions. One is that copyright should be construed as policy rather than property
(Vaidhyanathan, 2001). This means copyright law is not just about granting authors the
exclusive right to enjoy the fruit of their creation, but also about assuring the public’s
access to knowledge and information. Actually an historical analysis tells us that the
primary purpose of copyright was to promote the public welfare by the advancement of
knowledge, while protecting authors/publishers was one of the incidental functions of
copyright (Patterson & Lindberg, 1991). Furthermore, copyright law is not just a trade
policy solely related with the prosperity of the copyright industry; it is also a
communication policy that would determine the availability of information, which
consequently affects the content as well as the format of mass communication in any
given society. The other assumption is that copyright governance is not only a regulatory
regime but also a constructed discourse contingent upon the dynamics of power. Law
needs some form of social justification if it is to be successfully enforced. Along with the
actual appearance of copyright law as an institution that protects certain interests in
society in a specific manner, there is a parallel history of the ways in which such
institution has been legitimized and justified. Although the present conceptualization of
the character and applicability of copyright implicitly characterizes it as “having always
been with us”, the China case will help illustrate copyright law’s contingency on political
economic settlement.
Third, notwithstanding that the concept of intellectual property was alien to the Chinese tradition, IPRs were overwhelmingly framed as beneficial to the country when they were codified. Copyright law was legitimized as an important part of a legal system that would contribute to further marketization and privatization, to cultivate “the consciousness of right”, and to promote “rule of law” (as opposed to “rule of authority”), all of which were considered essential for China’s modernization (P. Feng, 2003). This thesis inquires into whether copyright law did deliver the benefits it promised and whether there are negative consequences associated with the mainstream discourse on privatization and modernization.

1.3 Note on Methodology
This study has been conducted through collecting and analyzing some primary but mostly secondary sources. The empirical evidence was acquired from a range of secondary sources, including documents released by governmental and international organizations and business reports as well as other important sources such as academic journals and books, survey results, trade and popular magazine articles, daily newspapers, electronic newspapers, and websites. This research aims to develop critically interpretive knowledge about the Chinese copyright law by examining existing evidence from new perspectives. As suggested by Christopher May (2003), a critical theory does not take institutions and social power relations for granted but seeks to examine how and why particular origins led to current manifestations. Herbert Schiller (1983) identified three major features of critical studies of communication. Instead of focusing on individual consumption of media products, critical researchers address the production of
informational outputs. Critical research makes an effort to understand the source and exercise of power, especially as they relate to communication processes and information flow. Third, this research demonstrates an awareness of continuous change in social processes and institutions, or, put differently, a strong sense of history.

According to Joe Kincheloe and Peter McLaren (1998), the project of critical research is not simply the empirical re-presentation of the world but the “transgressive” task of posing the research itself as a set of ideological practices. Empirical analysis needs to be interrogated in order to uncover the contradictions and negations embodied in any objective description. Critical researchers maintain that the meaning of an experience or an observation is not self-evident. The meaning of any experience will depend on the struggle over the interpretation and definition of that experience. In summary, Kincheloe and McLaren emphasize, “The way we analyze and interpret empirical data is conditioned by the way it is theoretically framed. It is also dependent upon the researcher’s own ideological assumptions. The empirical data derived from any study cannot be treated as simple irrefutable facts. They represent hidden assumptions – assumptions the critical researcher must dig out and expose” (p. 273).

1.4 Research Questions and Outline

“Law should be seen as a complex interpretive activity, a practice of encoding and decoding social meaning that merges imperceptibly with rhetoric, ideology, “common sense”, economic argument, with social stereotype, narrative cliché and political theory of every level from high abstraction to civics class chant” (Boyle, 1996, p.14).
As “a complex interpretive activity”, copyright law should always be examined within a specific political, economic, social and technological context. This dissertation is an attempt to move beyond the existing knowledge of the Chinese copyright regime by seeking more adequate answers to the following questions: why did China adopt its current copyright regime? What is post-WTO copyright governance like in China? What are the implications of the current Chinese copyright governance on both global and local communication networks and information flow?

RQ 1: Why did China adopt its current copyright regime?

1) What was the international context for China’s first domestic copyright law? How have global norms with respect to copyright regulation been established?

The theoretical tools for answering these questions will be mostly drawn from political economy, including Marxian analysis of privatization, and Gramscian hegemonic theory. The empirical evidence comes from existing documentation of the policy-making process in international copyright forums and relevant multilateral negotiations. I will consider how the role of GATT/WTO related to the adoption of minimum copyright protection standards, and the consequences of defining intellectual property law as a matter of “trade policy” for restraining or enhancing discourse in China.

2) What is the transforming role of the Chinese state in the era of globalization?

Several theories dealing with the relationship between the nation-state and development in the era of globalization will be reviewed with a view to identifying the best fit with China’s situation. The relationship between the legitimacy of the copyright regime and the dominant discourse on China’s modernization and the maintenance of state legitimacy through development will also be examined.
3) *How was the parallel relationship between China’s integration into global capitalism and the evolution of its copyright law developed before the WTO accession?*

What are the international and domestic factors that shaped the 1990 Copyright Law? How was this first copyright law legitimized? What led to the major revision of the 1990 Copyright Law after a decade? What are the main differences between the 1990 law and the 2001 Amendment? The evidence comes from three major sources: documentation of multilateral and bilateral negotiations concerning copyright; state officials’ and domestic policy makers’ rationalization and justification of the current copyright policies; and important court decisions and the explanations accompanying those decisions.

**RQ2: What is post-WTO copyright regime like in China?**

1) *How is post-WTO copyright governance negotiated between the international demand and the domestic concerns?*

What are the major problems with enforcing copyright law in China? How have different parties been trying to address those problems? What are the roles of global copyright industries and the Chinese state respectively in this process? This review will inquire whether a binary explanation (global vs. national) or a nuanced multi-level analysis of numerous diverse interests best explains China’s behavior in adopting international rules.

2) *How have domestic copyright industries set their agenda in mobilizing copyright protection?*

What is the relationship between domestic copyright industries’ structural reform and their strategy toward copyright protection? How have emerging local interest groups and the domestic copyright industry influenced post-WTO copyright governance? What role
are the Chinese counterparts of the RIAA and MPAA taking in promoting copyright law and related litigation? The similarities and differences between the agendas of the publishing industry, film industry and computer software industry are discussed.

RQ3: **What are the implications of the current Chinese copyright governance on both global and local communication networks and information flow?**

1) **What may be the social ramifications of the public’s access to information and communication networks in general under the current copyright regime?**  
The issue is addressed as to what extent, in the Chinese context, piracy is a form of information empowerment. In the face of an authoritarian regime that exerts strong information control, does piracy provide Chinese people with access to information that would otherwise not be available through legal channels? How will the emerging digital environment and the corresponding effort to regulate copyright on information networks affect the public’s access to information and their right to communicate?

2) **Which institutional factors, and what analysis of interests, should guide China in implementing its international copyright commitments, recognizing its unique character, history and national economic objectives?**  
What policy choices confront the state in order to balance its desire to shape and protect national information and culture with the need to integrate into an international regime to receive the benefits for economic growth?
Chapter 2

PRIVATE PROPERTY, DEVELOPMENT STRATEGY AND INFORMATION POLICY: ESTABLISHING A CRITICAL VIEW OF COPYRIGHT LAW

2.1 Theoretical Debates on Copyright as Private Property

Copyright protects original intellectual creations fixed in a tangible medium of expression. It therefore covers literary works, musical works (including sound recordings), dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, architectural works and computer software. Copyright forbids the reproduction, distribution, public display or performance as well as digital transmission of protected works without authorization from copyright owners. Proponents of copyright draw from three major intellectual resources to justify the private ownership of “literary and artistic works”: John Locke’s labor theory of property, Georg Hegel’s idea of the possession of property as the expression of self and Jeremy Bentham’s utilitarian view of property.

2.1.1 Justifications of Private Property

John Locke is credited as the first one to make a case for property as a natural right of the individual (Crawford B. Macpherson, 1978). In his Second Treatise on Government, Locke (1690/1964) began with the assumption that God has given the world to men in common and “no body has originally a private dominion” (p.26). He then develops his labor theory of property to justify the private appropriation of the common wealth of nature by arguing that since every male individual is the proprietor of his own person,
The labor of his body and the work of his hands, are properly his. Whatevery then he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes his property. (p.27)

There are several key points worth emphasizing here. First, Locke considers a person’s self-ownership as not being contingent upon any civil or political institution; thus, it is an undeniable “natural right” regardless of the existence and nature of governments (Christman, 1994). Second, labor mixing is fundamental to the establishment of a property title due to the tremendous contribution that labor makes to the value of resultant commodities. According to Locke (1690/1964), “it will be but a very modest Computation to say, that of the Products of the Earth useful to the Life of Man 9/10 are the effects of labour” (p.40). Third, Locke initially sets some limit to the accumulation of private property. There is supposed to be “enough and as good left in common for others” (p.27) and the objects should not exceed “as much as any one can make use of…before it spoils” (p.31). But later in the second treatise (sections 36, 37, 47 and 48) Locke acknowledges that the “Invention of Money” led to the irrelevance of previous natural limits to the fruits of labor represented by property. As Macpherson (1972) points out, “Locke’s astonishing achievement was to base the property right on natural right and natural law, and then to remove all the natural law limits from the property right” (p.199). This is exactly why the Lockean theory was later taken on by mainstream capitalist ideology to defend the maximum protection of unlimited private property.
Another perspective that legitimizes private property draws on the work of Georg Hegel, who argued that property can function as the externalization of the free will of the individual. Although Hegel was an outright critic of Locke, his view on property shared with Locke the presumption of a person’s self-ownership. If the Lockean defense of self-ownership expresses the idea that self-ownership is a form of protection, a negative barrier against the intrusion by the state into the personal realm, the Hegelian view is more of a positive one that emphasizes self-ownership as the manifestation of a person’s extension of his or her personality and will into the world (Christman, 1994). Private property expresses individual freedom in two ways. First, property embodies the individual’s control over nature and it serves as a vehicle by which the individual makes a transition from an inner, subjective world to an external, objective world.

The reasonableness of property consists in its satisfying our needs, but in its superseding and replacing the subjective phase of personality. It is in possession first of all that the person becomes rational. The first realization of my freedom in an external object is an imperfect one, it is true, but it is the only realization possible so long as the abstract personality has its first-hand relations to its object (Hegel, 1996, first section paragraph 41).

Second, the private nature of property also satisfies the basic human need of being recognized. Hegel states that, “since property gives visible existence to my will, it must be regarded as ‘this’ and hence as ‘mine’. This is the important doctrine of the necessity of private property” (Hegel, 1996, section 46). Private property provides individuals with a “boundary” that delimits relationships and permits the subjective personality to emerge from a public world (Richards, 2004).
Hegel’s contemporary, English philosopher Jeremy Bentham prompted a third justification of private ownership that is drastically different from the previous two. Bentham contends that there is no such thing as natural property, and that it is entirely the work of law. He rests both property right and rights of governments on the principle of “utility”, or the greatest happiness of the greatest number (Crawford B. Macpherson, 1978). Bentham identifies four ends that consist of the happiness of society: subsistence, abundance, equality and security, among which security is the “pre-eminent” object. For Bentham, the best thing law can do is not to provide people with subsistence directly but rather to create motives to work. He argues that, “Law does not say to man, Labour, and I will reward you; but it says: Labour, and I will assure to you the enjoyment of the fruits of your labour--that natural and sufficient recompense which without me you cannot preserve…if at the first moment we owe all to labour, at the second moment, and at every other, we are indebted for everything to law” (quoted from Macpherson, 1978, p.50).

This is where neoclassical economics borrowed the notion of privatization from. It is believed that only when the full package of use, transfer, and income rights over goods is vested in individuals are efficient outcomes achieved, which will ultimately meet the other three ends (subsistence, abundance and equality) of the happiness of society (Christman, 1994).

Based upon Bentham’s utilitarian view, liberal economists further refined the argument in favor of privatization as prerequisite to economic growth. According to Posner (2002), property rights confer two types of economic benefit, static and dynamic. The dynamic benefit of a property right is the incentive that possession of such a right imparts to invest in the creation or improvement of a resource in period 1, given that no
one else can appropriate the resource in period 2. This is the “security” that Bentham emphasized as one of the ends of the society. A private property regime allows people to reap where they have sown. Without that prospect the incentive to sow is diminished. If every piece of land is owned by someone then individuals will endeavor by cultivation or other improvements to maximize the value of land. As a result, the society as a whole enjoys the abundance of material goods.

As a matter of fact, none of the three justifications of private property contains specific discussion of privatizing intangible products like ideas or expressions. Putting aside many problems with those property theories as such, my main concern here is what Richards (2004) calls the “legitimate reach of the concept of property and property rights” (p.26), that is, how well they stand up when being applied to copyright.

2.1.2 Copyright and Labor Theory of Property

Critiques of labor theory of intellectual property usually focus on the applicability of two key concepts—commons and labor. Justin Hughes (1988) fully supports the extension of these two Lockean notions into the realm of intellectual products. Taking an essentially neo-Platonic perspective, Hughes views ideas as existing in an immaterial “commons”, from which individuals can create their own property by mixing their intellectual labor with “raw materials” they discover in the vast wilderness. Intellectual property is totally justifiable because (1) just like physical labor, intellectual labor is an unpleasant activity not desirable in itself if not for the reward it could bring; (2) intellectual labor adds substantial value to end products (Hughes, 1988).

Hughes’ standpoint is very much representative of those who advocate a strong copyright protection from a Lockean perspective, yet it is an argument that bears many
loopholes. Locke’s analysis of real property starts with the existence of the commons, which is the gift from God. But is there a preexisting intellectual commons? What exactly are the raw materials with which individuals mix their labor to produce intellectual products? Are those materials as natural as forest or land or are they results of previous creative activities? If the latter, is it still a “natural right” that whoever mixes their labor with intellectual resources should be able to claim a private ownership of the end product? Following a Lockean approach, if every intellectual worker is entitled to a property right over their creations or discoveries, will there be an intellectual commons at all? Fisher (2001) listed seven options defining intellectual commons, including “facts”, “languages”, cultural heritage and different sets of ideas, among which cultural heritage is the most relevant to copyright. According to Fisher, cultural heritage refers to “the set of artifacts that we ‘share’ and that gives our culture meaning and coherence” (p. 186). Under the current copyright regime, a large part of our cultural heritage—novels, paintings, musical compositions, movies—are owned by individuals or organizations as private property rather than by the community as commons. If we do set limits on the private ownership of intellectual products, as the current intellectual property legislation is trying to do, we obviously need some rationales other than Locke’s ideas to justify this invasion of the natural right of the owner. In response to Hughes, Richards (2004) contends it is highly problematic to consider intellectual property as products of the labor expended by isolated individuals and “the notion that ideas already have a prior existence in a ‘common,’ only waiting to be discovered by individuals is an absurdity…ideas as such are the result of social rather than individual creation” (p.41).
The other crucial element of Locke’s theory is labor. Lawrence Becker (1977) emphasizes that one of the important premises of Locke’s argument in the *Second Treatise* is that things are of no use until appropriated and appropriation in most cases involves labor that would not be undertaken except for the expected benefits, to let others have “the benefits of another’s pains” would be clearly unjust. Granting that individuals do add value to intellectual products in ways that are beneficial to others, do they engage in such activities only out of the expectation of reward, especially material reward? For creative workers like scientists, writers, composers or photographers, is intellectual labor a pain that they would usually avoid if not for the property right they could enjoy later? If the answer to these questions is yes, then how can we explain the splendid culture created by human being before the relatively recent emergence of intellectual property rights? Even if we think intellectual workers deserve some reward for their creative endeavors regardless of their original motives, how far shall property rights go? In his *Anarchy, State and Utopia*, Nozick (1974) proposes an oft-cited justification of patent law, but he also asks this very intriguing question: if I pour my can of tomato juice into the ocean, do I own the ocean? Analogous questions abound in the field of copyright. If I write a novel about an adventurous journey of two friends, may I legitimately demand compensation from people who wish to prepare motion-picture adaptations, write sequels or parodies, manufacture toys based on my characters, or produce T-shirts emblazoned with bits of my dialogue? A copyright legislation following a strong Lockean approach would be open to the constant expansion of property right without setting any boundaries, which will certainly impede the existence of an “intellectual commons”.

### 2.1.3 Copyright and Self-development
Hegel’s claim that “property is the embodiment of personality” has led some to forge a link between his theory and artistic objects. It seems that private ownership of literary and artistic works can be justified by the belief that an author’s creation is an expression of his or her own personality as well as subjectivity, thus strictly individual. Hegel writes that mental aptitudes, erudition, artistic skill, talents and so forth are “owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them” (Hegel, 1996, p.43). Intellectual works are materializations of personal traits. Hegel takes the position that one cannot alienate or surrender any universal element of one’s self. Just like one has no right to surrender his or her own life, the alienation of a single copy of a work (e.g., a copy sold to the buyer) does not entail the right to produce more copies because such reproduction is one of the “universal ways and means of expression… which belong to [the author]” (Hegel, 1996, p.69).

Nevertheless, Drahos (1996) argues that this interpretation is based on a misunderstanding of the Hegelian theory’s implications of intellectual property. After taking into consideration the critical nature of the whole Hegelian philosophy, Drahos concludes that Hegel actually offers more challenges than supports to intellectual property. For Hegel, property is the means for the development of personality rather than the receptacle of personality. In order to actualize itself, the free-willing mind needs to occupy something in the world so that others will not take away its power of determination and self-development. What is often ignored by many scholars who argue for authors’ rights is that artistic forms and objects have no privileged status in this respect and “the imposition of artistic form is simply one means by which we can take
possession of something” (Drahos, 1996, p.80). Thus it is problematic to advocate the moral rights of the author “to claim authorship of the work, and to object to any distortion, mutilation or other modification, or other derogatory action” in relation to their works. Such protection of moral rights implies a hierarchy of personality rights that has never been recognized by Hegel. As Drahos (1996) illustrates, the motor vehicle enthusiast who ‘pours’ his personality into the restoration of an old car does not have moral rights over the car once he sells it. Then why should authors and artists acquire special entitlements over the embodiment of their personality? There is no place in Hegel’s work where he makes a discrimination between producers of physical objects and that of intellectual products. “Hegel’s systemic account of property does pose a more serious critical challenge to authors’ rights jurisprudence than is commonly realized” (p.81).

To better understand the organic role of intellectual property and the dangers that intellectual property rights may pose for community, Drahos then makes reference to Hegel’s political philosophy. In contrast to the traditional view of freedom usually linked to Hobbes and Locke, Hegel considers the state not as an opposite force against individual freedom but as representing the highest form of freedom an individual can attain. The state consists of three subsystems: the political, the civil and the ethical. Civil society contains all the institutions necessary for guarding private property, but because of this, the subjective impulse it stands for could become a predatory force that weakens the ethical life of the state. Although Hegel sees the interests of the wealthy as legitimate, he does not think that the state should be the creator and guardian of privilege. Considering this view of the state, we find that many advocates of intellectual property rights actually took a too narrow interpretation of Hegel’s philosophy when they assumed
that the only proper role for the state is to serve individuals as members of civil society. For Hegel, the state should protect the ethical life of the community, which individuals need to participate in so as to reach the final state of their journey to freedom. Intellectual property, by bringing in consciousness about property rights in abstract objects, acts to increase the pressure that civil society asserts on the political state to establish new forms of property protection. Once the state begins to champion the selected interest of intellectual property owners, it runs the risk of replacing the ethical life of the community with a narrow group’s morality (Drahos, 1996).

In sum, Hegel does not explicitly propose any analysis of intellectual property. Although Hegel recognizes the role that property plays in the development of the individual person, he sees it more as the beginning rather than the end of a journey for individual will. For one thing, his ideas on property pose challenges to moral rights of authors; for the other, he warns about the danger of property rights being utilized by civil society for pursuing the interest of a small group, which could ultimately be detrimental to an ethical community.

2.1.4 Copyright and Maximum Social Welfare

The most common justification for copyright protection from a utilitarian viewpoint is what Fisher (2001) calls the “incentive theory”, which basically argues that copyright law provides the necessary incentive for producing more original expressive works.

Information and knowledge products bear the characteristics of nonexclusion, which means that it is extremely difficult (or costly) to prevent someone who does not contribute to the production from using the good (Browning & Browning, 1989). The general consensus among economists is that nonexclusion could lead to the
underproduction of public goods, as it is difficult for investors to recoup their investment and exclude free riders. Intellectual products are particularly susceptible to free riders as the cost of creating (sunk cost) a book, movie, song, map, or computer software is often high, while the cost of reproducing (marginal cost) it is often low. The traditional economic rationale for copyright implies that a firm is less likely to expend resources on developing a new intellectual product if competing firms that have not borne the expense of development can duplicate the product and produce it at the same marginal cost as the innovator; competition will drive the price down to marginal cost and the sunk costs of invention or creation will not be recouped (Landes & Posner, 2003). Thus without intellectual property law, copying would reduce incentives to create and would ultimately circumscribe the variety of intellectual products available to the public.

As many scholars have pointed out (e.g. Fisher, 2001; Landes & Posner, 2003; May, 2003; Richards, 2004), this argument is an oversimplification of the complicated relationship between copyright and social welfare. The main points may be summarized as follows. The first question worth pondering is, to what extent is the production of expressive works contingent upon the maintenance of copyright protection? Nobody has given any definite answer to this question by showing strong empirical evidence. There are empirical works suggesting that patent law has been more important in stimulating innovation in certain industries than in others, but no answer to the question of whether the stimulus to innovation is worth its costs. As for copyright, we have even less empirical data to support the causality between copyright protection and a viable production of literary and artistic works (Fisher, 2001). But what we do know is that the incentive for engaging in creative activities can come from many channels other than
material gains, such as sense of fulfillment, professional recognition (e.g. for scholarly works), prestige and celebrity. Even if we think in terms of income, as Landes and Posner (2003) remind us, many authors derive substantial benefits from publication that are over and beyond any royalties, including a higher salary for a professor who publishes than for one who does not, or greater consulting income, or for popular authors, income from lectures and even product endorsements. For publishing in itself is “an effective method of self-advertisement and self-promotion” (p.48).

Even if the incentive provided by copyright protection is necessary, how shall we weigh the cost and benefit of such a system and define “maximum social welfare”? The cost of copyright is a critical aspect that often gets downplayed or even ignored in those arguments advocating strong copyright protection. Landes and Posner (2003) identified three major costs of intellectual property rights. First, transaction costs for intellectual property tend to be high due to the difficulty of identifying such property, because “by definition it has no physical site” (p.16). For example, when it comes to transferring the property rights of a picture, it will be very difficult to define what those rights are and there might be the question of whether something that looks very much like the original is an infringement or an independent creation that merely resembles the original. The second major cost for intellectual property originates from the behavior of rent seeking, which refers to the expenditure of resources in an effort to secure the rights to economic rents that arise from favorable government policies. When commercially valuable works are about to fall into the public domain, copyright holders have incentives to expend resources on lobbying legislators to extend the copyright term of those works. If the major justification of copyright is providing incentives for more creative activities,
retroactive extension only increases transaction and access cost without bringing about the expected benefits. Plus the resources copyright holders spend on lobbying are a waste from a social standpoint. Third, the cost of protection for intellectual property is also particularly high. For one thing, it is especially difficult to trace the descent of an idea or expression, which does not have a definite physical format, and to mark the boundary lines for intellectual property. Furthermore, the public-good nature of intellectual property can make it costly to exclude free riders as well as detecting unauthorized uses (Landes & Posner, 2003).

Following a utilitarian approach, the critical question is, what is the minimum required reward necessary to procure the maximum dissemination of original and useful expressions? A strict utilitarian approach would require that every time the legislators vote for an extension of copyright protection, there should be enough empirical evidence showing that such extension would actually provide more incentive for authors to create and the benefit would exceed the cost. In reality, however, due to the difficulty of collecting empirical evidence on the effect of copyright and the strong lobbying power from copyright industries, law makers tend to assume an oversimplified causal relationship between strong copyright protection and flourishing creative activities.

In sum, neither Locke’s labor theory of property, nor the Hegelian theory of property and self-development, nor Bentham’s utilitarian theory provides adequate support for an unconditional intellectual property right in general and copyright in particular. There are serious gaps and limitations in each of the three justifications when they are applied to the intangible world of intellectual products. Nonetheless, these rationales constitute
mainstream discourse in multinational negotiations related to copyright, and they are often invoked to legitimize universalized copyright protection in international treaties such as the Berne Convention, the WIPO Copyright Treaty and the TRIPS. In order to understand the dominant status these “property talks” enjoy in the arena of copyright, we now turn our attention to the relationship between copyright and global capitalism.

2.2 Economic evidence for effects of intellectual property regimes

Economic evidence on the total welfare effect of IPR regimes has been inconclusive. Correa (2000) identified three major methodological difficulties for any attempt to analyze the impact of IPRs. First, it is very problematic to isolate IPRs in order to recognize the effects that are exclusively attributable to them, as distinct from those deriving from other economic or institutional factors. Second, intellectual property is a very heterogeneous set that ranges from inventions to artistic works, to geographical indications. Thus any reference to the “impact of intellectual property” is likely to constitute an oversimplification that would hardly be useful to understanding present conditions, not to say anticipating future trends. Third, even when one particular type of intellectual property is considered, its actual importance significantly varies in accordance with the sector and the type of activities or products involved (Correa, 2000).

Bearing in mind these difficulties, I will try to summarize the major findings on the relationship between the IPR regime and various dimensions of economic development, including foreign direct investment (FDI), trade flow, and economic growth.

Some analyses suggest that strengthening IPRs can be an effective means of inducing additional inward FDI. For example, in a survey comprising 100 major US firms in six
industries, Lee and Mansfield (1996) concluded that IPR weakness among developing countries tends to discourage FDI by these US firms. Maskus (2005) also argues that IPRs play an important role in multinational enterprises’ decision processes concerning FDI, though the importance varies by industry and market structure. His analysis of FDI flows to China in the early 1990s points to rapid growth and increasing openness as key encouraging factors rather than the stringency of IPRs. Other studies show empirically, however, that IPRs are a significant determinant of neither FDI flows (Ferrantino, 1993) nor the location of R&D facilities by multinational enterprises (Kumar, 1996). In fact, inflows of FDI in Asia and the Pacific have been concentrated in a few countries: China, Singapore, Malaysia, Thailand and Indonesia. These countries have become major recipients of FDI before changes in IPRs, even under legislation considerably inconsistent with the TRIPS standards (Correa, 2000). Quoting a 1993 United Nations report, Correa (2000) concludes that in a post-WTO scenario, innovative companies in the North are likely to sell directly the products or services that incorporate the innovations, rather than transfer the technology through FDI and licensing agreements. This is especially true in the area of copyright, for which protection abroad is neither necessary nor intended to guarantee FDI, US support of copyright protection is just “a matter of propping up profits and stemming losses in one of the US’s strongest export sectors” (Callan, 1996). Furthermore, Richards (2004) asks a more fundamental question: even if it could be demonstrated that strengthening IPRs stimulated FDI flows, could we conclude that such flows are welfare improving to the poorer countries in the short and long runs? Granted that FDI can benefit economic growth and development by facilitating technology transfer or improving productive efficiency, it has yet to be
empirically demonstrated that those benefits are greater than those that are obtained via the alternative of direct imitation and/or adaptation of foreign technologies in the absence of strong IPR protection. Richards (2004) points out there is also a critical distributional and equity aspect to this issue. To what extent does the transfer of technology via foreign investors aided by strong IPRs help to raise the well-being of a large population of a poor country? “While it may be true that foreign investors pay higher than average wages, there are many well-documented cases in which FDI had a highly distorting impact on the structure of a LDC’s economy and society” (p.73).

Another alleged benefit of a strong IPR regime is better trade flow. Maskus and Penubarti (1995) explored the relationship between patent law and international trade flow. Their regression results show a positive and statistically significant result between patent strength and imports. Nonetheless, when they disaggregated the data set by industry, there was no statistically significant relationship between trade flow and patent-sensitive industries, although several patent-insensitive industries reveal the positive relationship. This result seems to suggest that if the goal of the TRIPS agreement is to promote international trade, the agreement should only be extended to those patent-insensitive industries. Yet in reality, it is patent-sensitive industries that exert most pressure for the agreement. A more recent but similar study was conducted by Fink and Braga (2005). The authors suggest that the effects of IPR protection on bilateral trade flows are theoretically ambiguous. Because of the complex static and dynamic considerations related to a policy of tighter protection, it is difficult to generate normative recommendations. When they estimate the effects of IPR protection in a gravity model of bilateral trade flows, their empirical results suggest that, on average, higher levels of
protection have a significantly positive effect on nonfuel trade\textsuperscript{3}. However, IPRs are not found to be significant for high-technology trade flows.

The third relationship to be examined here is that between IPRs and economic growth in developing countries. Theoretically, stronger IPR can affect economic development in either a positive or negative way. The stimulative effects of IPRs protection on economic growth include: stimulation of invention and innovation, market deepening, quality assurance, and domestic and international diffusion of knowledge. On the other hand, IPRs could also limit economic development through increasing administrative costs, shifting resources out of infringing activities, monopoly pricing, higher imitation costs and IPR abuses (K. E. Maskus, Dougherty, & Mertha, 2005). Two empirical studies have considered this issue in econometric terms. Gould and Gruben (1996) found no strong direct effects of IPR strength on growth. But there was significant positive effect when the index was interacted with a measure of openness to trade. In other words, their study reveals that the character of a country’s trade regime plays a role in determining how IPRs affect economic growth, with more open economies benefiting more than closed ones. Park and Ginarte (1997) conducted a similar test, but they ran separate regression for the thirty richer countries and thirty poorer countries they chose as samples. Again they found no direct correlation between IPR strength and economic growth, but patent had a positive effect on physical investment and R&D spending in the overall sample and in the subsample involving the richer countries. The authors suggest from these results that either the LDCs do not respond to material incentives in the same way as the

\textsuperscript{3} Nonfuel trade refers to the transaction of nonfuel commodity, such as agricultural products and raw materials. During the process of producing these, energy is used for purposes other than for heat, power, and electricity generation.
developed countries, or that a significant part of their R&D efforts is imitative rather than innovative.

Based on the economic evidence discussed above, we really cannot conclude that the upward harmonization of intellectual property protection would have a beneficial impact on the welfare of the world’s majority. For every perceived benefit of IP protection comes with a cost, and each country should take into consideration its own characteristics in order to find a balancing point. Many economists have suggested that the welfare interests of the technology-producing and -exporting countries stand in fundamental contradiction to those of the consuming and importing countries (e.g., Chin & Grossman, 1990; Deardorff, 1992; Subramanian, 1991). Thus the relationship between the IPR regime and economic development is quite uncertain.

2.3 Copyright governance and Global Political Economy

2.3.1 Hegemony Theory

So far, problems with philosophical justifications of copyright as private property and the inconclusive empirical evidence for implications of the IP regime on total welfare have been discussed. Now I want to turn attention to the Gramscian term of hegemony, which I believe suggests an alternative approach to interpreting the current international copyright regime.

As much as Marx emphasized the dialectical relationship between the base of material production and the superstructure of political, legal and cultural sphere, traditional Marxism was weak on analysis of the forms of political power, the concrete relations between social classes and political representation and the cultural and ideological forms
in which social antagonism are fought out or regulated (Forgacs, 2000). One of the major theoretical contributions Gramsci made was that by developing two central concepts: hegemony and historical bloc, he offered an integral and non-deterministic framework for analyzing the totality of economic, political and ideological forces. According to Gramsci, hegemony is “an equilibrium between ‘leadership’ or ‘direction’ based on consent, and domination based on coercion in the broadest sense” (Lawner, 1973, p.42). He defines “historical bloc” as the ensemble of structure and superstructures, and it is formed only when the equilibrium exists, that is to say, when a given class succeeds in maintaining hegemony over society through both direction and domination, persuasion and force. A hegemonic apparatus in the Gramscian sense is realized through establishing moral and intellectual leadership, which relies more on consensus rather than coercion. Therefore, instead of reducing everything to economics, Gramsci emphasizes “the importance of facts of culture and thought in the development of history” and “the function of great intellectuals in the organic life of civil society and the state” (Forgacs, 2000, p.195).

Scholars in international political economy and international relations have applied hegemony theory to analyze the “fit between power, ideas and institutions” (Cox, 1996, p.104) in a larger world order. Rupert (1993) elaborates on the notion of “historical bloc”: “to the extent that a class or fraction is able to articulate a unifying ideology which presents itself as universal, which can elicit the variety of social practices, it may create the basis of hegemonic leadership in both state and civil society—that is, in Gramsci’s expanded or integral state” (p.80). Cox (1993a) stresses that the Gramscian term of hegemony should not be confused with the dominance of one country over others or what is commonly understood as imperialism. Rather, particular states are hegemonic insofar
as they are able to found and protect a world order that is considered universal. His description of world hegemony is worth quoting at length here:

“Hegemony at the international level is thus not merely an order among states. It is an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of production. It is also a complex of international social relationships which connect the social classes of the different countries…world hegemony, furthermore, is expressed in universal norms, institutions and mechanisms which lay down general rules of behavior for states and for those forces of civil society that act across national boundaries—rules which support the dominant mode of production (1993, p.62).

Cox recognizes that one of the important mechanisms of world hegemony is international organizations. Such organizations possess certain features that are expressive of their hegemonic function: (1) they embody the rules that facilitate the expansion of hegemonic world orders; (2) they are themselves the product of the hegemonic world order; (3) they ideologically legitimate the norms of the world order; (4) they co-opt the elites from peripheral countries; (5) they absorb counterhegemonic ideas.

2.3.2 Hegemony of Neo-liberalism

From the mid-1970s onwards, when it became clear that Keynesianism’s expansionary response to the economic crisis of the early 1970s had failed, the post World War II commitment to an essentially Keynesian bargain combining social welfare policies and multilateralism unraveled. Monetary neoliberalism resurged in both academic and policy circles as the only good alternative to economic stagnation and even retrogression in the poor countries. Neoliberalism insists on the expansion of the “free market” and the rolling back of the state, whose regulation is deemed to be inefficient and irresponsible.
Cox calls it “hyperliberalism” that endorses an almost Darwinian conception of global economic competition (Cox, 1993b). Neoliberalism puts economic growth as the first and foremost goal worth pursuing, while expecting issues like distributional justice and equity to be *eventually* solved by the “trickling down” effect of wealth accumulation. The Reagan and Thatcher era in the United States and the United Kingdom embraced an anti-Keynesian approach to economic policy. Both leaders implemented a radical free market agenda that favored finance capital and other mobile factors of production. This new approach was “not just a change of policies but a conscious effort to change ideas and expectations about the appropriate role of government, the importance of private enterprise, and the virtues of markets” (Gill & Law, 1993, p.101). The collapse of the communist system in the Soviet Union and Eastern Europe was further celebrated by neoliberalist theorists as the end of ideology. In the early 1990s, Fukuyama (1992) claimed that the passing of “Marxism-Leninism” signals “the end point of mankind’s ideological evolution”. He argued that this was the evidence of “the total exhaustion of viable systematic alternatives to Western liberalism”. Liberal democracy may constitute the “final form of human government” and as such constitute the “end of history” (p. xi).

The ideology of neoliberalism spread throughout the globe in the 1980s and came to predominate in major international organizations, most notably the IMF, the World Bank and the GATT. As Cox (1993a) points out, international organizations are important mechanisms of world hegemony. These institutions are both the outcome and the instrument of the hegemonic world order of neoliberalism. On one hand, each of them originated from the heavy hand of U.S. diplomacy and economic dominance in the postwar world; on the other hand, they had as their fundamental purpose the
establishment of conditions necessary to the facilitation of international trade and international investment (international circulation of productive and money capital) (Richards, 2004). The debt crisis of the 1980s opened the way for the imposition of neoliberal reform in many developing countries. In order to satisfy IMF conditionality requirements for emergency loans, many of these countries had to cut social spending, privatize state-owned enterprises, implement tax reforms, deregulate rules pertaining to foreign investment, remove exchange controls, and introduce so-called labor flexibilization policies (Richards, 2004). The neoliberal recipe unabashedly promotes the accumulation and expanded reproduction of capital on an international scale. The United States, once again, is found to be the model par excellence for reform, and the ideology of market neoliberalism, combined with liberal structural reform, is advanced as a recipe for securing the conditions of stable economic growth.

It is within this hegemonic order of neo-liberalism that the global information society is emerging. As knowledge and information are becoming increasingly important resources, it is crucial to integrate them into the global economic system. Neo-liberalism’s faith in the free market leads to its strong support for the institution of property rights and its re-emphasis on private economic activity over public interest (May, 2003; Sell, 2003). Thus despite contradictions within economic justifications of intellectual property as well as disparity between theory and reality, it is held to be truth that strong protection of intellectual property is the only way to achieve economic efficiency. Furthermore, the assumption of neo-liberalism is that economic efficiency per se is the ultimate goal worth pursuing, regardless of its actual effect on social welfare and distributional justice.
2.3.3 Political Economy of the TRIPS

Before the TRIPS agreement, two major treaties had been regulating the international dimension of intellectual property rights—the Paris Conventions for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886. In 1967, the World Intellectual Property Organization (WIPO) was established as a United Nations (UN) agency to administer the Paris and Berne conventions and to seek the harmonization of national intellectual property laws. Starting from the late 1980s, industry groups in developed countries, especially those in the U.S., began to exert stronger pressures on their governments for revising the international IP regime. Several factors contributed to the growing dissatisfaction with WIPO. First, the so-called information technology revolution sets in motion the transformation of economic structure in many developed countries, where “there is less and less return on the traditional resources: labour, land and (money) capital. The main producers of wealth have become information and knowledge” (Drucker, 1993). For industries that rely upon information and knowledge as the most important assets and inputs—pharmaceutical industry, biotechnology industry, entertainment industry, software industry, etc.—there was increasing need to have an institutionalization of property in intellectual products. Second, the 1980s also saw the growth of the U.S. trade deficit. In response to that, businesses argued that the unlawful appropriation by others of American intellectual property was a major reason for the burgeoning trade deficit and if a strong international IP regime forced developing countries to pay retail price for all the U.S.-produced intellectual products, the deficit could be wiped out (Alford, 1994). Despite the faulty assumption that once prohibited from making unauthorized copies, the alleged infringers
would certainly purchase legal products at full price, this argument was picked up by the
government. The link between intellectual property and trade soon became an important
Act to require the U.S. Trade Representatives (USTR) to defend U.S. intellectual
property rights in the world economy. The 1988 Omnibus Trade and Competitiveness
Act further mandated that the USTR provide an annual report to Congress on unfair trade
practices abroad, the so-called Special provision. Those who appear on the USTR list
would face severe trade sanctions. Third, from the standpoint of business interests, the
WIPO-administered conventions were “toothless”. For one thing, these conventions
lacked strong enforcement provisions; for another, there was no binding and effective
mechanism for settling IP-related disputes between states (Matthews, 2002; May, 2003;
Sell, 2003).

The TRIPS agreement, which was part of the Final Act of the Uruguay Round that
established the World Trade Organization (WTO), was considered as “probably the most
significant development in international intellectual property law this century”(May,
2003, p.68, quoting Blakeney, 1996), as this was the first time that IPRs were included in
the international trade regime. As such, TRIPS not only embodies IP-related industries’
success in shaping a public law that protects their private interests (Sell, 2003); more
importantly, it indicates the triumph of a hegemonic order in the arena of intellectual
property, an order that prioritizes commodification over preserving commons,
commercial interest over public access, production over diffusion, property rights over
development strategy.
Sell (2003) documents in detail how the US-based multinational corporations first imposed their vision of international IP on the decision-making process of the U.S. state, and later built consensus in the multilateral negotiations leading up to the Uruguay Round of GATT. Her analysis combines structural, institutional, and agent-based explanations with an emphasis on concrete problems that decision makers at various levels had to solve. Sell argues that the structure of global capitalism fostered institutional change in the United States. The state adopted policies designed to increase its own and its firms' abilities to compete in the global economy. Private enterprises rely on the political and social conditions secured by the state for their further accumulation. As Woods (1995) points out, “it is within options set out by the state that interest groups organize and influence policies and their implementation. In the meantime, private sector activism played an important role in institutional change at the domestic, international, and ultimately global levels. In fact, private sector actors had turned out to be very powerful in pushing their agenda. Sell (2003) divides the consensus-building process into three parts—identifying the problem and providing information; framing the issue; and advocating an appealing solution. First of all, private sector actors provided expertise to a government that did not understand very well lots of issues in the IP area. In this case, the knowledge of IP is bound up with a commitment to promote its protection. Secondly, they forged the link between intellectual property and US trade policy. The US-based twelve-member Intellectual Property Committee (IPC) \(^4\) presented a strong case in front of policy makers that blamed piracy for the growing US trade deficit. Last but not least,

\(^4\) Initially, the IPC members were: Bristol-Myers; CBS; Du Pont; General Electric; General Motors; Hewlett-Packard; IBM; Johnson & Johnson; Merck; Monsanto; and Pfizer. In 1994, CBS, Du Pont, and General Motors no longer participated, but Digital Equipment Corporation, FMC, Proctor & Gamble, Rockwell International and Time Warner did.
corporate actors were able to construct for the IP issue a normative context, which defines right and wrong and distinguishes fair from unfair competition.

If the final agreement clearly represents the vision of private enterprises in developed countries, how were developing countries persuaded? Matthews (2002) identifies several reasons why the latter group’s initial opposition to the TRIPS was ebbing away near the end of the process. The Special 301 utilized by the USTR was proved to be effective in undermining developing countries’ resistance to a multilateral agreement. Facing escalating pressures from the United States via Section 301, many developing countries hoped that the dispute settlement mechanism included in the package of TRIPS would offer them better solutions on IP issues than the unilateral trade sanction exerted by the US (Matthews, 2002; Richards, 2004; Ryan, 1998). Also, in contrast to developed countries delegations’ access to the highest level of business advice, developing countries were experiencing “negotiation fatigue” towards the end of the Uruguay Round due to information deficiency and lack of technical expertise. While only ten developing countries sent their IP experts to the TRIPS negotiations, IP specialists from developed countries already put on the table a detailed draft of the agreement (Drahos, 1995; Matthews, 2002). Another factor that contributed to the final consensus building was the linkage-bargain diplomacy employed in the Uruguay Round (Matthews, 2002; Richards, 2004; Ryan, 1998; Sell, 2003). As Ryan (1998) points out, the key to getting agreement in diplomatically and politically difficult areas is “getting the right mix of issues on the table so that previously unrelated issues can be linked” (p.12). Under the condition that TRIPS was accepted, developing countries were promised better access for their agricultural and textile products to markets in developed countries. “Indeed, a necessary
condition for the attainment of hegemony by a class or class fraction is the suppression of their narrow, economic interests by a more universal social vision or ideology, and the making of concrete concessions to subordinate groups in the process of securing their participation in the social vision of the leading class or fraction” (Rupert, 1993, p.81).

As an outcome of this particular process, the TRIPS agreement established a hegemony that encompasses material production, political institution and ideological conception of copyright. None of these three dimensions can be isolated from the other two and each one of them has an impact on another. Material circumstances include both the social relations and the physical means of producing intellectual products. Superstructures of ideology and political institutions shape the development of both aspects of production and are shaped by them. This is what Gramsci meant by emphasizing the theory of hegemony as being dialectic rather than reductionism. The TRIPS outcome constitutes structural power to shape the environment and redefine options for further development in many ways (Palan & Abbott, 1996; Sell, 2003).

First, the TRIPS agreement is an extension of the rights accorded to the owners of copyrights, and as such, it is also part of the extension of a property-based market liberalism into new areas of social interaction (May, 2003). May illustrates how the agreement is about ownership rather than creation with the example of moral rights. Although moral rights are recognized in a number of countries of continental Europe, where those rights come into conflict with rights mandated by TRIPS, they are disallowed. Second, as an agreement that was spearheaded by multinational corporations, the TRIPS is based on a controversial conception of copyright that privileges private rights over public goods (May, 2003; Sell, 2003). Although it does acknowledge the need
to take appropriate measures to protect the public interest, it is always under the condition that “such measures are consistent with the provisions of this Agreement” (GATT 1994, A1C). Third, in addition to putting legal constraints on the flow of information and knowledge, the TRIPS agreement restricts the discourse that can be mobilized to conceive any alternative model of copyright. According to May (2003), “the importance of the term “trade-related” is that it makes explicit the central concern of the negotiators from the developed states: the need to legislate for this commodity form of knowledge” (p.77). The establishment of final agreement indicates the universal acceptance of the link between trade and intellectual property rights. The notion of rights as conceptualized in the agreement is that “the whole purpose of these rights is that they can be traded, that they are alienable” (p.78). Therefore, the “non-trade-related” aspects of copyright as “an instrument of national cultural policy, a protection of personal identity, and a means by which to enhance and further democratic ideals” (Graeme B. Dinwoodie, 2000, p149) were all overshadowed by the need to fully exploit the commercial value of artistic and literary creations.

2.4 Copyright, Information Access and Cultural Diversity

The pervasiveness of neo-liberal “free-market” logic and the dominance of “property talks” have made it more and more difficult to construe copyright issues in an alternative framework. Nonetheless, the ramification of copyright law goes far beyond the private interest of copyright owners and the prosperity of copyright industries, so that we shall not limit our concerns to purely economic ones. As many have suggested, given the current trend of strengthening and extending copyright protection on a global scale, it is
very important to shift our focus to assuring public access to information and sustaining cultural diversity.

A lot of scholars used the term “enclosure” to refer to the increasing privatization of intellectual products (e.g., Bettig, 1997; Boyle, 2003; Dyer-Witheford, 2002) and its negative consequence on the public interest. In his book *Copyrighting Culture* (1996), Bettig demonstrated how copyright serves as an instrument of wealth that can be utilized in the cycle of capital accumulation to generate more wealth. The tendency of copyright to be monopolistic is exacerbated by the oligopolistic structure of the media marketplace. “Ultimately, the effects of concentrated ownership of the means of communication and of the messages themselves are the same: high barriers to entry in the ‘marketplace of ideas’ and a narrow and limited range of informational and cultural works” (p.2). With the tendency of centralization in capitalist production, the private ownership of copyright could lead to the decrease of diversity in intellectual works.

Vaidhyanthan (2001) traced the development of American copyright law and how it has affected American literature, film, television and music. Like many other critics of the current U.S. copyright law, Vaidhyanthan thinks the law has lost sight of its original charge: to encourage creativity, science, and democracy. Instead the law rewards works already produced and limits works yet to be created. Examples are abundant in his book of how copyright law is abused by copyright owners to put restrictions on new expressions that try to draw intellectual resources from old works. Vaidhyanthan argues that American culture and politics would function better under a system that guarantees “thin” copyright protection—just enough protection to encourage creativity, yet limited
so that emerging artists, scholars, writers, and students can enjoy a rich public domain of the broad “fair use” of copyrighted material.

Boyle (1996) offers a critique of the notion of authorship, which is one of the preconceptions that copyright law relies upon. For one thing, the authorship concept is closely tied in with the western tradition of individualism, thus implicitly unfavorable toward collective creations in non-western, non-mainstream cultures, such as storytelling, knitting patterns, etc. For another, this notion also builds around the emphasis on originality, which tends to undervalue the importance of sources, of the public domain. Boyle suggests that instead of pursuing the “author-vision” of copyright law that constantly moves toward further commodification of information, our decisions should focus on a different set of criteria. “The first is egalitarian--having to do with the relative powerlessness of the group seeking information access or protection. The second is the familiar radical republican goal of creating and reinforcing a vigorous public sphere of democracy and debate” (p.28). Somewhat corresponding to these criteria, Price (2002) also suggests studying how piracy contributes to the diversity or multiplicity of media content, and how it could support the development of plural and abundant media in transitional societies.

Further criticism of the current trend of copyright protection was also framed in the context of new communication technology (e.g., Boyle, 2003; e.g., Jackson, 2001; Jackson, 2002; Litman, 2001). While digital technology has great potential to distribute information in an egalitarian manner, copyright owners are making unprecedented efforts to restrict the public’s access. Being a law that has been “designed by a few individuals and applied to many”, copyright law has been characterized by its “neglect of the
interests of the ‘audience’, and neglect of the importance of conserving the public domain for the benefit of innovators and users alike” (Boyle, 1996, p.197).

2.5 Existing Knowledge of China Copyright

The current literature on the copyright regime in China can be categorized into three groups, all of which proffer important knowledge on this topic yet each has its own limitations. Exegesis of legal texts and compilations of cases by Chinese scholars (P. Feng, 2003; Xue & Zheng, 1999, , 2002; N. Zhang, 1997; C. Zheng, 1997) constitute the starting point for any further exploration of China’s copyright law. In addition to introducing China’s system of intellectual property protection, including legislation and enforcement, some scholars also noted legislative initiatives and commented on the court decisions of important cases (Zheng, 1997; Xue & Zheng, 2002). Others supply discussions of some basic concepts and key terms of the Chinese political-legal system (e.g., Feng, 2003). Since conducted exclusively by legal scholars, attention was mostly given to the legal system per se rather than to the political, cultural, economic and ideological context of legislation. For one thing, these researches did not explore the (in)compatibilities between the law on paper and the social conditions surrounding it. Neither did they provide much information on the actual effectiveness of copyright enforcement. Additionally, they did not discuss how a law that is designed to regulate “literary and artistic works” is likely to affect communication networks and information flow in China.

Due to China’s status as the largest developing country and the high-profile U.S.-China trade dispute concerning the piracy of intellectual products in the late 1990s,
China’s copyright law is often used as a typical case to illustrate various problems with the current international copyright regime. In this literature, there are actually two different attitudes toward the current trend of harmonizing international copyright through bilateral or multilateral treaties. For those who consider universal copyright protection as a desirable goal, the China case helps them propose better strategies to achieve that goal (Bains, 2002; Jayakar, 1997; Yu, 2000, 2003). For scholars who are more critical of the developed countries’ efforts to realize “upward harmonization” (Aoki, 1998), the problems identified with the current trend in international copyright include multilateral treaties as a threat to the sovereignty of nation-states (Aoki, 1998; Cate, 1994, 1998), as the instrument of substituting private interest for public interest (Endeshaw, 2002; Sell, 2003), and as the attempt to dismiss the heterogeneous historical, political, and economic conditions in different countries (Graeme B. Dinwoodie, 2000; Jackson, 2003). Regardless of their standpoint, however, these authors are more interested in the generalizability rather than the specificity of the China case, for China is perceived as a representative example of developing countries.

The third body of literature offers a more contextualized analysis of Chinese intellectual property law compared with the first group, while having a stronger intention of interpreting the specific situation in China as such. This type of analysis tries to avoid constructing the path that intellectual property law in the Western countries has followed as providing a “normal” course against which Chinese developments are to be evaluated. In his book *To Steal a Book Is an Elegant Offense*, William Alford (1995) traced the history of China’s intellectual property law and attributed the underdevelopment of such a legal system to the unique political culture of the Chinese society. He contended that
there was no indigenous concept of intellectual property in imperial China before the introduction of such a notion from the Western world in the late nineteenth century. The major reason for this is that the Confucian tradition emphasizes the need to interact with the shared past, which makes it almost impossible for individuals to claim the exclusive ownership of certain expressions. Any regime can only acquire legitimacy through establishing its connections with the past and that past should be the communal knowledge that is accessible to everyone. He then argued that current attempts to establish intellectual property law on the Chinese mainland have been deeply flawed in their failure to address the difficulties of reconciling legal values, institutions, and forms generated in the West with the legacy of China's past and the constraints imposed by its present circumstances. As no one else has presented such a systematic discussion of China’s historical experience with intellectual property and related issues of Chinese political culture, Alford’s book becomes arguably the most cited one in later analysis of Chinese intellectual property law. Notwithstanding its obvious merits, To Steal a Book is an Elegant Offense leaves unexplored significant issues. Alford wrote the book almost a decade ago, when China was much less involved in globalization than it is today. Thus when we examine Chinese copyright policies in the contemporary era, we may need to reevaluate the power relationship between transnational organizations and the nation-state. Secondly, Alford emphasized the incompatibility between a standardized Western version of intellectual property law and the particular political cultural tradition of China, but he did not talk much about the internal incentive for China to establish such a legal system. Among the forces that are shaping the Chinese copyright regime, the active agency of various Chinese players also takes an important role. Last but not the least, the
decade after the publication of *To Steal a Book is an Elegant Offense* witnessed the rapid advance of digital technology and global communication networks, which pose further questions worth exploring.

Another interesting treatment of the Chinese copyright law is a book written by a communication scholar. In her work *Framing Piracy: Globalization and Film Distribution in Greater China*, Shu-jen Wang (2003) provides case studies on film piracy and Hollywood’s global film distribution networks in Greater China (including the Mainland, Hong Kong, and Taiwan) within the context of “a changing digital media environment” (Wang, 2003). The field observations and in-depth interviews conducted by the author are great resources for understanding film distribution, piracy and governmental policies in Greater China. Furthermore, the interconnections Wang maps out among local governments, global trade regimes, legitimate and illegitimate copyright industries, and consumers offer valuable insights in reassessing key dimensions like law, technology and globalization. Although Wang states in the introduction that the book also aims to examine “the functional and regulatory roles of the state in an age of transnational trade and intellectual property regimes” (Wang, 2003, p.1), an in-depth discussion of related theories as well as state policies is lacking in this project and thus leaves a series of important questions unanswered. For example, what motivates the state to adopt the current copyright regime? What is the relationship between copyright law and the state’s goal of propelling economic growth on the one hand and maintaining information control on the other?
CHAPTER 3

GLOBALIZATION, DEVELOPMENT AND THE TRANSFORMATION OF THE NATION-STATE

The development of China’s copyright law has been significantly influenced by the speed and scope of China’s integration into the globalization process. Scholars noted that IP rights reforms in China kept pace with Chinese WTO negotiations—“when the negotiations encountered obstacles, the IP rights reform slowed down; when the negotiations reached agreements to promote the accession process, the IP rights reform accelerated noticeably. Since China has become a member of the WTO, Chinese IP law reform has also peaked” (Xue & Zheng, 2002, xxxix). This is nothing coincidental considering the central role that information and knowledge occupy in today’s global economy. Whether it is conceived as private property right, as development strategy or as information and cultural policy, China copyright law is caught in various tensions between transnational force and national power. The global trend of harmonizing copyright protection is constantly mediated by the state’s need to maintain legitimacy, to stimulate economic development and to retain information control. Before we start analyzing the power dynamics in the evolution of China’s copyright law, it is important to situate our understanding in a proper theoretical framework. Thus a review of some key aspects of globalization is in order. In this chapter, different views on the relationship between globalization and development are first discussed, then the changing role of the nation-state in the era of globalization is examined, followed by a more specific analysis of the transformation of the Chinese state.
3.1 Globalization and Development

3.1.1 Dependency Theory and World System Theory

Dependency theory emerged in the 1960s as an attempt to critically examine the persistent poverty of the Third World, especially Latin American countries. It is generally considered a Marxist theory although some of its later developments departed from classical Marxist propositions. Dependency theory is Marxian because it is based on the concept of exploitation of the weaker LDCs by the capitalist developed countries (DC). Also, it explains development and underdevelopment with reference to the capitalistic framework of the center (Ghosh, 2002). Sunkel (1969) defined dependency theory as “an explanation of the economic development of a state in terms of the external influences—political, economic, and cultural—on national development policies” (p.23). While modernization theory attributes underdevelopment to internal factors like the lack of key productive elements (e.g. capital, skilled workforce) or key institutions (e.g., market, bureaucratic efficiency), dependency theory sees underdevelopment as an outcome of the hierarchical structure of global capitalism, which assigns certain countries as providers of raw materials or cheap labor and denies them the opportunity to develop a full-fledged economy. In other words, the Third World countries remain underdeveloped not because they are not fully capitalist, but because they are incorporated into the capitalist system on a subordinate and dependent basis.

Frank (2002) refers to industrialized and developing countries as “metropolises” and “satellites” respectively. He argues that under the imbalanced relationship between the two groups, it is impossible for the satellites to achieve development, as metropolitan
countries have strong incentives to perpetuate the hierarchy in order to maintain the supply of primary commodities as well as the market for their “value-added” products. This kind of relationship not only exists at the macro-level of the world economy, but also at the micro-level of the economic structure of a particular underdeveloped country, where the city develops at the expense of rural areas and regions. In capitalism, it is always the case that the surplus from the weaker part is extracted and transmitted through a series of metropolis-satellite links (Ghosh, 2002).

Despite the insights dependency theory offers in explaining the persistent gap between the metropolis and the satellites, it has some obvious limitations. First, this theory treats developing countries as a homogeneous group and fails to acknowledge great differences among them (Gunnarrson, 1985; Hung, 2004). Second, the theory takes a rather simplistic view toward dependency and assigns too weak bargaining power to states and local capitalists of the Third World countries. As a result, it fails to explain the economic growth and industrial development that has taken place in some Newly Industrializing Countries (NIC) (Sklair, 2002). Furthermore, overemphasis on external factors leads to neglect of internal dynamics in a country’s economic development (Hung, 2004).

World System Theory developed by Wallerstein (1974a) shares many assumptions with dependency theory, including the repudiation of modernization theory and the basic recognition of unbalanced military and commercial power in the world economy. By Wallerstein’s definition, a world-system is any historical social system of interdependent parts that form a bounded structure and operate according to distinct rules, or “a unit with a single division of labor and multiple cultural systems” (Wallerstein, 1974b, p.390). The current world-system is a capitalist world-economy because it is “a system that operates
on the primacy of the endless accumulation of capital via the eventual commodification of everything” (Wallerstein, 1998, p.10).

World System Theory is less rigid than dependency theory because it points out the existence of “the semi-periphery” as a “buffer” between the core and the periphery. The semi-peripheries could be either core regions in decline when they failed to predominate in international trade or peripheries attempting to improve their relative position in the world economic system by pursuing limited development. The semi-periphery did achieve capitalist development, but their development is dependent in two senses. First, much of the production of the industries in semi-peripheral countries is the output of transnational firms that are headquartered in the core regions. Second, a large percentage of products from the semi-periphery countries is sold as input for further production in center country industries (Richards, 2004). The semi-peripheries exploited by the core often were exploiters of peripheries themselves. Another thing that differentiates World System Theory from earlier dependency theory is the unit of analysis (Richards, 2004). Dependency theory typically starts from nation-states and assumes the existence of a national economy. World System Theory, in contrast, breaks the binary of external vs. internal factors suggested by the dependency theory and shifts focus to explore the dynamics of development of the capitalist world economy a whole.

Peter Evans (1979) applied the concept of dependent development in analyzing the mechanism of economic development in the Third World countries. According to Evans, dependent development is characterized by the alliance of international and local capital. The state also joins the alliance as an active partner, thus this triple alliance is a fundamental factor in the emergence of dependent development.
Besides the economic exclusion of the masses, in order to maintain the stability required for continuing large-scale foreign investment and economic growth, the dominant ruling class excludes the masses politically from participating in politics by making abrupt constitutional changes and by repressing their demands for democratic reforms. Accordingly, most dependent development effectively proceeds under bureaucratic-authoritarian regimes.

Drawing together the insights offered by earlier dependency theory, World System Theory and Evans’ analysis of dependent development, I summarize four major implications for developing countries and relate each one to the specific concern of copyright policy.

1. Dependency analysis suggests that the success of the richer countries was a highly contingent and specific episode in global economic history. A repeat of those relationships is not highly likely for the poor countries of the world. Taking the intellectual property issue as an illustrative example, the intellectual property rights regimes of the Now-Developed Countries (NDC) were (when they were themselves developing countries) quite deficient by the standards of our time. There were widespread and serious violations by even the most advanced NDCs until the late nineteenth century, especially when it comes to the intellectual property rights of foreigners (Chang, 2002; Goldstein, 2001). With the copyright-related industry playing an increasingly important role in the global economy, copyright exporters in developed countries are trying to promulgate the universal norms and rules of behavior that both embody as well as facilitate the expansion of hegemonic world orders. Thus in terms of access to information and knowledge, today’s developing countries are in a much disadvantaged
position. To use Chang’s (2002) expression, the current discourse on unifying the developmental model actually mounts to “kicking away the ladder” for many developing countries.

2. Dependency analysis makes an important distinction between economic growth and economic development and puts more emphasis on whether the society as a whole benefits from economic activities. Therefore indices like life expectancy, literacy, infant mortality, and education are of more concern. While the market does have great power to realize higher efficiency and productivity, it is certainly not the optimal mechanism to solve the distribution issue and improve social welfare as a whole. Along the same line, the growth of the copyright industry is not synonymous with the development of art, literature and science in any given society. The distribution and diffusion of literary and artistic works is also a critical issue. Copyright policy is not just about assuring profitability for copyright owners, but also about facilitating access for the public.

3. According to theorists like Frank (2002) or Amin (1967), dependent states should pursue policies of self-reliance through ‘delinking” from the world economy. Becoming fully integrated into the global economy is not necessarily a good choice, as reliance on foreign capital, foreign technology or foreign aid will prevent developing countries from achieving full-scale development. The “delinking” strategy appears problematic in today’s world given the triumph of a global market. In fact, China’s Open Door policy was proposed after the failure of almost thirty years’ policy of autarky. In the current context, self-reliance should be interpreted as endorsing a policy of controlled interactions with the world economy: the social and economic welfare of the larger citizenry should always be the primary concern. When it comes to copyright, which is
gaining importance as economic and cultural as well as information policy, the ongoing
trend of universalization and harmonization on a global level is both unjust and
impractical. Developing countries need to fight for more legislative space to
accommodate their diverse economic, cultural and political conditions.

4. While dependency analysis acknowledges the possibility that technological
advances could precipitate economic development in some peripheral or semi-peripheral
countries, this school of theory emphasizes the institutional context where technological
force always takes effect. Wallerstein (1984) contends that as long as the international
division of labor remains unchallenged, social and economic disparities between sections
of the world economy would likely to increase. By the same token, some political
economists argue the globalization of intellectual property nowadays is basically
following the same logic of colonization, for it is trying to perpetuate the international
division of labor under which northern countries generate innovations and southern
countries constitute the market for the resulting products and services (Bettig, 1996;
Correa, 2000; Endeshaw, 1996; May, 2003; Richards, 2004). This fits in with what
Harvey (2005) calls “accumulation by dispossession”, which is a concept he uses to
capture the predatory practice of capitalist accumulation. As long as developing countries
are excluded from accessing information and technology, they will remain dependent on
the few industrialized countries.

3.1.2 Neoliberal Vision of Development

Steger (2002) lists five central claims of the neoliberal discourse about globalization. I
will use his list as a rubric to elaborate the problematics of the neo-liberal vision on
development and global capitalism.
1) Globalization is about the liberation and global integration of markets.

According to this view, a self-regulating market is the normative basis for a future global order. The rationality and efficiency of such a free market can only be realized in a democratic society that values and protects individual freedom. Those who advocate the liberalization of markets on a global scale generally oppose the expansion of governmental intervention in the economy. It is believed that privatization, free trade and unfettered capital movements are “the best and most natural way for realizing individual liberty and material progress in the world” (Steger, 2002, p.49).

2) Globalization is inevitable and irreversible.

Although liberalism has criticized Marxism for its deterministic view of history and its downplay of human agency, neoliberal elites actually share with their ideological opponents a teleological notion of historical inevitability, which was echoed in former British Prime Minister Margaret Thatcher’s declaration that “there is no alternative” as well as former U.S. President Bill Clinton’s warning that “globalization is irreversible. Protectionism will only make things worse”. Steger (2002) argues that by presenting globalization as the spread of irreversible market forces driven by technological innovations, “the narrative of inevitability” serves three major functions. First, it depoliticizes public discourse about globalization in order to achieve its own political goal. Resistance to globalization is depicted as unnatural, irrational and dangerous. Second, this narrative helps to justify public-policy choices under the name of responding to “objective historical pressures”, while in reality many of those choices are to serve certain political interests. Third, the inevitability claim “assigns a privileged position to those nations that are in the forefront of ‘liberating’ markets from political control” (p.59).
3) Nobody is in charge of globalization.

This claim is closely related with the preceding one and they work together trying to suggest that globalization does not involve human choice. In his book *The Lexus and the Olive Tree*, Thomas Friedman (1999) says the basic truth about globalization is that “nobody is in charge” and “the global marketplace today is an Electronic Herd of often anonymous stock, bond and currency traders and multinational investors, connected by screens and networks” (p.62). To describe major players as a faceless Electronic Herd is to overlook the asymmetrical power relationship in the global market, as if the decision-making process only involves free choice and the “invisible hand” of market rules. Yet there is plenty of evidence to suggest the opposite, if we look at who possesses more bargaining power in transnational institutions like the WTO, IMF or World Bank and how these institutions push the agenda of neoliberalism in developing countries in order to further the material interests of the developed countries (Steger, 2002). Furthermore, to emphasize “nobody is in charge” is also a good way to relieve the dominant power of any responsibility for any negative consequences of globalization.

4) Globalization benefits everyone.

Any value judgment about whether globalization is a “good” or “bad” thing presumes certain standards for assessing development. For neoliberal globalists, development means statistical reports that show higher productivity and efficiency, expansion of investment and trade, and increasing global economic output. What often gets lost in these numerical indicators, however, is the living conditions of real people: who is actually benefiting from the growing wealth in what way, and what is the human cost in
this developmental process? Anti-globalists like Jay Mazur, the president of the U.S. Union of Needletrades, Industrial, and Textile Employees, argues that:

the benefits of global economy are reaped disproportionately by a handful of countries and companies that set rules and shape markets…Of the 100 largest economies in the world, 51 are corporations. Private financial flows have long since surpassed public-development aid and remain remarkably concentrated (Mazur, 2000, pp80-81).

The 1999 U.N. Development Report also states that global economic inequality has increased dramatically as a result of economic globalization. Even some of the previous major champions of globalization have now started to reflect on the actual consequences of market liberalization. Joseph Stigliz (2003), chief economist of the World Bank, contends that the structural-adjustment programs imposed on developing countries by both the World Bank and the IMF often lead to disastrous results. He also notes that while the 1997-1998 Asian financial crisis was partly caused by the unregulated flow of financial capital, “market ideologues” used this chance to discredit state intervention and to promote more liberalization.

5) Globalization furthers the spread of democracy in the world.

For neoliberals, free market and democracy are almost synonymous terms. They tend to argue that the sustainability of a market relies on the voluntary participation of free individuals, transparent decision-making processes, rule-based business practices and legal standards, all of which are considered essential dimensions of democracy. Thomas Friedman believes that for those authoritarian regimes that are unlikely to generate
democracy internally, for example countries like Indonesia or China, the integration into the global market will force them to adopt a “more democratic, accountable, and open” governance. In this sense, the free market fulfills the missionary role of spreading democracy world wide. Nonetheless, the good will of neoliberal globalists seems to be contradicted by empirical evidence from globalization. To begin with, the “consensus” on the benefit of globalization was not achieved in a democratically transparent process. Former U.S. Trade Representative Charlene Barshefsky admitted the undemocratic character of the WTO procedures:

The process, including even at Singapore as recently as three years ago, was a rather exclusionary one. All meetings were held between 20 and 30 key countries…this led to an extraordinarily bad feeling that they were left out of the process and that the results even at Singapore had been dictated to them by the 25 or 30 privileged countries who were in the room (cited in Steger, 2002).

Secondly, according to a report released by the New Economic Information Service, democratic countries were losing out in the race for American export and American foreign investment. U.S. corporations actually prefer the lower wages, bans on labor unions, and relaxed environmental law offered by dictatorships (Steger, 2002). Singapore is a typical case that demonstrates the compatibility between free market capitalism and strong authoritarian governance, which keeps political and cultural dissent to a minimum (Castells, 2000). And now with China’s further integration into the global economy, we see once again the parallel processes of liberalization in the economic realm and the tighter control in the political sphere.
In sum, neoliberalism asserts a mutually constructive relationship between globalization and development. On the one hand, development can only be achieved by establishing a global free market; on the other hand, economic growth and technological innovation will create more incentives toward further integration. From the analysis of the five central claims above, we see that the neoliberalism doctrine suggests the following for developing countries and these suggestions are quite distinct from those offered by dependency analysis. First, the universally applicable model for sustainable development is characterized by marketization, privatization and liberalization. The only “inevitable” as well as “rational” choice developing countries face in order to catch up is to emulate the current pattern established by developed countries. Second, efficiency and productivity are the two primary goals in policy design, while distributive issues should be left to the mechanism of the market, which will allocate the rewards of efficient production in a rational and unbiased manner. This is what is usually called “trickle-down” economics or the belief that “a rising tide will lift all boats”. Even if globalization has led to an increasing inequality in many developing countries, this problem will eventually be solved once the transitional period is over and wealth is distributed to those at the bottom. Closely related with the pursuit of efficiency and productivity, aggregate measures of economic growth such as the GDP or trade indices are considered as sufficient indicators of economic development.

3.2 Globalization and the Role of the Nation-State

In addition to the relationship between development and global integration, the changing role of the nation-state is another major theme running through discussions on
globalization. Some scholars interpret globalization to mean a qualitative transformation of the environment of accumulation from essentially nationally dominated “economies” to an “economy” and “society” which span the entire world and are largely impervious to political borders. An assumption is drawn that under such conditions the experience of government intervention, which played a determinant role in stabilizing the post-war economy, has been frustrated. The resulting gulf between intent and content, and between governments’ goals and aims and their ability to deliver has led to an “almost universal loss of faith in the capacity of any individual state to intervene decisively and effectively” (Phillips, 1992, p.104). In these arguments, adjectives like “defective”, “diminished”, or “hollow” are often used to describe the incapacity of the state in a more and more globalized world. Some proponents of “powerless state” assert that nation-states have become the local authorities of the global system. They can no longer make sovereign decisions regarding economic activities and are only there to provide the infrastructure that global business needs (Ohmae, 1990; Reich, 1992).

Many have criticized the above standpoint as exaggerating not only the decline of the state but also the extent of integration globalization has achieved. For example, Hirst and Thompson (1996) emphasize that the present highly internationalized economy is not historically unprecedented and is far from “truly global”. Nation-states have a significant role to play in economic governance at the level of both national and international processes. Evans (1997) also points out there is no clear logic connecting economic globalization to “low stateness”, thus the myth of the “powerless state” serves a rather ideological function of determining how globalization affects stateness. Here I concur with this view and argue that what the nation-state has experienced under globalization is
more of a transformation rather than the diminishment of its regulatory role. I will first talk about the transforming role of the state in both empirical and normative senses, then focus on the relationship between globalization and the Chinese state.

3.2.1 The Transformation of the State

Those who advocate the retreat of the state make the problematic assumption that the global market and nation-states represent two separate forces that are mostly in conflict. Their rhetoric often reflects the neo-liberal consensus that state intervention could only compromise the efficiency of the market and thus should be reduced to the minimum (Hirst & Thompson, 1996; McMichael, 2000). What they have ignored, however, is how the state is also part of the global expansion of market capitalism, and oft-times even acts as a driving force behind it. This can be seen from three aspects.

First, globalization is more than just a “trend” emanated from the natural course of capitalism. It is an orchestrated project pushed forward by various stakeholders. States that are economically and politically dominant have been able to “exert powerful governance pressure over financial markets and other economic tendencies” (Hirst & Thompson, 1996, p.2). For example, the U.S.’ dominance established after World War II gave it disproportionate power to define the general and specific content that constitutes the supranational institutions like IMF or World Bank. The debt crisis in the 1980s provided the opportunity for these institutions to impose their neoliberal agenda on developing countries in need of emergency loans. As a result, more countries made commitments to free-trade and a deregulated market economy. In the meantime, the U.S. also tried to universalize this ideology by wielding both military and economic power against regimes (e.g., Nicaragua and Chile) that evinced an alternative model to the
neoliberal prescription for economic development. The pivotal role of the hegemonic state should not be dismissed, although this state itself is now also subject to the constraints of international institutions.

Second, states have the incentive to internationalize their economic activities in order to achieve further economic growth, and maybe more importantly to retain legitimacy through development. This is especially the case for the so-called developmental states in East Asia. In a pioneering analysis of Japan’s highly successful post-war reconstruction, Chalmers Johnson (1982) attributed the “Japanese miracle” to the efforts of a developmental state, which refers to a state that directly intervenes in the development process rather than relying on market forces to allocate economic resources. Weiss (1998) discusses how countries like Japan, Taiwan and Korea have adapted to the new pattern of trade and investment and promoted internationalization. She points out,

Rather than counterposing nation-state and global market as antinomies, in certain important respects we find that ‘globalization’ is often the by-product of states promoting the internationalization strategies of their corporations, and sometimes in the process ‘internationalizing’ state capacity (p.4).

Third, as much as transnational organizations like the WTO or OECD are aggressively intervening in national regulations on economic activities, a strong state is always needed to actually enforce the rules. As the world economy relies more and more on values generated by ideas and expressions—from software to media products—authoritative
enforcement of property rights become both more difficult and more crucial to profitability. As Evans (1997) emphasizes, major global players in the information economy like Microsoft or Disney actually need stronger states that are sophisticated and active enforcers. On the other hand, the state cannot afford to retreat either. Rodrik (1998) found strong correlation among the OECD countries between government expenditures and exposure to trade: countries that are more open to trade have bigger government. Interestingly, this positive relationship between the size of government and exposure to trade also existed in developing countries when he extended the analysis to more than 100 countries. Rodrik’s explanation is that government spending plays a risk-reducing role in economies exposed to high external risk. Evans (1997) concurs with this view and says that countries will do better in bargaining with large TNCs if a “competent, unified national agent participates in the bargaining on the local side” (p.68).

The discussion above indicates that rather than viewing globalization and the state as two conflicting dynamics destined to pull in opposing directions, we need to pay more attention to the adaptation of the state to the new conditions. Without neglecting changes brought by globalization, states still have an essential role to play, although sometimes “under new organizational forms, new procedures of power-making, and new principles of legitimacy” (Castells, 2004, p.304).

3.2.2 Globalization and the Chinese State

A state is developmental when it establishes as its principle of legitimacy its ability to promote and sustain development, understanding by development the combination of steady high rates of economic growth and
structural change in the productive system, both domestically and in its relationship to the international economy (Castells, 2000, p.283)

The primary issue that Chinese leaders faced after the Cultural Revolution was to restore the political legitimacy of the party-state. Chinese society was highly politicized and organized under Mao Zedong’s leadership. Franz Schurmann (1968) correctly described Communist China as a “vast building made of different kinds of bricks and stone”, and “what holds it together is ideology and organization” (p.1). Mao initiated various political experiments according to his own Utopian idea of a socialist country, with the aim of eliminating any private space and politicizing every corner of the Chinese society with a totalitarian state power (Y. Zheng, 2004). Yet the obsession with political movement not only hindered economic growth but also disintegrated any necessary social base that could be supportive of the regime. As a result, when the Cultural Revolution ended in 1976, the pressing need for the party-state was to regain the ability to rule effectively and legitimately. After Deng Xiaoping came to power in the late 1970s, he pointed to economic development as the single most important means to enhance legitimacy. The over-politicization in Mao’s era has since given way to an economic approach to reorganize the society.

Zheng (2004) explicates how the party-state’s conscious pursuit of an “interest-based” social order (as opposed to the old ideology-based one) contributed not just to economic expansion per se, but also to beneficial political consequences from the rapid economic growth (pp.66-69). On one hand, the creation and expansion of private enterprises in the economic arena provided the Chinese people an “exit” from the ideologically charged
public arena. Previously economic benefits were distributed through political means. The existence of private space made it possible for citizens to remain apolitical if they chose not to get involved in politics, yet they were still able to pursue their own interest in the market. This greatly reduced the intensity of political conflicts, and thus the political burden on the party and the government. On the other hand, in an interest-based society, economic activities are more predictable and manageable. Individuals driven by the pursuit of economic wellbeing are supposedly more governable than those driven by political passion. Also in Mao’s time, economic activities were subjected to the irregularity of political changes, while under Deng’s leadership, economic rules matter. This is certainly not to overlook the intervening role of the government, but even government policies would take into consideration economic rationality.

In the aftermath of the 1989 pro-democracy movement and the collapse of communism in the Soviet Union and East Europe, the CCP reinforced its strategy of carrying on economic reform without touching political issues. In 1992, Deng Xiaoping made what is now considered the historical southern tour (Nanxun) to Special Economic Zones in Guangdong province, where he made a speech to emphasize how economic reform had brought enormous benefits to the majority of the population. Deng also stressed developmentalism as the party’s political legitimacy by saying that: “development is the hard rule”. Deng’s successors did not move beyond the developmentalism framework he established, but only moved further toward the direction of privatization and marketization, which inevitably led to China’s integration into global capitalism.
Therefore, to “join the world” was the conscious decision made by the developmental state to enhance its legitimacy through economic growth. The Chinese party-state plays an active role in propelling as well as monitoring the globalizing process. For example, the CCP tried to gain more social support for China’s accession to the WTO by playing up the nationalistic sentiments, while leaving untouched many problems related to the expansion of global capitalism, such as labor and inequality. As manifested in Yuezhi Zhao’s (2003) study of mainstream Chinese newspapers’ coverage of the U.S.-China WTO deal, the discourse of nationalism is utilized in de-politicizing, naturalizing and normalizing the logic of neo-liberal globalization. Zhao found that the Chinese press unanimously emphasized that WTO membership is about “the realization of the grand objective of the rejuvenation of the Chinese nation,” that is, the dream of a strong and powerful nation. Some scholars also point out that the seemingly awkward term “socialist market economy” was deliberately crafted to serve the regime’s nationalistic goal. Chinese leaders were trying to define the nation’s unique role in global affairs (Y. Zheng, 2004).

The process of globalization is intertwined with the global expansion of free market capitalism. The dominant discourse of neoliberalism celebrates the prosperity that has been and will continuously be brought by globalization, and it insists on the free market as the only efficient mechanism to organize economic activities. What’s more, neoliberal capitalism has the tendency to conquer new frontiers that are not yet fully commodified, among which intellectual products is arguably the most important one. The worship of the market leads to hostility toward state regulation. Yet on this issue, neoliberalism is
self-contradictory at best. Putting aside how the spread of neoliberalism itself has involved strong intervention of hegemonic states, there has been enough empirical evidence suggesting that effective state regulation is always necessary to sustain the functioning of the market.

Dependency theory provides an alternative interpretation of the world capitalist system from the perspective of developing countries. Rooted in Marxian political economy, dependency theory focuses on those aspects that are marginalized by the neoclassical/liberal tradition, including the unbalanced power structure in the world economic system, exploitation in capitalist production, inequality resulted from the international division of labor and distributional injustice. Granted that some dependency theorists’ suggestion for developing countries to sever their connection with developed countries does not seem applicable in today’s world, this theory still offers invaluable insights into the relationship between the core and the periphery. In an economy that values information and knowledge more and more, intellectual property rights are a critical leverage that the core would utilize to keep the dependence of the periphery. Under this circumstance, state intervention once again plays a significant role in terms of striking a balance between observing international rules and protecting local development. This brief account of the transformation of the Chinese state confirms the importance of the nation-state in the era of globalization. The following analysis of power dynamics in the evolution of China’s copyright policy will continue to illustrate this point.
Chapter 4
EVOLUTION OF COPYRIGHT LAW IN CHINA

4.1 Before the 1990 Copyright Law:

To fully appreciate the complexity of copyright issues in today’s China, we need to adopt an historical perspective by looking at the long journey it took for this originally alien concept to enter the Chinese legal system. Restrictions on books and other types of publications were not foreign to the Chinese. As early as in the Han dynasty (206 B.C.-A.D.220), there were recorded bans on unauthorized production of Classics (Alford, 1995). The Wenzong Emperor of the Tang dynasty issued in A.D. 835 an edict on regulation of publication and republication. This decree initially prohibited unauthorized publication of items related with time and astronomy such as calendars and almanacs, as those were central to the emperor’s claim that he was the essential link between humanity and nature. Later on, the ban expanded to include copying and distribution of state legal pronouncements, official histories and “devilish books and talks”. The advance of printing technology and a rise in the literacy rate in the Song dynasty (A.D. 960-1279) stimulated proliferation of printed materials. In order to put restrictions on the private reproduction of objectionable materials that were neither subject to state control nor heterodox, the Zhenzong Emperor ordered private printers to submit works they would publish to local officials for prepublication review and registration (Alford, 1995). The Song’s imperial successors mostly maintained a similar system for prepublication review,
with variation only in the degree of strictness and the scope of books designated as undesirable.

None of these regulations, however, is equivalent to the modern western institution of copyright law. The purpose of such restrictions was to sustain the imperial power of the state rather than to protect the economic interest of authors and publishers, thus, quite distinct from the stated mechanism of copyright law, it is essentially ideas rather than expressions that were being regulated in the context of imperial China. To be sure, authors were concerned about pirating as the publishing developed: Zhu Xi, for example, was able to successfully petition a local subprefect for the destruction of the blocks of an inferior pirated edition of his *Sishu houwen* (Questions and Answers on the Four Books). Publishers were also worried about unauthorized reprinting of their texts: books printed in the Ming and Qing commonly included warnings like “Reprinting prohibited” (Alford, 1995; Brokaw, 2005). Nonetheless, a regulatory system that grants authors and publishers the same protection as enjoyed by their European counterparts was never codified in imperial China.

Just as the formation of a copyright system in 15th century Europe had to do with the development of printing technology, the rise of an artistic class, the transition from monopoly guilds to merchant capitalism, and the shift of political power from the church to the state (Jackson, 2002), an explanation for the absence of such a system in imperial China would inevitably touch upon many aspects of the traditional Chinese society. The underdevelopment of inexpensive mass printing technology and the low literacy rate in China are two reasons often cited (Adelstein & Peretz, 1985; C. Zheng & Pendleton, 1985).

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5 The fundamental elements of the intellectual property system were largely developed between 1450 and 1550 in the Republic of Venice, which is cited as the first European city where the business of printing and publishing became important. See Bettig, *Copyrighting Culture*, 1996, pp15-23.
1991). Alford (1995) contends that it is political culture to which we should turn to for the “principal explanation”. He makes a compelling argument of how the great importance of the past in the Confucian political culture created an environment inimical to private ownership of literary and artistic creations. Alford points out it is the Confucian vision that civilization is defined by a network of relationships, each bearing reciprocal responsibilities and expectations, which individuals are morally obligated to fulfill. The way that individuals, be it rulers or ruled, learn about their proper position in the whole network is through interacting with the common past, which is kept in things like “the rules of propriety (li)”, the Classics compiled by the ancients, the poetry written by previous scholars, etc. In a word, access to the cultural heritage is crucial to establish a good society where everyone knows the right from the wrong. Alford quoted the noted scholar of Chinese literature Stephen Owen: “the experience of the past roughly corresponds to and carries the same force as the attention to meaning or truth in the Western tradition” (p.26). In this context, creators of literary and artistic works are less eager to claim their uniqueness and individual authorship than to prove the connection between their work and their predecessors’. Because the past validates the present, being part of the tradition is essential for obtaining legitimacy. As a matter of fact, from the Sui Dynasty (A.D. 581-618) onward, any intellectuals who wanted to get a position in the civil service system had to take examinations that mostly tested their understanding and interpretation of the Classics. As Confucius himself indicated in the Analects, “I transmit rather than create; I believe in and love the Ancients” (Alford, 1995, p.25).

The Confucian view of the relationship between the ruler and the ruled also contributed to the absence of an indigenous concept of intellectual works as private
property. In a political culture which originated from an agrarian civilization, the importance of family can never be overestimated. Family is the basic economic unit around which to organize agricultural activities, the starting point for every person to learn about their social roles and responsibilities, and it is also the constitutive element to form a harmonious society. In imperial China, the structure of the state is pretty much an extension of the family hierarchy, in which “the ruler had a fiducial obligation to provide for both the spiritual and physical well-being of the populace, who, in turn, were expected to be loyal and productive” (Alford, 1995, p.20). Unlike John Stuart Mill who firmly believe in the ability of truth to win out on a marketplace of ideas, Confucian philosophers since Mencius and Xunzi emphasized the human tendency to become deluded through the interplay of “truth” and “falsehood” (Metzger, 1981). Therefore it is the duty of state officials (parents) to filter any potentially dangerous knowledge that could do harm to the “spiritual well-being” of their people (children).

These two aspects of the Confucian political culture—the importance for people to share a common cultural heritage and the necessity for the state to take control of ideas—were major disincentives to the emergence of private ownership of creative work. It was not until the late nineteenth century that Chinese people learned about the western notion of intellectual property through a series of commercial treaties, which were forced upon China as a result of China’s defeat in the Opium War (1839-1843). The Treaty of Nanjing of 1842 granted western merchants access to the Chinese market. As their economic involvement expanded, foreigners became increasingly concerned about protection of intellectual property, albeit at that time it was more about trademark than about copyright.
China’s negotiations with British, and later with America and Japan, at the turn of 20th century, all resulted in treaties that addressed intellectual property rights. Unhappy at being forced to negotiate these treaties in the first place, Chinese officials did not have much incentive to enforce those laws (Alford, 1995).

On the other hand, the idea of treating creative and inventive works as marketable property did find a modest number of receptive audiences. With mechanization being introduced to the Chinese printing industry, publishers and booksellers began to feel the need to secure their investment. As historian Christopher Reed (2004) commented, “the growing overhead brought by industrialization challenged this industry, originally based, at least in its own view, on public service, now consciously to stress financial issues” (p.177). The abolition of the civil service examination system in 1904-05 and the sudden proliferation of new-style schools stimulated the industry supplying those schools. In the city of Shanghai, where commercial printing was more developed than most other areas, publishers formed guilds to adjudicate copyright infringement issues. If works that were generally acknowledged as belonging to particular firms were reprinted without permission, the guild would take steps to regulate the situation. Members were expected to report on the details of their backlist of publications in order to enable the guild to sort out disputes (Reed, 2004). Of course, this kind of regulation was by no means widespread.

After the collapse of the Qing Dynasty (1663-1911), the Nationalist Party (Guomindang) took power and legislated a copyright law in 1928 (Alford, 1995). Yet it seems to be the consensus of both foreign and Chinese scholars that such law on paper brought little change in the practice of Chinese people. David Kaser observes that even
after the 1928 Copyright Law took effect, “protection of any kind for literary property
was so seldom recognized as deserving of attention in China that very, very few cases of
alleged violation went to litigation; precedents, although not unknown, were rare”
(quoted from Alford, 1995, p.52). Shen Ren’gan, the first head of the PRC’s State
Copyright Administration, also claimed that “despite laws promulgated by the
Guomindang government, it was impossible…to assure the author’s justifiable rights and
interests”. The reason for such lack of enforcement seems obvious: the three decades of
the Nationalist Party’s governance in China were beset with wars and turmoil and it was
not just copyright law but the whole “modernized” legal system that suffered from
disgrace. But Alford (1995) emphasizes the incompatibility between a law drafted by
elites and a society that did not even possess the fundamental “consciousness of law”. He
criticizes the legislators’ scant recognition in these laws “that the overwhelming majority
of their fellow Chinese citizens were unfamiliar not only with the niceties of ‘modern’
intellectual property but with the very idea of vindicating rights though active
involvement in a formal legal process meant to be adversarial in nature” (p.54).

Being a socialist regime that follows the guidance of Marxian doctrines, the People’s
Republic of China did not promulgate any regulations with regard to copyright protection
in its early years. This is easily understandable. First, the Communist Party does not
recognize the sanctity of private property rights, which are considered by orthodox
Marxian theories as the root of inequality and exploitation. Second, when it comes to
intellectual works in particular, Marx emphasized the social rather than the individual
characteristic of those:
“Even when I carry out scientific work, an activity which I can seldom conduct in direct association with other men, I perform a social, because human, act. It is not only the material of my activity—such as the language itself which the thinker uses—which is given to me as a social product. My own existence is a social activity. For this reason, what I myself produce, I produce for society, and with the consciousness of acting as a social being.” (Marx, 1963)

Thirdly, in socialist China, creative workers such as writers, musicians, or painters, all work for a certain kind of working unit (danwei) that was either state owned or collectively owned and secured fixed-amount salaries. Technically speaking, the state could determine whether and how their creations could be used without prior approval from, or payment to, the individual creator. Following a Soviet model, authors did get remuneration for their published works via the form of gaofei, which was “based on the nature of the work, the quality and quantity of (Chinese) characters, and the print-run of the work” (R. G. Shen & Zhong, 1982, p.261).

4.2 From Open Door Policy to the 1990 Copyright Law: Learning About International Rules

4.2.1 Exogenous Pressure on Domestic Law

In 1978, the Chinese Communist Party (CCP) reopened the country to the world after carrying out Mao Zedong’s seclusion policy for almost thirty years. One year later, China and the U.S. signed the Agreement on Trade Relations between the United States and the
People’s Republic of China, which was considered a major step for China to rejoin the world economy given the dominant position of the U.S. in international politics and the world economy. The Agreement provided that “each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party” (U.S.-P.R.C., July 7, 1979).

The specification of the copyright issue is hardly surprising given the political economic context. Broadly speaking, the high rate of inflation and unemployment in the 1970s created demand for economic reform. In response to that, there was a growing belief that the so-called “post-Fordist” era of production had rendered obsolete the Keynesian policies of strong government intervention and regulation, and that the free market was the only way out of stagnation. The renewed commitment to liberalism went hand in hand with securing property rights, which provide the basic incentives for private economic activity and the starting point for transactions whereby resources are shifted to their most valuable use. As Landes and Posner (2004) point out, in extreme versions of free-market ideology, “the goal of economic liberalism is total commodification—everything of economic value owned by someone” (p.22). In fact, in 1976 the U.S. made the first major revision to its domestic copyright law in nearly seventy years in order to accommodate new developments. The 1976 Copyright Act substantially expanded the rights of copyright owners, for example, it added unpublished works to the category of covered works, significantly lengthened the copyright term, and added numerous provisions specifying the scope of protection for particular categories of work (Landes &
Posner, 2004). Therefore it was only logical for the U.S. to specify the importance of intellectual property in a trade agreement promoting free-market ideology. What is more, the United States’ economic dominance in the post-Vietnam period was seriously challenged by Japan and the rising East Asian newly industrialized countries like South Korea and Singapore. Businesses started to argue that the unlawful appropriation by others of American intellectual property was a major cause of the burgeoning trade deficit and they mobilized to institutionalize modern intellectual property rights in developing countries (Alford, 1994; Correa, 2000; Landes & Posner, 2004). Now facing China as yet another developing country as well as a potential competitor, it was certainly critical for the U.S. to clarify the “international standards” of intellectual property in its initial attempts to normalize bilateral trade relations.

Unlike many Western developed countries including the U.S., which was able to keep its discrimination against foreign authors for almost a century after enacting its first copyright law, China assumed an international legal obligation for intellectual property rights protection even before it had established a domestic intellectual property protection system (Xue & Zheng, 2002). This somewhat unusual path was largely due to the hegemony that Western industrialized countries had established in the arena of intellectual property rights. By the time China reopened to the global economy, norms of international copyright were already institutionalized. The Paris Convention for the Protection of Intellectual Property was signed in 1883 to provide protection to holders of patents, trademarks, industrial designs, and marks of origin. The Berne Convention for the Protection of Literary and Artistic Works was signed in 1886 and amended over the years to provide copyright protection for published works. The World Intellectual
Property Organization (WIPO), which operated informally as the combined secretariat of the Paris and Berne conventions, was formally established in 1967. Despite the different scope of their agreements, they all require a nation’s IP law be applied on an equal basis to foreign and domestic right holders. Since China did not have a tradition of sanctifying property rights, lawmakers in China had to use the existing models in developed countries as references for them to conceive the legal framework. Needless to say, this gave the developed countries a very good opportunity to recommend an “advanced” copyright legislation that met the international standards. For Chinese lawmakers, the discrimination against foreign works was not an option regardless of the benefits it could bring to the newly open country. Promising to protect foreign copyrights was actually the prerequisite for China to launch trade relations with developed countries (Ryan, 1998; Xue & Zheng, 2002).

According to the hegemony theory, particular states are hegemonic insofar as they are critical to the formation of an historical bloc that presents its class interest as the universal interest. The hegemonic state is able to “project its culture, institutions, technology, and social relations abroad so that they become models to be emulated even by those nations that have not achieved the same level of development of the material forces and conditions of production” (Richards, 2004, p.119). Although the formation of an historical bloc relies more on universalizing beliefs that are actually grounded in historically specific socio-political conditions, the use of coercive power is also considered an important strategy to maintain hegemony. The U.S.-China trade disputes over intellectual property rights in the last two decades are typical examples of the dominant power trying to attain conformation by using coercive strategies.
In 1984, as a response to the IP-based business argument that the trade deficit was attributable to IP violations, the U.S. Congress amended Section 301 of the 1974 Trade Act by adding “inadequate protection of intellectual property” as yet another “unreasonable” practice. This meant that non-compliance with international treaties on IP could lead to the U.S. Trade Representatives (USTR) invoking Section 301 measures, which authorize the president to take unilateral actions against the target country without observing international obligations. The 1988 Omnibus Trade and Competitiveness Act further mandated that the USTR provide an annual report to Congress on unfair trade practices abroad, the so-called Special provision. It transferred from the president to the USTR the authority of carrying on investigations and enforcing 301 measures (Mertha, 2005). Within thirty days of releasing the national trade estimates at the end of April each year, the USTR must:

- identify those foreign countries that deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to United States persons that rely upon intellectual property protection, and those foreign countries…that are determined by the Trade Representative to be priority foreign countries that have the most onerous or egregious acts, policies, or practices (Omnibus Trade and Competitiveness Act, cited in Ryan, 1998, p.72).

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6 The major lobbying groups included American Association of Publishers, Motion Picture Association of America, Recording Industry Association of America, American Film Marketing Association, National Music Publishers’ Association and Computer and Business Equipment Manufacturers Associations. In 1984, they joined together and formed the International Intellectual Property Alliance (IIPA).
For 1989 the priority offenders included Brazil, India, South Korea, Mexico, Saudi Arabia, Taiwan, China and Thailand, among which China was considered the worst case. The USTR stated, "China is our only major trading partner to offer neither product patent protection . . . nor copyright protection for U.S. works . . . . Piracy of all forms of intellectual property is widespread in China, accounting for significant losses to U.S. industries." American producers of books, films, music, and software were claiming that they lost $400 million a year because of the lack of copyright protection in China. Although this estimate is premised on the faulty assumption that with the enforcement of copyright, all the alleged infringers would purchase a legal copy at its full price, the USTR was ready to become aggressive about using trade sanctions when China appeared on the priority offenders list again in 1991. In September, 1990 the first copyright law was legislated in the People’s Republic of China and the new law took effect in June, 1991. Needless to say, to have a law on paper did not automatically lead to strict enforcement. By September 1991, the United States had once again announced that the weak enforcement of the new copyright law was causing substantial losses to U.S. businesses. The USTR pressured China to accede to international IP treaties by threatening to raise tariffs on $1.5 billion of Chinese goods, including beer, footwear, clothing, leather goods, televisions, watches, and nuts and bolts (Ryan, 1998). In January 1992, the United States and China signed the Sino-U.S. Memorandum of Understanding (MOU) on the Protection of Intellectual Property, which includes provisions for China to join both Berne Convention and the Geneva Phonogram Convention and make the legislative reforms necessary to implement treaty conditions.
4.2.2 Legitimacy of the new law

For a regime that declares itself to be socialist, it is a challenging task to justify the protection of private property rights of intellectual products. In fact, during the long and complicated drafting process that produced more than 20 drafts of a copyright law, commentators and officials were struggling to find “an innovative strategy of justification, one that conveniently tucks in the ideological inquiries underneath the concrete and tangible advantages that the IPRs are said to bring for China’s modernization” (P. Feng, 2003, p.4).

Generally speaking, legislating a new copyright law is an important component of the developmental state’s agenda of pushing forward China’s modernization. In August 1977, Deng Xiaoping regained power after the Cultural Revolution and delivered a speech to the Eleventh Party Congress stressing the Four Modernizations of agriculture, industry, science and technology, and national defense. To modernize China not only means to reform a wide array of institutions so as to “catch up with” the western industrialized countries, but also means to selectively import the value system of modernity, which in its original Hegelian sense is premised on the realization of subjective freedom.

One thing in common between Confucianism and the Communist ideology that used to dominate China is that they both promote a sense of obligation when it comes to the relationship between the collective and the individual. In the Confucian tradition, people’s identity was defined through their relations to the collective rather than as individuals (Chen & Starosta, 1998). A person is not a complete entity without considering his or her ancestors and descendants. It is believed that society as a whole follows the structure of a family (jiaguo tonggou), where each individual has certain
responsibilities and obligations to take as father/mother, brother/sister, son/daughter. Although based on a different philosophical foundation, Mao’s vision of communism also involved great emphasis on class solidarity, moral duties and the sacrifice that individuals are supposed to make for realizing a goal that is bigger than private concerns. Societal members have obligations to their work unit at the lower level, and to the national project of building a socialist country at the higher level. The Cultural Revolution mobilized by Mao Zedong had led the nation into political chaos and severe economic recession. In the aftermath, there was a strong backlash against the authoritarianism and collectivism that characterized Maoist society. When modernization once again became the eminent task facing the nation, liberal modernity became an important source of inspiration. As a law that grants individual authors certain control over their own creative works⁷, copyright appeals to the general demand of individual autonomy in the post-Mao era.

Copyright was proposed as an essential policy to rehabilitate the intelligentsia by recognizing their rights as authors through legal protection (Alford, 1995; P. Feng, 2003; Yu, 2003). Just like most other Marxists, Mao was aware of the mobilizing power that “organic intellectuals” could exert on the masses, thus he relied on intellectuals to provide discursive justification of many social movements he initiated. On the other hand, however, as a dictator, he was extremely cautious of the possible challenge intellectuals could pose to his leadership. Since intellectuals tend to be more resourceful and critical

⁷ The controlling power offered by the 1990 Copyright Law was certainly restrictive if compared to Western standards. For example, in Article 16, the law indicates that the author’s work unit (danwei) shall have the priority to exercise their copyrights within their businesses. Nor was the work unit the only entity free to use an author’s creation given the law’s open-ended fair use provisions. At the political level, the law also states that “works prohibited by law to be published and disseminated” are not entitled to copyright protection.
than average people, they are more likely to question the status quo, thus are not to be completely trusted. The anti-intellectualism erupted in a rather extreme form in the Cultural Revolution, during which intellectuals as a group were labeled the “stinking ninth category” (chou laojiu, of class enemies next to landlords, reactionaries, etc.). Being a well-educated person became something one should feel ashamed about, as according to the logic of Cultural Revolution, to have knowledge and culture automatically means to alienate oneself from peasants and workers, who are supposedly the most progressive class in a socialist country. All the highly specialized experts in universities were seen as constituting a self-interested class divorced from the rest of society, and the resentment against these people often times ended up in violent physical abuse.

It was against this historical background that Deng Xiaoping’s call for the Four Modernizations of China struck a chord with intellectuals. The new leadership realized the importance of scientific and intellectual works for the nation to make up for the decade of development lost in the Cultural Revolution. Starting from 1978, academic institutions were revitalized and intellectuals were praised for the essential role they were about to take in the reconstruction of the country. Not surprisingly, copyright law was embraced by intellectuals as a critical step to enhance their social status and protect their rights. From the Party’s standpoint, this new law also helped to shed the political burden of the Cultural Revolution and put up a modernized image. Article 22 of the Constitution provides that: “The state promotes the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, culture centers, and other cultural undertakings, that serve the people and
socialism....” (cited in N. Zhang, 1997, p.7). This is the basis for the protection of copyright. Article 1 of the Copyright Law therefore provides that: “This law is formulated in accordance with the Constitution to protect the copyright of authors of literary, artistic and scientific works, as well as to safeguard their copyright-related rights and interests, to encourage the creation and publication of works which contribute to the development of the socialist material and spiritual culture and to promote the development and prosperity of socialism’s culture and scientific institutions” (People's Republic of China, 1990).

Internationally, protecting copyright was perceived to be a prerequisite that China had to meet in order to rejoin the world economy. Proponents of a copyright law recognizing foreign authors’ rights were hoping that this law could be a device for fostering a more general openness, which could further create a beneficial environment for foreign trade and investment. Article 2 of the 1990 Copyright Law of the People’s Republic of China states that:

Works of foreigners first published in the territory of the People’s Republic of China shall enjoy copyright in accordance with this Law. Any work of a foreigner published outside the territory of the People's Republic of China which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs and China, or under an international treaty to which both countries are parties, shall be protected in accordance with this Law.

As a result of the Sino-American Intellectual Property Negotiation of 1992, the State Council enacted the International Copyright Treaties Implementing Rules in September
of that year. The U.S. government insisted that China enact the rules to clarify that, wherever the protection level provided by the Chinese Copyright Law was lower than that of those treaties, foreign copyright works would be protected according to the international copyright treaties to which China acceded. The rules only apply to foreign works. While the double standard of copyright protection was meant to privilege domestic works in 19th century America, the very same expression indicates the reverse meaning in the Chinese legal context.

Although potential conflicts exist between socialist institutions and granting copyright the status of private property, the fundamental ideological discrepancy was carefully “tucked in” underneath a rights discourse that emphasizes individual autonomy, a modernization task that relies on the improved social status of intellectuals, and a development agenda that recognizes the importance of “international standards”. In fact, this is all in tune with Deng Xiaoping’s overarching pragmatist strategy of focusing on economic development while putting aside major political debates.

4.3 Join the World: Trade Disputes, WTO Accession and the 2001 Copyright Law

4.3.1 Sino-U.S. Trade Disputes on Intellectual Property in the 1990s

Although by the end of 1992, China had a largely complete legal framework for copyright protection and had joined all the major international agreements on copyright, the actual enforcement of copyright law was far from satisfactory in the eyes of U.S. copyright industries. During the 1990s, copyright was one of the top issues that affected Sino-U.S. trade relations; at times (in 1991, 1995, and 1996) it almost triggered trade wars between the two major economic powers.
After the 1992 MOU was announced, China showed its good will towards enforcing copyright protection by issuing an “Urgent Circular on Augmenting Control over Reproduction of CD and Laser Disk Players” with the joint effort of the State Planning Commission, the National Press and Publication Administration (NPPA), and the National Copyright Administration (NCA). During this campaign, officials sent from NPPA and NCA examined and registered CD production lines in various localities and closed four of those production lines in Guangdong Province (Mertha, 2005).

Nonetheless, given the size of the country and the increasing sophistication of infringement activities, sporadic close down of production lines was certainly not enough to meet the U.S. standard of establishing “an effective IPR enforcement regime” in China. In 1993 and 1994, China again made the Priority Watch List of the USTR. Associations of U.S. copyright industries including the Recording Industry Association of America (RIAA), the International Intellectual Property Alliance (IIPA), the Business Software Association (BSA), the Motion Picture Association of America (MPAA), and the International Federation of the Phonographic Industry (IFPI) consistently pushed for trade sanctions. During hearings in Washington, a BSA representative argued that in 1993 alone the U.S. software industry lost $322 million to piracy in China, and he called for the U.S. side to pressure Beijing on carrying out commitments to the 1992 MOU (Mertha, 2005). By December 31, 1994, no agreement was reached between the two countries. The Clinton Administration drew up a preliminary list of trade sanctions, which would impose 100% tariffs on a total of $2.8 billion worth of Chinese imports, including electronic products, toys, shoes, leather garments, etc. (Sanger, 1995). China responded with a counterthreat of similar tariffs on U.S. manufactured compact discs,
cigarettes, alcoholic beverages, and other products. On February 26, 1995, the two sides finally reached an agreement only hours before the designated effective time for mutual trade sanctions. The Chinese government promised to implement an “Action Plan” that focuses on improving its enforcement structure and conducting training and education on the protection of intellectual property throughout China. Many commentators initially deemed the 1995 Agreement “the single most comprehensive and detailed [intellectual property] enforcement agreement the United States had ever concluded” (Cooper & Chen, 1995). Yet within less than a year, the U.S. and China once more threatened each other with trade sanctions as a consequence of disputes over intellectual property issues.

Following the previous pattern, the two countries reached another agreement at the eleventh-hour to avoid a trade war that could eventually cause great loss for both sides. China closed down fifteen CD factories, six major CD distribution markets, and more than 5000 minitheaters that showed pirated videos for a fee. China also expanded permission for foreign music and movie companies to produce and sell their products inside China (Yu, 2000, p.149). Compared with the 1992 MOU and the 1995 “Action Plan”, the 1996 Accord was less about adding new rules than about confirming the commitments already made in 1995 in terms of stepping up enforcement.

The 1996 Accord seemed to put an end to the most confrontational period between the U.S. and China on IPR related trade disputes. In the rest of the 1990s, IPR issues still emerged frequently, but the tenor of negotiations had changed into a much milder one.

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8 This includes institutionalizing a series of “task forces”. These Task Forces were authorized to enter and search any premises allegedly infringing on intellectual property rights, to review books and records for evidence of infringement and damages, to seal suspected goods, and to confiscate materials and implements directly and predominantly used to make infringing goods. If the Task Forces found infringement, they had authority to impose fines; to order a stoppage of production, reproduction, and sale of infringing goods; to revoke production permits; and to confiscate and destroy without compensation the infringing goods and the materials and implements used to manufacture the counterfeit products.
The talks in 1997 and 1998 focused on further implementation of the 1995 and 1996 agreement. According to interviews with governmental officials, although the USTR kept presenting evidence demonstrating the gap between China’s commitment and the reality, the tone of talks in 1999 and 2000 had become rather cooperative and consultative (Mertha, 2005). On the American side, it became obvious that a coercive strategy was not the best choice for dealing with a country like China. Using a two-level games approach, Jayakar (1997) points out that since the costs of temporary sanctions for the United States are high, the threat to impose sanctions does not appear credible to the Chinese. In addition, the USTR has to consider not only demands from U.S. copyright industries, but also the divergent concerns of the manufacturing sector and foreign policy segment, thus it cannot take a hard line that sacrifices other interests for the sole purpose of protecting U.S. copyrights. Similarly, Zeng (2004) attributes the relative ineffectiveness of coercive policy to the complementary trade relation (as opposed to a competitive one) between the U.S. and China. If trade relations between two countries are competitive, threats of trade sanctions are more likely to enjoy support from all sectors. In contrast, when trade relations are complementary, domestic interests are likely to be divided in the country posing the threat, as export-seeking industries and import-using industries will have different policy preferences.

On the Chinese side, great efforts were made to bring its IP law into conformity with the TRIPS and the new WIPO treaties. In 1997, China amended its Criminal Law to include a section on intellectual property crimes. In 1998, China set up a new ministry-level branch of the State Council called the State Intellectual Property Office for improving IP application and management. In addition, the China Intellectual Property
Training Center was established in Beijing in January 1997 to facilitate research and provide training, and it also holds international and regional seminars with WIPO. All these contributed to a higher level of intellectual property protection in China. The 2000 National Trade Estimate Report by the USTR stated: “Today, China has improved its legal framework - and it has virtually shut down the illegal production and export of pirated music and video CDs and CD-ROMS. Indeed, today it is an importer of such products from third countries” (cited in Yu, 2000, p.153).

4.3.2 The WTO accession and an amended copyright law

On Dec. 11, 2001, China became the 143rd member of the WTO after almost fifteen years’ negotiation. In anticipation of this, China overhauled its intellectual property system by amending copyright, trademark and patent laws and introducing new regulations on the actual implementation of the laws. (X. Feng & Huang, 2002). The amendments to the 1990 Copyright Law were proposed by the State Council on November 29, 2000 to the Standing Committee of the National People’s Congress. A decision was adopted on October 27, 2001 to put the Amendments into effect on the same day. In the proposal, the State Council specified two major themes for this revision, one was to bring Chinese copyright law into compliance with WTO/TRIPS standards, and the other was to meet challenges posed by the development of information technology. Since the first Copyright Law was legislated not long after China embarked on the unique path of building a “socialist market economy”, a lot of issues related to property rights in general and intellectual property in particular were quite unfamiliar to the Chinese at that time. The 1990 law defined most rights in a rather sketchy manner, hence in reality it relied on the 1991 Copyright Law Implementation Regulations and other lower-level
administrative measures to provide for more specific guidelines. In addition to the two
tasks mentioned above, the 2001 Amendments also upgraded some of these guidelines to
the Copyright Law itself.

Another unique dynamic behind the 2001 revision was the so-called “double
standards” of copyright protection or “super-national treatment” problem in the Chinese
copyright system (X. Feng & Huang, 2002; Xue & Zheng, 2002). In 1992, the State
Council enacted the International Copyright Treaties Implementing Rules as a result of
China enact the rules to assure that whenever the protection level provided by the
Chinese Copyright Law was lower than that of international treaties like Berne or
Universal Copyright Protection, foreign works will be protected based on those treaties to
which China acceded. Since the rules only apply to foreign works, foreign authors ended
up enjoying higher level of protection than Chinese nationals. So an important reason for
the modification was to unify the level of protection.

Instead of recounting all the changes in detail, I will try to map out the big picture of
the 2001 Amendment by summarizing the revisions as follows. Drawing on previous
research (P. Feng, 2003; X. Feng & Huang, 2002; Mertha, 2005; Xue & Zheng, 2002; P.
Yu, 2006), I will give examples for each of the four aspects.

1) The clarification and expansion of economic rights of copyright holders. While the
1990 Copyright Law only vaguely stated that an author was entitled to exploit his or her
works, the 2001 Amendment specified thirteen categories of rights, including
reproduction, issue, rental, exhibition, performance, showing, broadcast, dissemination
on information networks, film making, adaptation, translation, compilation and “other
rights that a copyright owner should enjoy”. One example that illustrates how far China had moved toward a market economy is the assignment of copyright based on contract. The 1990 Copyright Law did not mention the assignability of copyright. This can be understood from two perspectives. In theory, the Chinese copyright system recognizes authors’ moral rights, which are certainly not alienable from authors thus cannot be assigned. In practice, it was also argued that allowing copyright assignment would result in authors losing their rights to more powerful units like publishing houses due to the unbalanced bargaining positions (P. Feng, 2003). The 2001 Amendment codifies the use of contract in the assignment of copyright. In contrast to the old licensing system with state regulated licensing fees and a maximum of 10 years’ “authorization of use”, it allows contracting parties to freely negotiate the term and conditions of assignment in accordance with relevant provisions of the law. This indicates higher degree of freedom to contract and heavier reliance on market as economic mechanism.

2) The enlarged scope of copyrightable works. The Amendment reorganized some categories of works already recognized by the 1990 Copyright Law and added three new categories within its scope of protection, including acrobatic works, architectural works and works of compilation. The fast development of the database industry in China had created a demand for protection. The 1990 law contained no provision on databases. The 2001 revision clarifies that databases, including multi-media ones, can be treated as compilation works for the purpose of seeking copyright protection.

3) The limitations on fair use and statutory free use. Fair use is an important part of copyright law that limits the private enclosure of creative expressions and assures the dissemination of information and knowledge. It defines the conditions under which the
public can freely use certain portions of copyrighted works without having to get
permission or making a payment. Understandably, in a socialist society, the range of such
free use would be more extensive than in a capitalist society. Foreign copyright owners
had always criticized the fair use clause in the 1990 Copyright Law as being too vague
and broad. The 2001 Amendment made a further effort to comply with the Berne
Convention and China’s commitment to the WTO regime by listing twelve kinds of fair
use and qualifying the purpose, proportion and extent of “taking of published works. One
of the most contentious issues during the revising process was about the freedom that
media could enjoy in using published works. Previously, all media were state owned
propaganda organs that could use published works without authorization so long as the
author did not state an expressed prohibition at the time of first publication. After the use,
they should send copyright holders remuneration. But radio or television stations could
use, for noncommercial purposes, published sound recordings without seeking
permission or making compensation (foreign works were protected according to terms
defined in international treaties). The 2001 Amendment downgraded the privileges of
radio and television stations by requiring them to send relevant compensation to rights
holders. It also repealed the performers or performing units’ right to use published works
in for-profit performances.

4) Increased status of collective copyright management. The 1990 Copyright Law did
not touch upon the issue of collective management. But the Implementing Regulations of
Copyright Law provide that copyright holders can exercise their copyright through
collective administration. The above-mentioned 1992 International Copyright Treaties
Implementing Rules also allow foreign organizations to collectively manage foreign
copyrights in China. The 2001 Amendment expands the provisions on the status, power and function of collective management organizations. According to the new law, collective management could extend from copyright to other related rights, and those organizations could act not merely as agents of right holders but as an independent party in enforcement actions against infringements.

5) The specification of copyright in a network environment. The 1990 Copyright Law did not deal with network issues at all. In the late 1990s, however, the Internet population grew exponentially in China. Internet service providers (ISP) and websites also exploded. Unauthorized uploading and downloading of copyrighted works began to cause legal disputes. In December 2000, the Supreme People’s Court was prompted to provide some tentative guidance on resolution of an increasing number of copyright disputes related to a network environment (X. Feng & Huang, 2002). The 2001 revision added the right of transmission through information networks to the bundle of rights of copyright holders. Following the manner of the 1996 WIPO Internet Treaties, the Amendment included online infringement provisions that prohibit the intentional circumvention or destruction of technological measures for protecting copyright. The provisions also prohibit intentional deletion or alteration of the electronic rights management information of a copyrighted work.

In sum, the 2001 Copyright Law has substantially upgraded the legal protection for copyright in China. The revisions are to meet demands from several directions, including the pressure for China to be further integrated into the global capitalist system, the growth of local copyright industries, and the development of new information technology. The following section will elaborate on the power dynamics surrounding the evolution of
China’s copyright law as both a summary of this chapter and an introduction to the next part.

4.4 Power Dynamics between the Global and the Local

The evolution of China’s copyright law is more than just a story of how private ownership of creative expressions and other related rights have been gradually put under legal protection. The intertwining between Chinese copyright legislation and global integration has also turned this into a much more intricate story about exogenous pressure vs. local elements, global power vs. national policy.

First, global harmonization of copyright protection involves a coercive strategy pushed forward by private interests. Putting aside all the rhetoric about how developing countries should establish a strong copyright regime first in order to stimulate the development of local copyright industries, what is really prioritized in bilateral or multilateral negotiations is the private interest of those who are currently dominating copyright industries based in developed countries. One former USTR official admitted that U.S. trade policy is biased toward the “squeaky wheel”: those industries that complain the most, influence the USTR the most. “In our negotiations with the PRC, we would claim to represent the entire U.S. industry, but in reality, we were only responsive to those with the most effective lobbying or PR or information dissemination efforts” (cited in Mertha, 2005, p. 58). Although the threat of trade sanctions did not achieve as much as the U.S. expected, its influence on Chinese copyright legislation was undeniable.

Second, the state plays a critical role in both negotiations and enforcement of new laws and policies, although its bargaining power may vary case by case. As Mertha (2005)
points out, China’s strategy during the process of IPR-related Sino-U.S. trade disputes was to resist as many U.S. demands as possible without jeopardizing the talks themselves. In other words, the state was carefully balancing the compromise China had to make on IPR issues and the country’s need to rejoin the world economy. During the 1995 talks, after China announced its counterthreat against the U.S., Xinhua News Agency, China's international news service, stated that such retaliatory measures were “to protect sovereignty and national dignity.” Yet sovereignty at times gives in to economic development, as the prospect of building a stronger nation through global integration is also critical to maintaining the party-state’s legitimacy.

Third, local political, cultural, and economic factors always matter. On one hand, the lack of copyright enforcement, which has been a thorny issue in Sino-U.S. trade relations, is just a clear indication of the discrepancy between the law on the paper and the reality. Just think about the fact that the U.S. was able to keep in its copyright law a discrimination against foreign copyrights for more than a century before granting foreign authors the same protection as its nationals. This gave the U.S. enough time to develop its own copyright industries by taking advantage of works of foreign authors. In a sense, China’s copyright legislation has already outpaced its developmental stage, and this inevitably leads to enforcement difficulties. On the other hand, the 2001 Amendment made on the 1990 Copyright Law was not solely born out of the necessity to accede to WTO. It also had a great deal to do with the growing number of local stakeholders. Feng and Huang (2002) contend that to a certain extent, “the acceptance of international standards itself is the result of domestic socio-economic changes, technological advancement and ‘liberalization of thoughts’” (p.921).
CHAPTER 5
COPYRIGHT GOVERNANCE IN POST-WTO CHINA: NEGOTIATIONS AMONG GLOBAL BUSINESSES, THE STATE, AND LOCAL INDUSTRIES

5.1 From Law on Paper to Law in Practice

Now that China’s copyright legislation is up to the standards of the TRIPS, the enforcement issue becomes the only focal point in copyright related trade disputes. What is worth emphasizing is that copyright enforcement issues are oft-times part of the general problems with China’s legal system. As a developing country that just decided not long ago to build a “rule of law” regime, China has a long way to go in turning the law on paper into law in practice. Riggs (1964) calls those developing countries in a transitional stage a “prismatic society”, which refers to the heterogeneous mix of traditional characteristics and modern traits. He points out one key feature of prismatic society is formalism, that is, the discrepancy between what is prescribed and what is actually practiced. In his words, “[a] law which is formalistic sets forth a policy or goal which is not, administratively, put into practice” (p.15). What permits formalism to persist is the lack of pressure toward program objectives, the weakness of social power as a guide to bureaucratic performance, and a corresponding permissiveness for arbitrary administration. This analysis is very much applicable to the situation in China, where an independent judiciary and consistent rules of law are lacking. Many scholars have noticed that despite all the fervor over “legal reform”, to a certain extent laws in China are still
concrete formulations of Party policies rather than a comprehensive and self-containing rule system with coherent principles and well-defined concepts (P. Feng, 2003; Yu, 2001).

As for intellectual property law *per se*, one should bear in mind that a top-down legal reform that was also under the influence of exogenous pressure is very different from a reform answering the demands of local players. Just like other reforms conducted in China in the past three decades, a new intellectual property law could simply mean the reallocation of political resources and economic benefit among departments and regions rather than an enforceable legal protection of private ownership of intellectual products (P. Feng, 2003). The fact that the copyright issue is high on the agenda of the USTR does not mean the strength of the Chinese copyright regime could magically outgrow China’s developmental stage.

**5.1.1 Copyright Regulatory Bodies and Enforcement Measures in China**

China’s copyright law enforcement relies on a unique “dual channel” that is comprised of both judicial and administrative organs. The court system is made up of four levels of courts: the Supreme People’s Court, Higher People’s Courts, Intermediary People’s Courts and District People’s Courts. The Supreme Court not only makes decisions on cases but also issues judicial explanations for implementing laws. These explanations provide important guidelines for lower courts to apply the existing laws. In the Chinese legal system, the courts at all levels are bound by these explanations when deciding copyright cases. In addition, since 1985, the Supreme Court has been compiling representative cases decided by Chinese courts at different levels in its monthly *Gazette*. Although these cases are not introduced to establish judicial precedents to be directly relied upon, they provide very important references for future decisions of lower courts.
In practice, if a lower court decides to take a different approach from a Gazette case when trying on similar factual patterns and legal issues, the judge bears the burden of explaining why the court decided to take an alternative way of reasoning (P. Feng, 2003).

Each People's Court has the following four trial divisions: a civil trial division; an economic trial division; a criminal trial division; and an administrative trial division. To strengthen judicial enforcement for protection of intellectual property rights, a new intellectual property trial division has been set up since 1993 in the Higher People's Courts. By the end of 2004, divisions specialized in the trial of IPR cases had been established respectively in all Higher People’s Courts at the provincial level, Intermediate People’s Courts in all provincial capital cities and some other big cities and even in certain District People’s Courts. The IPR trial division in the Supreme People’s Court was set up in October 1996, and was renamed the Third Civil Division in 2000.

The administrative system is the other important aspect of copyright enforcement. In 1985, the State Council established the National Copyright Administration (NCA) within the Ministry of Culture to take over the responsibility of overseeing the draft of the PRC’s first Copyright Law, which was promulgated in 1990 after many debates and revisions. Organizationally, NCA and the State Publication Bureau (SPA) are the same unit that enjoys a “one organization, two signboards” relationship. In 1987, SPA was moved out from under the Ministry of Culture and became the National Press and Publication Administration (NPPA) directly administered by the State Council. In April, 2001, NPPA was upgraded to ministry-level rank and renamed the National Press and Publication General Administration. During this process, NCA kept the same relationship with NPPA. Starting in 1987, local-level Copyright Bureaus were gradually established.
in provinces. Just as NCA was derived from NPPA, local bureaus are also affiliated with the local press and publication administrations. As specified in the 1991 Copyright Law Implementing Regulations and confirmed by the 2001 Amendment, NCA’s responsibilities include the following:

1. implement the Copyright Law and formulate ancillary administration rules, including rules on author’s remuneration, administrative penalties, standard copyright contracts, copyright registration for reproduction and publication of overseas audio-visual works, investigation procedure, etc.;

2. investigate and handle cases of copyright infringement having a national impact, including anti-piracy raids on suspect factors;

3. approve the establishment of copyright collective administrative organizations, foreign-related copyright trade agencies and copyright contract arbitration committees, as well as exercise supervisory functions;

4. be in charge of foreign-related copyright administration, such as registration of contracts in dealing involving foreign copyright;

5. be in charge of administering state copyright works; and

6. supervise regional copyright bureaux in their work, including training copyright administrators and judicial officials nationwide (P. Feng, 2003, p.18).

Pursuant to the Regulations on Computer Software Protection 1991, there was some ambiguity about whether software copyright disputes should be handled by the NCA or by the Ministry of Machinery and Electronic Industry, where the computer software registration center is located. This was clarified in 1995 when the center was moved under the NCA. Furthermore, with the promulgation of the Regulations on
Administration of Audio-visual Products in 1994, NCA’s jurisdiction was extended to infringement of audio-visual works at all stages, including publication, reproduction, import, sales, rental, projection or performance (P. Feng, 2003). Nowadays, NCA and its local bureaus may initiate enforcement actions on their own or launch an action after receiving a complaint from a copyright owner. They use channels like report hotlines, market surveillance and reports from rights holders or interested parties for obtaining information (Sun, 2004). In fact, with the escalating exogenous pressure for China to step up enforcement and an increasing number of domestic copyright disputes, administrative regulation has been greatly expanded. The 2001 Amendment to the Copyright Law increases the administrative measures to include ordering the cessation of infringing acts, confiscation and destruction of infringing copies and confiscation of materials, tools, and equipment that are used to make infringing copies (Xue & Zheng, 2002). Compared with the judicial system, administrative enforcement of copyright has the advantages of being more responsive, flexible and effective, yet due to the lack of strict procedural restrictions, mismanagement and corruption could also occur from time to time.

5.1.2 Problems with Copyright Enforcement

Any evaluation of the effectiveness of copyright enforcement in China is predicated on certain assumptions about the legitimacy as well as benefits of copyright law. From the U.S. point of view, China’s copyright issue is a story of evil pirates of the East free-riding the genius of Western creators. Browsing through the mainstream U.S. media coverage on China IP related topics, one can easily come across statements like “they feel like they need to steal as much as they can for as long as they can until they produce their own” (P. S. Goodman, 2005), constant reference to copyright infringers as “cheater” or
“thief”, and complaints that Chinese do not treat IPR crimes seriously enough as real crime, at least “not in the same class as burglary or rape” (Wonacott & McBride, 2005). As James Boyle vividly depicts, the current dispute on international copyright protection has been presented as a moral play: “Finally, tired of seeing pirated copies of Presumed Innocent or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries - led by the United States - have decided to take a stand…It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo” (Boyle, 1996, p.123).

If we acknowledge the power of moral argument in any justifications of law and policy, then for Chinese people, the copyright issue is a different type of morality play. Given the history of China in the late 19th and early 20th century, when Western imperialist powers forced China to sign a series of unequal treaties giving out significant economic and territorial concessions, the Chinese people have developed a strong nationalist sentiment that emphasizes independence and self-strengthening on the one hand and bears deep skepticism toward Western powers on the other (Alford, 1995). Hence for some, intellectual property is yet another instrument foreigners use to set obstacles for China’s modernization. During the Sino-U.S. trade negotiations in the early 1990s, Chinese officials defended book piracy by claiming that people are too poor to pay for Western books, “yet we must obtain this knowledge so that we can develop our economy. Furthermore, our printers give Chinese people jobs. Your companies are rich and your country is rich, yet always you want more” (Cited in Ryan, 1998, p.80). Nowadays, the Chinese sometimes refer to pirated computer programs as “patriotic
software”, out of a belief that it speeds the nation's modernization at little or no cost (Yu, 2001).

Needless to say, different perspectives lead to different perceptions. Whenever copyright becomes the focus of trade disputes, the Chinese side tries to prove its determination as well as the effectiveness of enforcement by presenting numbers of piracy production lines closed down and copies of pirated products confiscated. Yet some observers comment that this kind of high-profile national-scale crack downs are more of a demonstration of good will rather than having sustaining effects. On the other hand, the USTR relies mostly on two types of statistics to illustrate the gravity of piracy in China. One is the alleged piracy rate of ninety percent or higher (U.S. Department of State, 2005), the other is the estimated loss for U.S. copyright industries, which was claimed to be around $2.5 billion for 2005 according to the U.S. Commerce Secretary Carlos Gutierrez (Lemon, 2006). Both numbers are questionable, as they were provided by self-interested industry groups. In fact, the president of the Consumer Electronics Association regards the piracy rate stated by the Business Software Alliance as “absurd on its face and patently obscene” (Cited in P. Yu, 2006). As for the estimated loss, the U.S. copyright owners seem to forget they are talking about a country where average monthly income is less than $100. They calculate the potential loss based on the assumption that once the piracy is gone, Chinese people will be willing to spend two months’ salary on a legal copy of Windows XP.

Instead of jumping to the conclusion that copyright enforcement has been ineffective in China by drawing upon the Western standard and statistics provided by trade groups, this thesis presents the major tensions in the enforcement scenario of China so as to
further illustrate that copyright is a policy issue tangled with interests of multiple groups. The discussion in Chapter 4 of the evolution of China copyright already demonstrated why copyright was an alien concept to the Chinese political cultural tradition and how this legal system was transplanted into China in a rather swift manner. In addition to those embedded historical elements, the status quo adds more complexity to the picture.

First, economic reform actually contributed to the growth of piracy in many ways (D. Clark, 2000). Continued liberalization allows domestic companies to produce what they want and to distribute products where they choose. The Open Door policy also made it possible for a production and distribution network to be established among mainland China, Hong Kong and Taiwan, the so-called Greater China region. In fact, the latter two are places where most manufacturing facilities were initially located and they supplied the mainland with pirated products. Only later on were some of those production lines shifted to the mainland, especially southern provinces like Guangdong or Fujian that hosted the first Special Economic Zones. Furthermore, the rapid development of communication and transportation infrastructure facilitated the distribution of both legal and illegal products, the growth of online piracy being the most recent development.

Local protectionism poses another obstacle to enforcing copyright protection (Jayakar, 1997; Yu, 2000). Kim Newby (2004), an attorney experienced with U.S.-China trade has noted that China’s legal reforms have exceeded its enforcement abilities and it lacks the legal infrastructure to competently and efficiently handle intellectual property disputes. Moreover, “Beijing’s ability to enforce its intellectual property regulations is seriously hampered by local resistance to change, particularly when local authorities sense that such change will take power out of their hands” (p.241). One of the initiatives that the
CCP announced in the communiqué of the Third Plenary Session, the document that marked the starting point of China’s reform era, was to implement the decentralization of power (Y. Shen, 2005). This was originally proposed as an incentive for local development, but ended up causing the central government to lose control over local administrators. Many scholars have noted that local protectionism and regionalism characterizes the political landscape of Post-Mao China and how the decentralization of political power affects the enforcement of legal rules in general (Berkman, 1996; Dong, Zhang, & Larson, 1992; D. S. Goodman & Segal, 1994; Segal, 1994). A well-known expression in China sums up the protectionist attitudes of local governments: “The central government has policies but the local governments have policy-proof devices” (Shangyou zhengce, xiayou duice). Since pirating businesses serve as an important revenue source for lots of areas, local governments lack incentive to enforce the copyright law (Jayakar, 1997). Many local government entities either use pirated materials or have financial interests in the illegal production of copyrighted products. Moreover, the livelihood of people in some villages is wholly dependent on the production of pirated goods. The local police are reluctant to close down an illicit industry if it adversely affects an entire village. Overall, there are political, social and economic costs associated with a serious crackdown on piracy, as “overcoming local protectionism will require the expenditure of considerable political capital and divert limited resources from China's myriad other pressing problems” (Chow, 2000, p.5).

The particular bureaucratic structure of China’s copyright administration creates one more level of tensions (Mertha, 2005). Just like the National Copyright Administration that enjoys a “one organization, two signboards” relationship with the National Press and
Publication General Administration, the copyright bureaucracy at the provincial level is nestled within the Provincial Press and Publication Bureau (PPPB). Yet unlike the NCA, which endeavors to be a showcase for China’s progress in copyright protection, its provincial-level counterparts are “little more than lonely outposts scattered along China’s copyright protection frontier” (Mertha, 2005, p.137). There are two major reasons for this. First of all, the Provincial Copyright Department (PCD) totally subordinates to the PPPB for personnel and budgetary allocations, and it lacks an organizational identity of its own. The PCD is generally understaffed. None of them have any subdivisions to perform specific functions, thus tasks are usually assigned to individual members. A selected list shows that as of 1999, a PCD typically had 4 to 6 staff members. In contrast to this, the PCD is charged with a wide scope of responsibilities, including carrying out relevant copyright laws, regulations, and policies; hearing cases of copyright disputes according to Article 46 of the Copyright Law; supervising copyright-related commercial activities within the province, etc. Although theoretically, PCD could always draw from the PPPB some additional staff on a temporary basis if needed, in practice this involves high transaction cost. In the Chinese bureaucratic system, a department (chu) is of lower status than a bureau (ju), hence possesses less bargaining power. Unless the PPPB gives priority to copyright enforcement, copyright departments do not get to decide the frequency or type of mobilization (Mertha, 2005). This leads to the second factor that affects the capability of provincial PCD, that is, given the PPPB’s major function of regulating information flow in the printing media, the concern of censorship tends to override that of copyright enforcement, although it is possible for the two to coincide with each other at times. For example, PPPB usually has investigation teams that “supervise publishing
houses to ensure production quality, appropriateness of content, and the legitimate operation of publishing enterprises, which can include, but does not necessarily consist of, copyright enforcement” (p.140). The PCD has no power to mobilize these teams, which only report to the PPPB. So oft-times, copyright enforcement is subsumed in large scale campaigns against pornography and illegal publications (saohuang dafei). Illegal publications include works infringing copyright, but also works deemed as “anti-government” or “anti-Party”. Actually the major goal of this kind of saohuang dafei campaigns is to eliminate cultural commodities that are “reactionary” or “socially disruptive”. Although the reproduction and distribution of pornography and antigovernment works do involve copyright infringement, most copyright piracy in China is neither pornographic nor antigovernment in nature. Accordingly, they are not targeted in those campaigns.

Overall, a strict copyright enforcement that is up to the standard of the USTR encounters great difficulties and afflicts various tensions in the Chinese context. The political, economic and social cost involved in enforcement is too high to be sustained unless more and more interest groups begin to see the benefit as exceeding the cost.

5.2 Agenda of Global Copyright Industries

Since the WTO requires members to grant each other Normal Trade Relations (formerly know as the Most Favored Nation status), the U.S. could no longer use the extension of China’s MFN status as a bargaining chip in IP related trades disputes. China’s WTO membership also excludes the possibility of the U.S. exerting unilateral trade sanctions, which now have to be negotiated through the multilateral Dispute
Settlement Body (DSB) of the WTO. Yet this by no means implies that the USTR and the industry groups it represents will give up the effort to influence China’s copyright legislation as well as its enforcement scenario. What distinguishes the pre- and the post-WTO period is only the different means utilized to achieve the same goal of harmonizing copyright protection. For the USTR and most U.S. based copyright industries, the post-WTO agenda includes three major tasks: to continuously exert pressure on China’s copyright enforcement through trade negotiations; to help establish local stakeholders with the hope that domestic pressure can produce more outcomes than the exogenous ones; to develop a pay-per-use society by deploying more flexible business strategies.

Since the United States continues to have a significant trade deficit with China and U.S. copyright industries are still having a hard time to “reap what they have sown” in China, the USTR has kept up close monitoring of the China copyright issue. In February 2004, the Motion Picture Association of America (MPAA) urged the USTR to use Special 301 to leverage China to reduce piracy. Jack Valenti, the president of the MPAA stated that, “The export of American films and TV programs is an enormous asset to the U.S. economy. To ensure that America’s creative products thrive in the global marketplace, they have to be protected from theft. Special 301 is an effective and powerful tool that the U.S. Government can leverage with foreign countries to level the playing field” (MPAA, 2004). According to the MPAA, the piracy rate in China is at 95% and any real progress in copyright enforcement has been “hampered by a lack of focus and consistency”. Valenti called on the USTR to use “trade weapons” forcing China to fulfill her promises in protecting copyright. Later that year, Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America (RIAA), testified...
before the U.S. Senate Foreign Relations Committee on the same subject matter. Bainwol emphasized that providing intellectual property-based goods and services is “one of the economic activities Americans do better than the people of any other nation” (Bainwol, 2004). It is the U.S. government’s responsibility to protect this competitive strength of the nation so as not only to keep the thousands of jobs the recording industry offers, but also to reduce the soaring trade deficit of the U.S. An analogy is made between copyright piracy and the theft of physical goods—“the intellectual property of the United States is like a warehouse of ideas and creativity. For people to walk in and steal them is no more tolerable than theft of physical goods” (p.2). Again, the calculation of piracy’s effect on America’s account balance is based on the assumption that each and every sale of a pirated product abroad substitutes for the sale of a legitimate American product.

As a response to this ongoing dissatisfaction with copyright enforcement, the USTR elevated China to the Priority Watch List in its 2005 Special 301 Report, marking the country’s first appearance on this list resulting from non-compliance with the TRIPS. The USTR pointed to the following aspects as indicating China’s failure to fulfill its TRIPS obligations and 2004 U.S.-China Joint Committee of Commerce and Trade (JCCT) commitments. 1) Lack of transparency in IP-related rulemaking. 2) Criminal enforcement has been very weak. The threshold for criminal charges is too high and there has not been enough deterrent effect demonstrated by criminal cases. 3) Although there have been nation wide crackdowns on infringing products, there is no transparency about what happened with seized products and the deterrent effect of crackdowns has not been strong enough due to the lax punishment. 4) Since China has not acceded to the 1996 WIPO
Internet-related treaties, the protection of copyright on information networks is considered by the U.S. as not up to the international standard either.

In addition to imposing pressure through trade negotiations, U.S. -based global copyright industries have been actively seeking local partners under the new trade provisions granted by the WTO agreement. The rationale is obvious: further integration makes harmonization possible. The best way to cultivate China’s respect of the game’s rules is to increase its stake involved in the game. It is hoped that once Chinese parties obtain significant IPR stakes, the cost and benefit calculations of consuming and pirating Chinese parties, as well as those of government enforcers, will begin to shift with some of the significant costs of non-enforcement being borne locally by Chinese stakeholders (Butterton, 1996). Many commentators have noticed the potential benefit of developing local stakeholders in curbing piracy. Some use India as an example to show that once domestic film and software industries achieved development, piracy declined (Schrage, 1995). Others mention Taiwan and Korea, both of which once appeared on the priority watch list of USTR, yet both were able to have sustaining IP enforcement once indigenous innovative technologies were developed (Alford, 1995; Yu, 2003).

Foreign companies’ effort to convert pirates to partners began early. One of the most notable examples was Hollywood majors’ co-option of former pirates. In 2000, Warner Bros. announced Xianke will be one of its three Home Video licensees in China. Interestingly enough, Xianke was the first of two home video piracy cases that MPA brought to the Chinese court in 1994. The verdict was issued in 1996 for Xianke to compensate MPA for damages, lawyers’ fees and court costs (Wang, 2003). Now Warner Bros. could kill two birds with one stone by shutting down a bogus operation while at the
same time taking advantage of Xianke’s existent capacity. With more restrictions on joint ventures being lifted by the WTO agreement, transnational corporations (TNC) have begun to more aggressively seek Chinese partners. Ever since China’s official accession to the WTO in Dec. 2001, Hollywood has wasted no time in further integrating China into its global production and circulation. In the production sector, AOL Time Warner’s Asia-Pacific executives have completed a tour to Lin'an, in east China's Zhejiang Province. In Oct. 2002, the company disclosed its intention to invest four billion yuan (US$81.9 million) in building a 330-hectare filming base, which is also expected to become a tourist attraction (Xinhua News Agency, 2002a). Almost simultaneously, Disney was seeking cooperation with Changchun Film Group in building a movie world in Northeastern China, which will look a lot like a Hollywood film studio with its three-dimensional demonstrations of tornadoes and floods (Xinhua News Agency, 2002b). In addition to investing in the construction of facilities, Hollywood studios are also taking major steps to finance co-productions. Sony’s Columbia Pictures Film Production Asia, the most active Hollywood player in the Asian market, has scored recent successes with Big Shot’s Funeral (Da wanr, 2001), Hero (Ying Xiong, 2002), Warriors Between Heaven and Earth (TianDi YingXiong, 2003). Sony has also announced that it plans to invest US$100 million in China’s music and film industries within three years, and will shoot five movies in China every year. Sony chairman Nobuyuki Idei expects China to become Sony’s second largest market, after the U.S., by 2008. On the television side, Viacom signed an agreement with China International TV Corp. and began to broadcast programs of MTV 24 hours on channel 39 via Guangdong Cable TV from April 26, 2003. In March, 2004, following the change in Chinese law announced several weeks earlier allowing
foreign participation in Chinese production companies, Viacom announced a joint
venture with Shanghai Media Group (SMG) to produce Chinese language kids and youth
programming for distribution to SMG’s channels. In addition, the joint venture intends to
distribute the content to channels outside Shanghai (Viacom, 2004). Six months later,
another alliance with Beijing Television (BTV) for producing Chinese language music
and entertainment programming was publicized (G.A. Fowler, 2004). Putting aside the
influence on China’s media landscape per se, these booming joint ventures in copyright-
based industries will raise local stakeholders’ awareness of copyright protection. When
more and more Chinese organizations begin to discover the value of intellectual property,
they are likely to make the most convincing arguments for development and enforcement
of strict IPR protocols in China. Also, a local government is more willing to take action
when a foreign investor has a local partner and the government's own interest is at stake.

The third approach media and software companies take in countering piracy in China
is to deploy more flexible business strategies to profit alongside the pirates. Turning a
product into a service is one of the new tactics. In 2005, California based videogame
giant Electronic Arts Inc. moved its global on-line games operation to China and opened
an online-games studio. Electronic Arts was set to sell online games in China from its
Chinese game studio. In cafes or homes with broadband access, China’s online gamers
subscribe to Internet services that deliver live games simultaneously to thousands of
people who play against each other. While online games aren’t impossible to copy, the
servers are more complicated to crack than duplicating a DVD (G. A. Fowler & Dean,
2005). Similarly, record companies have realized that the licensing of songs to cell phone
services such as ringback tones, which allow users to download a song snippet and use it
as the ring their callers hear, is another way to generate revenue while staying ahead of pirates. Hollywood studios, on the other hand, are trying to distribute their products at a lower price in a more timely fashion. In June, 2005, Warner Bros. released the film “Sisterhood of the Traveling Pants” on DVD in China on the same day the movie premiered on screens in the U.S. This could help Warner to reap sales in China that would have gone to pirates selling discs that are made by videotaping the movie as it plays on the screen in the theater. But the same-day initiative could not prevent pirates from copying the legitimate DVDs and reselling them. In February 2005, Warner Home Video launched its joint venture with China Audio and Video Publishing House, a state company controlled by the Ministry of Culture. Then in early 2006, Warner took a bolder step to sell a “simple-pack” edition of the Aviator DVD that is priced at only $1.5 (RMB $12) on the Chinese market. In addition to selling songs to advanced cell phone services, music labels are also looking for new ways to profit from the huge market in China, including, promoting concerts, managing artists and entering into commercial sponsorship. R2G, a company founded by a group of Chinese entrepreneurs, monitors the distribution of online music for record companies. With monitoring help from the Chinese government, R2G compels Chinese web sites to stop distributing songs free and to use only licensed content (G. A. Fowler & Dean, 2005).

From the global copyright industries’ agenda and practices discussed above, one can clearly see that copyright policy making and enforcement is an integral part of those companies’ global expansion. It may seem ironic that on one hand, TNCs want the state to retreat from direct intervention in economic activities and to lift as many regulations as possible, while on the other hand, private companies constantly request the Chinese state
to step up enforcing copyright. But these are two sides of the same coin—the free market ideology requires securing private property rights so as to commodify everything profitable while deregulating transactions of those commodities. From the point of view of dominant forces in the capitalist world-economy, the optimal state-structure of a newly incorporated zone was one that (1) was not strong enough to interfere with the flows of commodities, capital, and labor between this zone and the rest of the capitalist world-economy, but (2) was strong enough to facilitate these same flows (Wallerstein, 1984, pp80-81). This meant that incorporation involved in some cases weakening the pre-existing state-structures, in other cases strengthening them or creating new ones—in all cases, restructuring them.

5.3 Initiatives of the Chinese state

The state-initiated efforts for strengthening copyright governance take three major forms: 1) to clarify formal rules and delineate more boundaries through further legislation; 2) to upgrade enforcement by facilitating coordination among governmental agencies and that between state administration and social groups; 3) to build a social norm on copyright protection through educational programs and public awareness campaigns.

In December 2004, China released a new judicial interpretation on the IPR sections of its Criminal Code, taking a major step in criminalizing IPR violators. One common criticism of the Chinese copyright regime is that the criminal sanctions are not severe enough for serious offenders. Considering the fact that China did not have an official Copyright Law until 1990, the legislators were concerned that criminal prosecution might be too harsh for people who did not even understand what copyright is. Yet as part of the
commitment of signing the TRIPS, China had to substantially upgrade the criminal liability for copyright infringement. Compared with previous interpretations, the current one contains several significant changes concerning copyright violators. First, it lowers the minimum monetary thresholds required for criminal convictions from illegal sales of RMB 200,000 ($25,000) to 50,000 ($6,300) and illicit income of RMB 50,000 to 30,000 ($3,700), although this is still too high a threshold from the U.S.’ point of view (Cohen, 2005). Second, it further clarifies some vague terms in the Criminal Code such as “sells in large volume”, “gains a large amount of illicit income”, “knowingly sells duplicate works” with more concrete explanations. Third, it applies accomplice liability to importers, exporters, landlords and others who provide assistance to infringers. Fourth, it permits goods produced in factories and/or kept in warehouses to be included in sales calculations. Fifth, it authorizes using the number of illegally duplicated disks or advertising revenue for Internet infringements to satisfy the “for the purpose of reaping profit” requirement. Last but not least, for the first time, “distributing a written work, music work, motion picture, television programs or other visual work, computer software or other works to the public by information networks” is incorporated under the definition of “producing and distributing” stipulated in Article 217 of the Criminal Code.

While acknowledging the above-mentioned changes, the USTR still argues that the current criminal enforcement does not demonstrate enough deterrent effect as required by Article 61 of the TRIPS Agreement, which states, “Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with
the level of penalties applied for crimes of a corresponding gravity” (available at http://www.wto.org/english/tratop_e/TRIPS_e/t_agm0_e.htm). The 2005 USTR Special 301 Report points to the following “deficiencies” of China’s 2004 Judicial Interpretation (JI): 1) it is the price of infringing goods rather than the price of legitimate goods that is used to determine whether criminal thresholds are met; 2) the JI criminalizes copyright infringements, including online piracy only if undertaken to make a profit; 3) the JI fails to independently criminalize the export of infringing goods; 4) the JI fails to criminalize the unauthorized rental, translation, public performance, broadcasting, adaptation and bootlegging of performances, even when done in a commercial scale; 5) service providers are not held liable for infringing material hosted on their networks and the profit motive is required for criminalize online copyright infringement. 6) The JI fails to address software end-user piracy; and 6) maintains thresholds three-times higher for working units than for individuals (USTR, 2005a). As a matter of fact, many copyright scholars have criticized the current trend of overcriminalizing copyright violators (e.g., Jackson, 2002 ; Litman, 2001; Moohr, 2003). Issues like the calculation of damages caused by copyright infringement, the liability of ISPs in network infringement activities, and the criminalization of infringement for personal use are all controversial ones that are still up for debate, yet the USTR points to those “deficiencies” as if a general consensus or a global norm has been established. As Sell (2003) acknowledges, “while opponents see TRIPS as a ceiling, the United States sees it as a floor” (p.175).

At the enforcement level, in order to overcome various limitations of the current copyright administration, such as its dependency on other agencies, and budgetary and personnel constraints, the State Council is exploring alternative strategies by mobilizing
and coordinating more governmental as well as social forces. In August 2004, the first U.S.-China joint investigative effort, dubbed “Operation Spring,” resulted in the shutdown of a DVD export ring, arresting six people (including two Americans) while seizing more than $83,000 in cash and more than 200,000 DVDs. This is notable for the cooperation between U.S. Immigration and Customs Enforcement (ICE) and Chinese Ministry of Public Security (MPS) authorities. (USTR, 2005b). In the meantime, the State Council announced a year-long national campaign to crack down on IPR infringements in sectors where trademark counterfeiting and copyright infringement are concentrated, including import and export activities, trade fairs and exhibitions, distribution and wholesale markets, brand name processing and publishing. This is a collective effort of the National Copyright Administration, Ministry of Culture, culture market management department and copyright administration at the provincial level, and local public security agencies. On March 31, 2005 Vice Premier Wu Yi, who was given the name of “IP czar” by the foreign press because of her significant effort in improving IP protection in China, extended this campaign until the end of 2005. The second phase especially targeted street vendors of illegal publications, audio-visual products and software (USTR, 2005a).

The nonsustainability of large scale crackdowns poses a challenge to enforcing copyright protection on a regular basis. Mertha (2005) notices the development of the so-called “small government, big society” as an important way to cast a wider network of copyright governance. Initially formed in three experimental provinces (Sichuan, Jiangsu, and Guangdong) in as early as 1999, Anti-Piracy Alliances (fan daoban lianmeng) have since emerged in more than 20 provinces. Typically these alliances include groups like domestic software producers, producers of audio-visual products, retailers, and
publishing houses that help the local copyright departments locate piracy within their jurisdictions and go after violators. Anecdotal evidence seems to suggest that these alliances seem to be making a dent in the piracy situation on the ground in China (Mertha, 2005). In addition, foreign associations like the International Federation of the Phonographic Industry, the Business Software Alliance and the Motion Picture Association of America, are actively seeking local partners to counter copyright piracy in China. In March 2005, a new Regulation on Copyright Collective Management was released. According to the new regulation, a Chinese collective management organization may enter into a reciprocal representation agreement, in which the Chinese organization and its overseas counterpart of the same category mutually authorize each other to conduct collective management activities in their respective territory. Such an agreement is required to be filed with the NCA and publicized by the NCA. In such an agreement, a foreign national may authorize a Chinese collective management organization to manage his copyright and related rights enjoyed in China. It is generally expected that the new regulation will provide substantial support for individual copyright holders to take action against infringers and to exploit the commercial value of their rights, especially the rights of public performance, public display, broadcasting, leasing, transmission over information networks and reproduction.

As much as laying out formal rules and strengthening enforcement mechanisms are both crucial to the authority of law in any given society, what is equally important, if not more fundamental, is the question of how the law can be internalized by members of the society and be accepted as legitimate. As critical legal studies scholars tend to emphasize, law is “a practice of encoding and decoding social meaning that merges imperceptibly
with rhetoric, ideology, “common sense”, economic argument, with social stereotype, narrative cliché and political theory of every level from high abstraction to civics class chant” (Boyle, 1996, p.14). In other words, for any law to take root in a society, it is very important to cultivate a general consensus of “this is the only way things should be” and to weave this notion into the fabric of the daily practice of average citizens. Indeed, one of the initiatives the USTR has been urging China to take is to raise “public awareness” of copyright law. In 2004, China launched a national campaign as part of the U.S.-China Joint Commission on Commerce and Trade (JCCT) commitment to educate the Chinese public on IPR protection. The State Intellectual Property Office (SIPO) introduced a television program called “Intellectual Fortune”, which is broadcast in 20 provinces nationwide. In April 2004, SIPO began publishing an insert in the English-language China Daily on intellectual property. In February 2005, the NCA hosted a nationally broadcast anti-piracy concert at Beijing Capital Stadium, with an estimated television audience of 500 million.

What is especially noteworthy is the national-scale educational campaign conducted among high school students from April 2004 to December 2004. Titled “Resisting piracy, starting from me”, this campaign was co-sponsored by NCA, Ministry of Education, Department of Propaganda and the Central Committee of the Communist Youth League⁹. The campaign consisted of three major stages: mass education on copyright protection through distribution of free reading materials compiled specifically for students; essay and speech contests at both provincial and municipal levels under the theme of “copyright and me”; special programs broadcast on China Central Television, featuring

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⁹ The Communist Youth League is a mass organization of advanced youth led by the Chinese Communist Party. Supposedly, it is a school for the broad masses of youth to study communism in practice and a reserve of the CCP.
conversation on copyright between IP experts and contest winners. After examining the discourse which emerged in this campaign, including those in official documents, press coverage and students’ writings, one can see several ways copyright was justified. First, copyright is important for maintaining the good order of the “socialist market economy”, while low-quality pirated goods would only disturb the economic order by hurting legitimate industries and bringing harm to consumers. Second, copyright is the best incentive for encouraging innovations and creations, which are not only critical to the development of culture but also to the survival of the nation in the era of the knowledge economy. Third, just like plagiarism and stealing, pirating is morally wrong and disdainful. Fourth, to respect copyright is to respect knowledge and the labor that is invested in creating knowledge products. It is a prerequisite for becoming a good citizen. Interestingly enough, all these arguments are questionable and none of them could stand as absolute truth. For example, pirated goods could benefit consumers to a great extent by facilitating low-cost access to more information; the expansion of copyright could also hamper creation due to the enclosure of intellectual “raw materials”; the non-exclusion and non-rivalry characteristics of intellectual products made the piracy issue a far more complicated and debatable one than the theft of tangible goods, etc. Nonetheless, the sanctity of copyright is passed to young students as part of the pedagogy of citizenship. Although it is hard to actually measure the effect of such indoctrination, a national-scale educational campaign like this will undoubtedly contribute to setting the social and cultural norm on copyright.

5.4 Domestic copyright industries in further privatization and integration
Many critics of China copyright law focus too narrowly on the binary of external pressure vs. local resistance. What often gets neglected is “the fact that the interests, with regard to copyright protections, of domestic Chinese firms are beginning to align with those of foreign firms in an unprecedented way” (Chynoweth, 2003). As much as there is competition between global and local capital, and there exists different concerns for industries and the state, the TNCs, the state and the local industries also form a “triple alliance” that yields not only economic growth but also structural changes in social, economic and political realms (Evans, 1979). In the arena of copyright governance, the direct outcome of this triple alliance is growing awareness of copyright as development strategies and stronger enforcement of copyright protection.

5.4.1 Publishing industry

According to the Chinese Constitution, citizens have the right to publish. But in reality, all the extant 562 publishing houses in mainland China today are owned by the government. It is practically impossible for common citizens to exercise the right to publish by getting legally registered as a publisher. The following chart of book flow depicts choices and consequences faced by authors in the PRC. Yet the economic reform did not leave the publishing sector intact. Private interests have been gaining presence ever since China entered the era of market economy, at first in retail sales, then moved upstream to planning, editing, designing and other aspects of publishing. There are now many so-called workshops or cultural corporations. They cannot publish themselves, but they can cooperate with the officially approved publishers by publishing under their book numbers.
Some of them have relied on their monopoly in elementary and secondary school textbooks to sustain their businesses. Others rely on government subsidies to survive. The third option is to rely on selling the imprimatur. Based upon the going rate, an imprimatur
can be sold for 15,000 RMB. If a small publishing house can sell one or two hundred imprimaturs per year, it would be able to cover operating expenses. By contrast, the workshops are subject to the test of the marketplace from the moment that they come into existence. They have to pay some money to the publishing house for the imprimatur and their profits come from what money is left. This forces them to develop a keen sense of the marketplace. Their educational levels are usually higher than the people in the publishing houses and they know more about the design, promotion and selling of books. At the moment, more than 80% of the best-selling books on the market have the participation of the workshops or cultural companies. Each year, before the annual national book publishing fair, there is a fair during the week before for secondary channel book orders in which the products of the workshops are bought and sold.

After China’s accession to the WTO, the publishing industry witnessed further regulatory reform. To enhance its competitiveness, the Chinese publishing industry initiated the process of setting up publishing groups on March 29, 2003, when Liaoning Publishing Group, the first of its kind, totally divorced from the local government publication authorities, announced its establishment. Structural reform has undoubtedly injected vigor into the development of Liaoning Publishing Group, which has achieved remarkable progress in diversification of asset mix, management reform, personnel structural adjustment, establishment of hi-tech supporting systems and a modern book logistics center. According to the latest statistics from the Liaoning Publishing Group, its book reprints have increased by 10.2 percent compared with the figure before the founding of the publishing group, and the number of books winning national prizes and ministerial/provincial prizes has increased by 55 percent and 36 percent respectively. At
the Beijing Book Fair of 2003, Liaoning Publishing Group won the largest order. By the end of last year, 13 large publishing groups had been established in China, marking the initial completion of restructuring of the Chinese publishing industry (J. Li, 2005).

With regard to eliminating restrictions on private ownership, in March 2003, China issued the *Measures on the Administration of Foreign-Invested Distribution Enterprises of Books, Newspapers and Periodicals*, which became effective on May 1, 2003, and which allow wholly foreign-owned enterprises in publication retailing. The Measures also allow all forms of foreign investment in wholesale distribution from December 1, 2004. Finally, China has published guidelines permitting the injection of private equity into publishing enterprises, which were previously controlled exclusively by state entities. Although this liberalization is limited, for the present time, to domestic Chinese private investment, it may be indicative of further moves toward the introduction of market forces (including foreign investment) in this sector (U.S. Chamber of Commerce, 2004).

Overall, competition in book publishing has become fierce in post-WTO China. Accordingly, copyright as an invaluable asset has become more and more appreciated by publishing houses, many of which have set up their own department/office of copyright protection to counter book piracy. For example, China Law Press is the leading legal publisher that enjoys a *de facto* monopoly in the publication of study materials for the State Judicial Exam (SJE), which was introduced in 2002 to improve the quality of the judiciary. Any person who wants to work as a judge, prosecutor, or become a practicing lawyer or a public notary, will need to pass the SJE to obtain a Certificate of Legal Profession Qualification. In 2005 alone, 244,000 people enrolled in the exam. Needless to say, such a number indicates a lucrative market for exam preparation materials, both legal
and pirated. Starting from 2003, the distribution branch of China Law Press has been making efforts to enforce copyright by: 1) collecting information about pirated books through consumer report “hotlines” (jubao rexian); 2) sending employees to book stores all over the country to check for evidence of piracy; 3) pledging the NCA to take administrative actions against piracy of SJE materials; 4) suing major infringers for copyright violation (X. Li, 2003). In China Law Press vs. Beijing Wenlin Xuan Bookstore, Beijing Wenhanyuan Cultural Corporation, and Beijing Baolixing Data & Optical Disc. Inc., Beijing Haidian District Court ruled the defendants infringed China Law Press’s copyright by reproducing and distributing the plaintiff’s SJE materials without permission. Baolixing Data & Optical Disc. Inc. was ordered to compensate the plaintiff’s economic loss of RMB 300,000 ($36,500) for illegal reproduction, and Wenlin Xuan Bookstore and Wenhanyuan Cultural Corporations were to make a total compensation of RMB 200,000 for illegal distribution and sales. In addition, what makes this ruling somewhat unusual is that the court also ordered the suspension of Wenlin Xuan Bookstore’s right to sell any legal copies of SJE materials for three years (Yang, 2004).

Another example is about the Chinese version of Harry Potter novels. Ever since its debut, the Harry Potter series has enjoyed great popularity in China and unauthorized copying proliferated like anywhere else in the world. Before the authorized Chinese translation of the fifth book Harry Potter and the Order of the Phoenix was released by the Renmin Wenxue Publishing House, the unauthorized version was available on the Internet (Yan, 2003). Fake sequels were also abundant, using all kinds of imaginary titles from Harry Potter and the Leopard-Walk-Up-to-Dragon, Harry Potter and the Golden
Turtle, to Chinese Emperor and Harry Potter. Although Renmin Wenxue was originally scheduled to release its authorized translation of Harry Potter and the Order of the Phoenix in October 2003, it ended up moving its production schedule forward to protect itself against online and offline piracy (P. Yu, 2006). In 2005, before Renmin Wenxue was ready to release the new installment *Harry Potter and the Half-blood Prince*, it cooperated with the Copyright Bureau of Beijing, Beijing Anti-piracy Alliance and Qingneng Innovative Tech. Inc. to design a better copyright protection scheme, which included adding a hologram on the book, greatly publicizing ways to differentiate unauthorized copy from the legal one, exerting tighter control on the reproduction and transportation of legal copies, and setting up a special cash reward for those who report on piracy. As a result, within the three months of October 2005 to January 2006, the sales volume of the legal copy of *Harry Potter and the Half-blood Prince* had exceeded the total sales of the fifth book in the last two years. The anti-piracy campaign of the sixth installment of the *Harry Potter* series was claimed by Renmin Wenxue as a “major victory”.

The China Law Press case and the Harry Potter incident have several important implications. First, as vested interests increase for domestic publishers, they now have a stronger incentive to mobilize both administrative and judicial means to protect their copyright. During this process, local stake holders oft-times find themselves in alliance rather than in conflict with foreign companies. Yilin Press, the authorized publisher of the Chinese translations of Bill Clinton’s *My Life* and Hilary Clinton’s *Living History*, has set up a cash reward of RMB 100,000 ($12,000) for individuals who provide important information on reproduction and distribution of pirated copies. Second, copyright is
actually a monopoly granted to publishers in exchange for the products they provide for the society. In the China Law Press case, the defendants did argue that the plaintiff abused their monopoly by setting the book price too high, but this argument obviously did not convince the judge.

Interestingly, on the China Book Info Web (www.21cbi.com), which is a major website specialized in publicizing all kinds of information related to China’s book publishing industry, all of the six anonymous comments on the China Law Press case showed sympathy toward piracy (www.21cbi.com/Article/200312/1751.htm). One comment says, “I think pirated book is a good choice for students who cannot really afford the legal version. I have been purchasing pirated study materials ever since high school. It’s only because I cannot use my already tight living budget to support legal books”. Another one says, “Those publishing houses are ripping us off! How could they charge RMB 30 for a copy of exam prep material?! If the pirated book is almost of the same quality, why shouldn’t we choose to pay less money”? I have no intent to claim these random examples are an accurate reflection of the general public opinion toward this case, yet they do point to a critical tension between the interest of publishers and that of the public. Therefore when moving toward stronger copyright protection, it is also important to keep in check the monopoly power of copyright owners.

5.4.2 Film industry

It has almost become a cliché to count piracy as the number one reason for the tardy development of the Chinese film industry in the last decade, but in reality the dynamics between Hollywood, the domestic film industry, state regulation, technological development and piracy form a much more complex network than just a linear causality.
From the late 1970s till the mid-1980s, which is the decade right after the Cultural Revolution, film was the major entertainment for Chinese people. Movie attendance in 1980 was 34 billion spectators and the average daily attendance during the mid-80s was 27 million spectators (X. Feng & Huang, 2002). However, these figures that used to be envied by the Hollywood filmmakers dropped severely during the late 1980s and the 1990s. The rise of television in the 1980s, the lack of diverse content due to censorship, and the underdevelopment of a healthy production, distribution and exhibition system are all reasons contributing to the decline of the domestic film industry in China. Audience attendance decreased from 14.39 billion in 1991 to 10.55 billion in 1992. Many theaters had to make efforts to subsidize their movie showing by opening up other businesses such as a video-game room or Disco bar. The production branch of the industry was also in danger; six of the sixteen feature film studios went bankrupt.

What gave the already recessive film industry a fatal blow was the decision made by the Ministry of Radio, Film and Television in 1994 to import ten revenue-sharing foreign films per year. Before then, foreign films were screened in China, but there was no revenue-sharing option. The China Film Corporation purchased the films’ full national distribution rights at a meager bidding price, which cut out high-budget commercial films (M. Zhao, 2003). During the years when the number of officially imported Hollywood movies was strictly restricted, it was the pirated videodisc that cultivated the Chinese audience’s taste for Hollywood models. The rampancy of pirated videodiscs was like the distribution of extremely low price product samples, thus once the restriction on movie importation was relaxed, Hollywood saw the promise of a large amount of “conventional” consumers (Miller, Govil, McMurrria, & Maxwell, 2001). In this sense,
piracy serves Hollywood’s interest in the long run and what really gets hurt is the domestic film industry. Beginning in 1995, Hollywood blockbusters have attracted massive market share in urban and rural China, and the ten imported foreign films have taken 60 per cent of China’s annual box-office revenue. Driven by profit considerations, the state-controlled film distributor and cinemas aggressively promote Hollywood movies, while ignoring domestic production. This double standard “fully intensified the squeezing power of transnational capital over domestic films” (M. Zhao, 2003, p.143).

If the Chinese film market in the pre-WTO era could be summarized by the metaphor of “wolves and lambs”, which was used by the internationally acclaimed Chinese film director Jiang Wen to predict that the feeble Chinese film industry would finally become the victim of the power of transnational capital represented by the Hollywood, then the post-WTO era is more like “dances with wolves” (M. Zhao, 2003), as the domestic film industry is experiencing a deep integration (as opposed to assimilation) into a global system dominated by Hollywood. According to Thiers (2002), deep integration constitutes a four-step process: (1) a nation-state agrees to join an international regime and harmonize its own laws and policies with said regime; (2) formal harmonization through the amending and changing of laws and regulations; (3) the implementation of the newly harmonized standards; and (4) ongoing monitoring and enforcement to verify the compliance with the agreement (pp.414-415). For the film industry, this integration includes both reducing market barriers for foreign capital and deregulating local capital. In order to compete with Hollywood, the local film industry is increasingly following the logic of Hollywood in production, distribution and exhibition, including anti-piracy strategies.
After the accession to the WTO in 2001, China doubled its quota of revenue-sharing Hollywood films from 10 to 20 per year. China also reduced tariffs on audiovisual imports and opened up its consumer market for audiovisual products for foreign distributors, and more importantly, allowed foreign investors to own up to 49% of companies that build, own or operate cinemas in China (The White House Office of Public Liason, 1999). One of the first steps the government took to open up the domestic film industry was to end the production monopoly of the large state-owned studios in 2002. Licensed private Chinese film companies may now apply directly to the government for approval to produce and distribute a movie. Just like Time-Warner and Sony are seeking more opportunities to invest in film production in China (see section 5.2 of this chapter), attempts have also been made by the domestic industry to boost international co-production. China Film Co-Production Corporation has made important concessions to allow two different prints for all co-productions, one for domestic release and one for international release. The measure is significant because the former “one print” policy meant that co-productions were sanitized by Chinese censors largely because of domestic concerns over content, removing many internationally marketable elements. Overseas investors viewed this as a major impediment to recoup from overseas sales (Zhu, 2003).

New policies enacted in June 2005 also allow private Chinese equity in theatrical distribution, which paved the way for the creation of Huaxia Film Distribution Co. Private distribution companies targeting domestic movies have also been popping up, such as Beijing Bona Culture Co. and Huayi Brothers, some of them backed by major Chinese conglomerates. Companies such as Poly Group Corp. and Stellar Megamedia
Group Co. Ltd., which are investing in local distribution companies, are also moving aggressively to enter the exhibition market by acquiring existing cinema chains. In fact, in anticipation of the WTO accession, the state already implemented a series of policies to encourage the consolidation of entertainment conglomerates whose businesses span film, television, and home video. The consensus among the domestic film industry is that “we shall get bigger to compete with Hollywood”. Such moves signal a future in which a handful of large companies will control all three sectors of the film industry.

The Chinese film industry’s integration into globalization leads to cooperation between domestic groups and international organizations in enforcing copyright. On August 24, 2005, 62 Chinese film-related companies established the China Film Copyright Protection Association (CFCPA), under the direction of Zhu Yongde. At the time, Zhu said, “The association will protect not only Chinese-made films but also imported films” (Xinhua News Agency, 2005). The non-profit CFCPA sees itself as a “right(s)-safeguarding” organization that provides copyright consultation to members, advises the government on film copyright protection and takes part in international exchanges. The organization has stated that it will serve as a bridge connecting the Chinese state with the film industry in the area of copyright. In March 2006, the Motion Picture Association (MPA) and the CFCPA signed a Memorandum laying down a framework for cooperation on intellectual property rights education and joint anti-piracy activities (MPA, 2006). Under the terms of the Memorandum, the MPA and CFPCA will share anti-piracy information with each other in an effort to further the scope and effectiveness of government and industry anti-piracy efforts in China. The MPA and CFPCA also agreed to jointly support the anti-piracy efforts of Chinese and U.S. law
enforcement agencies as appropriate. The MOU builds off other cooperative initiatives between the two organizations including the joint publication in 2005 of a copyright education pamphlet aimed at schools and retail outlets titled “Do You Understand the Copyright Interests in Films?”

On the other hand, the Chinese film industry is also learning from Hollywood in developing business strategies to better counter piracy and exploit the value of their films’ copyright. While a decade ago, the budget of a domestically produced film seldom exceeded $1 million, recent changes on the film market have pushed the industry to “forge China’s own blockbusters” by all means. Film director Chen Kaige, whose first critically acclaimed movie Yellow Earth made in 1986 only cost $70,000, claims that “our job now is to make the Chinese film industry bigger, and in order to develop our market here, we have to learn how to be businessmen” (Landreth, 2005). Chen’s most recent work Promise was made on a $35 million budget, exceeding the $30 million investment of Zhang Yimou’s Hero. With the budget getting substantially higher, producers are now putting more and more emphasis on ancillary markets like video, cable television, pay per view, broadcast television, etc. in order to recoup their investment. Because private capital has been permitted to enter video distribution, many of the video pirates who made a fortune selling illegal copies of Hollywood films are now turning semi-legitimate. One sign of this shift toward legitimacy was the video rights purchase price for Hero, which was bought at auction by Guangdong Weikai Audio and Video Production Co. for nearly RMB 18 million ($2.12 million), a previously unheard-of sum.

Previously, the windowing strategy worked well for the major studios in Hollywood—they segment audiences by differentiating among different outlets of distribution and
their time of release. With protection of copyright, Hollywood majors used to effectively charge audiences different prices to see the same film via different outlets depending on where and when the film is seen (Wang, 2003). The development of digital technology and new information networks have made it possible to deliver high quality pirated content to the audience in a speedy way, thus poses a serious challenge to the windowing strategy. In response, Hollywood had tried to shorten the release intervals to combat piracy and meet the global audience demand for speedy delivery. For example, on September 29, 2003, Warner Bros. Pictures announced the simultaneous release of the third film of the trilogy, *The Matrix Revolutions*. This unprecedented distribution scenario made *The Matrix Revolutions* available to global fans at 6 a.m. in Los Angeles, 9 a.m. in New York, 2 p.m. in London, 5 p.m. in Moscow, 11 p.m. in Tokyo, and at corresponding times in over 50 countries. In addition to creating the hype of a global event, this was supposed to protect the film’s copyright through instantaneous availability across geographical boundaries (Proffitt & Tchoi, 2004). Similarly, the Chinese film industry now is also focusing on securing films’ box office in their first week’s release. When viewers showed up on Oct.30, 2002 for the premiere of *Hero*, they had identity card numbers inscribed on their tickets. They were videotaped as they entered the theater's foyer. They handed over all cellphones, watches, lighters, car keys, necklaces and pens and put them in storage. Before taking their seats, they passed through a metal detector. Then they got a welcoming address from an executive with the film’s Chinese distribution company pleading with the audience not to make illegal copies. During the screening of the movie, uniformed policemen roamed the aisles during the film. A few sat in front of the screen and watched the audience with what appeared to be night-vision
binoculars (Kahn, 2002). Although later on pirated copies still became available in both optical disc format and on the Internet, the film earned a record 250 million yuan (US $30.12 million).

Before Feng Xiaogang’s much anticipated *Cellphone* was released in theatres, the producers Huayi Brothers and Zhong Kai Cultural Co., the company that bought the exclusive right to distribute audio visual products of the movie, joined together to allocate RMB 2 million ($250,000) to fight piracy. Their goal was to make sure no pirated discs would come out at least until after a week of the movie’s theatrical release. Before the national premier of *Cellphone*, Huayi Brothers told the press about their five-step anti-piracy campaign, which includes sending 200 special agents all over the country to collect information on piracy, setting up an audio visual market inspection task force to work together with the cultural market management team of local governments in raiding illegal products; sending lawyer’s notice to any underground production that shows a sign of making pirated copies, etc. (Y. Zhao, 2003). The campaign supported by the NCA and National Shaohuang Dafei (sweeping away pornography, striking down illegal publications) Working Committee proved effective and *Cellphone* topped that year’s box office.

5.4.3 Software industry

Among all copyright industries in China, the software industry is the one that grew hand in hand with piracy from the earliest stage. During the 1991-1992 U.S.-China IPR negotiations, the then Ministry of Machinery and Electronics Industry (MMEI) and the Ministry of Chemical Industry (MOCI) were both against granting U.S. software better copyright protection. MMEI at that time was in charge of making software (many of
them pirated) available throughout China’s state-owned enterprise network and MOCI similarly was one of the largest distributors of pirated industrial computer software. For enterprises, pirated software was a critical tool for them to catch up with the latest technology, for average Chinese people, piracy provided the only affordable way to acquire computer literacy. Thus it may not be exaggerating to state that the domestic software industry would not have gotten developed without piracy. Bill Gates once noted in 1998 in an exchange with Warren Buffet:

> Although about three million computers get sold every year in China, people don’t pay for the software. Someday they will, though. And as long as they are going to steal it, we want them to steal ours. They’ll get sort of addicted, and then we somehow figure out how to collect sometime in the next decade (Grice & Junnarkar, 1998).

Gates was right, had it not been for the widespread piracy of Microsoft’s products, its software would not have become the industry standard in China.

From the very beginning, the Business Software Alliance (BSA) has been one of the major lobbying groups that urged the USTR to impose trade sanctions on China for not respecting international copyright. A BSA representative argued in 1993 that the U.S. software industry had direct losses of $322 million in China and in 2004 the estimation of losses amounted to $1.47 billion. According to industry testimony, U.S. software sales to China have stalled due to IPR concerns: “Consider that in 1996 China was the sixth largest market for personal computers and the twenty-sixth largest for software; it is now the second largest market for personal computers but still only the twenty-fifth largest market for software. This growing gap between hardware and software sales is the
inevitable consequence of a market that does not respect intellectual property rights” (U.S.-China Economic and Security Review Commission, 2005).

On the Chinese side, copyright protection for software products is gaining momentum on the government’s agenda. The Computer Software Regulation of 1991 allowed making a small number of copies without the consent of the software copyright owner if it was for the purpose of classroom teaching, scientific research, or state organs performing public duties. The revised 2001 CSR, however, greatly narrowed the scope of fair use. It allows unauthorized use now only for the purpose of studying the design of the software, excluding classroom teaching and government use (P. Feng, 2003, p.155). A judicial interpretation issued by the Supreme People’s Court in 2002 makes it a civil liability to use unauthorized software in a commercial environment. This is the first time that end-user is specifically mentioned in the law. Of course, there are procedural problems, as always, but this is a significant step forward in committing the Chinese government to going after end-users. (Mertha, p.136). In 2002, the General Office of the State Council issued Document 47 titled “Vigorously Promote the Strength of Software Production Activity” (zhenxing ruanjian chanye xingdong gangyao). One of the stipulations of the document is that if a government agency initiates an information technology project, software must account for at least 30 percent of the total project cost. This is to urge the purchase of legitimate software.

Two recent cases are very illustrative of problems with enforcing the copyright of computer software in today’s China and they involve both local industries and the two foreign companies that are most aggressively enforcing their rights in China—Microsoft and Adobe. In April 2003, the Shanghai Municipal Education Commission got a letter
from Microsoft China, warning that all primary and high schools should remove pirated versions of Microsoft Office from their computers and purchase legal products instead. Microsoft had noticed that most of the schools in Shanghai were not on the company’s client list, yet the Information Technology textbook and the accompanying software environment these schools adopted focus on MS Office. In response, the Municipal Education Commission sent out a notice to all the 2000 schools requiring them to uninstall MS Office and change Information Technology from compulsory to an elective course. Nonetheless, the Commission did not meet Microsoft’s second request of purchasing legal copies of MS Office, but decided to install Kingsoft WPS, a domestically produced office system, on school computers. The unit price Microsoft initially asked for was RMB 10,000 ($1,250) for each package of MS Office and a license that would allow the school to install the software on multiple computers. When they learned about the Municipal Education Commission’s intention to switch to the domestic product, the price was lowered to RMB 5,000 per unit. Yet compared with the RMB 1,500 Kingsoft was able to offer, the total cost for all the 2,000 schools made a huge difference for the not very rich public education system. What’s more interesting is that when asked what if Microsoft proceeded to require an overhaul of the operating system, an official of the Education Commission responded: “we can always remove Windows and adopt Linux instead” (Hou, 2003).

While Kingsoft WPS was found to be an adequate replacement of MS Office, not all anti-piracy campaigns could end up benefiting the domestic software industry like the Shanghai school case. In the summer of 2003, Shangtong Co., one of the authorized local distributors of Adobe, initiated a raid of pirated Adobe Photoshop among advertising
companies across Fujian Province, which is one of the most economically developed provinces in Southeast China (Xinhua News Agency, 2003). With the help of the local Administration for Commerce and Industry (ACI), inspectors from Shangtong would show up in advertising companies without prior notice and note down the number of computers installed with unauthorized Photoshop software, sometimes even confiscating computers as evidence. Later the inspected company would receive a notice from the ACI that required them to purchase an equal number of legal products in addition to paying a fine of RMB 5,000 ($625) for each pirated copy used. Within two months, this campaign successfully brought more than 20 companies under administrative sanction and forced them to buy legal Photoshop software at the price of RMB 6,000 per unit, with the largest company purchasing 150 copies. Some advertising companies claimed that this is not a typical anti-piracy campaign, but is more like a “violent marketing strategy” for legal products. Insiders also suggested that it is unusual for Shangtong to acquire support from the ACI rather than the local copyright bureau, and this may suggest a revenue-sharing deal between the distribution company and government agencies.

Several aspects of these two incidents are worth pondering. First, as Bill Gates predicted, now is a good time for transnational software companies to collect payment in China because addiction was obviously well developed. Second, for developing countries that are in need of accessing information and knowledge, making a commitment to copyright protection means bearing an extra cost on education and economic development. Thus the interest of copyright owners should always be balanced against the public interest. One such balancing mechanism could be flexible pricing. Third, once again copyright was used as a means to strengthen monopoly, yet as the Shanghai story
indicates, competition from local industry could cause TNCs’ anti-piracy campaign to backfire. In fact, in addition to establishing a domestic proprietary software industry, China is also making a great effort to develop open source software. In August 2002, the open source operating system called Yangfan (or “raise the sail”) Linux was released by a government-sponsored software development group, which is expected to replace Windows and Unix on all Chinese government PCs and servers (Y. Li, 2002).

This chapter examined the post-WTO copyright governance in China by focusing on the changing strategies of both global and local copyright industries as well as the transforming role of the Chinese state, as a result of China’s integration into global capitalism. It first critiqued the Western—mostly U.S.—accusation of China’s lax copyright enforcement by putting the issue back in its political economic context. China’s stage of economic development and its political structure have put constraints on carrying out the “rule of law” in general and copyright enforcement in particular. It then looked at the U.S.-based global copyright industries’ constant push through the USTR to strengthen China’s copyright regulation and how their new strategies of converting pirates to partners have been facilitated by China’s WTO accession. Thirdly, It discussed the critical role of the state in copyright legislation, enforcement, and more importantly, building a social norm on sanctity of copyright through educational campaigns. Last but not least, further privatization and liberalization of domestic copyright industries also created stronger incentives for local stakeholders to tighten copyright control with intellectual products becoming an increasingly profitable commodity. What is missing from the picture above, however, is the critical element of the public as supposedly the
ultimate beneficiary of copyright policy. After all, it is in the name of promoting “the
development of literature and art, the press, broadcasting and television
undertakings …that serve the people” that copyright was deemed necessary in China’s
constitution. Yet the current trend of harmonizing copyright protection on a global level
has obviously been mobilized by the private interests of corporate copyright owners. We
cannot fully understand the implications of copyright policy until we steer away from the
hegemonic discourse of privatization and commodification, and give attention to the
public’s basic right to access information as well as to communicate.
CHAPTER 6

PIRACY, CENSORSHIP, AND INFORMATION ACCESS: COPYRIGHT AND PUBLIC INTEREST IN THE CHINESE CONTEXT

A scrutiny of both theoretical justifications and empirical evidence in Chapter 2 already posed a series of challenges to the alleged benefits of expanding both the duration and scope of copyright protection. Now after examining the power dynamics in China’s copyright governance, this chapter further questions the merits of a strong copyright regime that meets “international standard” by exploring the relationship between piracy and information access in the Chinese context.

6.1 Piracy as Empowerment

6.1.1 Pirating Businesses as Economic Empowerment

As Wang (2003) points out, piracy as a shadow economy works through and around existing institutions and infrastructure, thus the growth of piracy in China has been parallel to that of the formal economy. The proliferation of pirated books, VCDs, and software products went hand in hand with commercialization and marketization, which not only created incentives for production and consumption of pirated goods but facilitated the process of manufacturing and distribution as well. Take the publishing industry as an example. Underground publishing had been deemed as one of the most profitable sectors in China, with an estimation of 4,000 printing factories and a distribution network of 2,600 sellers (Y. Shen, 2005). These underground printing factories are tightly organized, with a clear division of labor. The collusion between bona fide publishers and illegal publishers enables the exchange of electronic copies of
manuscripts for bribes or kickbacks. The manufacturing process of a book is divided and allocated to several different factories at once, with each factory printing a few pages, and separate specialized factories responsible for binding and distribution through special channels (X. Li, 2003). It is not surprising that some commentators call piracy “the most classic example of free-swinging capitalism in China's transitional economy” (Movius, 2002). Operating independently of growth targets and restructuring directives, the pirating sector has the flexibility to accommodate the Chinese dispossessed by harsh economic reforms and the shrinking of the social safety net. The reform of state-owned enterprises since 1998 has caused 25 million employees to lose their jobs and the pensions of countless more have dwindled to uselessness. Some 80 million migrant laborers have seeped into the cities since the launch of Deng Xiaoping's trickle-down economic policy of developing the urban coastal areas first (Y. Shen, 2005). Without residence permits, this floating population cannot find long-term employment, accommodation or school their children. Pirating businesses play a significant role in feeding hundreds of thousands of dispossessed farmers and poor city dwellers. Wang (2003) profiled a street vendor pirate in Beijing in her book:

“Mr. E is in his thirties and is part of the ‘floating population’ (liudong renkou) in Beijing. He is also a former peasant, from Anhui province in eastern China. He and his wife and their toddler son live in a tiny room in northern Beijing. He makes slightly over RMB 1,000 (around US $ 120) a month selling pirated VCDs. He sells movies, music, and computer software…When asked about the piracy networks and how they operate, he says he only knows the person who delivers the goods to him. According to Mr. E, the police care more
about cracking down on pornography than on piracy. But in case of an arrest, he would be sent home without further punishment. And he would always return” (p.91).

Similarly, Movius (2002) also reports that the scores of CD/DVD agents prowling Shanghai’s Xiangyang Market, the largest retail center for pirated goods in Shanghai, are all migrants. Each shop employs 12 to 14 scouts. They buy the discs for RMB 5 and resell for around $1 to $1.20 apiece. One of the young men says he has been in the business for a couple of years and has been arrested three times in periodic police raids. Each time, he was imprisoned for three months, paying fines totaling over $1,200, but he always returns to the market. He was quoted saying: “This is a hard business, but so is all business in China, and this isn't as bad as most. It sure beats manual labor, and it beats staying in the countryside. It's not like I earn much money doing this, but it's a way to survive.”

Even the state media now admits that the fact so many migrants depend on the pirating business for a livelihood has created great difficulty for cracking down on piracy. A peasant couple from Henan Province told the reporter from China Daily that even though the business is dangerous, it is better than making ends meet on a farm. The couple sells pirated books in Beijing. If they are lucky enough to sell 20 books a day, that is enough to support their family of two children in Henan (Xie, 2005).

These three stories provide a unique perspective for us to look at the piracy issue. While it is the copyright industries’ estimated loss that always occupies the center stage of any international IP negotiations, the cost associated with enforcing copyright and the
potential benefits of piracy are seldom discussed. This was not the case a century ago when the U.S. Congress debated about whether to grant foreign authors copyright protection. At that time, the strongest objection against international copyright came from domestic publishers, booksellers, printers, binders, paper-makers, and those who made a living on piracy. The opponents pointed out that copyright was essentially a statutory right as opposed to a natural-law property right. Thus the grant and extension of this right is a matter of expediency instead of justice. The then Congress was on the side of opponents (A. Clark, 1960). Now in today’s China, if eradicating piracy means to deprive the only income opportunity from the economically dispossessed social group, how shall we balance benefits with cost? As China tries to build a “harmonic” society by making efforts to bridge the gap between the rich and the poor, this question becomes especially acute. After all, “the bottom line for perhaps all economic policy is maintaining employment, particularly in the urban sectors, a bottom drawn by fear of social instability that would result from large-scale urban unemployment” (Breslin, 2000, p.394).

6.1.2 Piracy as Information Empowerment

Just like the above-mentioned economic benefit argument, calling piracy a form of cultural empowerment also has its historical precedents in the 19th century America, when the movement for international copyright was under way. Opponents of international copyright argued that the lack of protection for foreign authors made it possible for average American citizens to afford high quality books, most of which were written by British authors. And this further improved the literacy in this post-colonial country (Bender & Sampliner, 1997). On February 7, 1873, the Senate once again
rejected several bills advocating the protection of foreign authors. The Committee report said:

While it may be conceded that the tendency of the law of copyright is to stimulate the production of literary and scientific works, it is believed to be equally true that one of its effects is to repress the popular circulation of such works…In view of the whole case, your committee are satisfied that no form of international copyright can fairly be urged upon Congress upon reasons of general equity or of constitutional law: that the adoption of any plan for the purpose which has been laid before us would be of very doubtful advantage to American authors as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hindrance to the diffusion of knowledge among the people and to the cause of universal education (A. Clark, 1960, p.105).

This report is worth quoting at length because it emphasizes the diffusion of knowledge and the cause of universal education, which were supposed to be the ultimate goals of copyright protection yet have been buried by the private interest of corporate copyright owners. The more balanced view toward copyright reflected in this quote has been marginalized in the contemporary hegemonic discourse that prioritizes private property over public access.

Piracy as an important cultural source for Chinese people to get otherwise unavailable information and knowledge dates back to the Maoist era. In the preface to his book
Intellectual Property in China (2003), the U.S.-educated legal scholar Peter Feng recollected his first encounter with book piracy in the early 1970s: “In both Shanghai and Beijing, the Foreign Languages Bookstore had an ‘upstairs’ counter, which was actually housed in a nearby back alley, where ‘pirated editions’ were ‘internally’ sold. A visit there was to me truly a pilgrimage to knowledge, a peep at civilization—I was then a youth undergoing ‘re-education’ in a remote village” (p.vii). That was during the Cultural Revolution, when most western books were considered by the Party as “poisonous grass” that spreads “capitalist ideology”, while the majority of state-owned publishing houses were engaged in publishing propaganda materials (Lynch, 1999). It was only through illegal channel or “internal circulation” that Chinese people could get exposure to a larger variety of content.

Now after more than three decades, copyright-related industries in China have experienced a sea change (see Chapter 5), yet piracy still provides the Chinese with more affordable access to a wider selection of uncensored cultural products. Price is the number one reason that people choose pirated goods. According to a 2006 survey of the National Bureau of Statistics (www.stats.gov.cn), the average monthly per capita income in China is RMB 1121.44 ($ 140). Beijing and Shanghai are the only two cities in the country with residents’ monthly income exceeding RMB 2000 ($250). In addition, Zhejiang, Guangdong, and Fujian are on the top five among high-income regions with average per capita income reaching RMB 1920.15, RMB 1592.87 and RMB 1351.86 respectively. The current market price for a Windows XP Home Edition is RMB 786 and DVD movies are generally priced around RMB 50-70, while a pirated copy of any software or DVDs can be purchased at RMB 6 to 10.
In addition to the concern of cost, choice and availability are other important issues. Under an authoritarian regime that exerts strong control on information flow and censors all types of media, illegal channels oft-time means more diversified content. A trip to the underground book market in Beijing’s Sanlihe District, which is a busy area where many first-class national organizations are located, will provide a glimpse of the underground publishing industry. Here one can find all sorts of pirated books. Almost all Hong Kong and Taiwan publications and books banned by the Chinese authorities can be found here. Old issues of Open Magazine, Zheng Ming and Beijing Spring are found everywhere\textsuperscript{10}. Books such as Zhou Enlai’s Later Years, Premier of the Red Dynasty, Too Hard to Call You Father, The Tiananmen Papers and even Chiang Kai-Shek’s China’s Fate are all available for low prices (Y. Shen, 2005). The print quality of these books is usually very poor, with typographical errors and missing words or even pages. But there are also newer pirated editions that are printed from computer files, and their quality is comparable to standard publications, but at prices cheap enough for the average reader.

A typical example of how piracy could serve as an important alternative source is the case of A Survey of Chinese Peasants (zhongguo nongmin diaocha), which was an exposé on the inequality and injustice forced upon the Chinese peasantry. The authors, Chen Guidi and Chuntao, conducted thorough investigation into the economic, social and political conditions of the approximately 900 million Chinese peasants. They describe the problems of corruption, of despotism, and lawlessness, along with unjust taxation, from which a large part of the rural population suffers. The book also shows how China's enforced industrialization is built largely upon the impoverishment of the Chinese

\textsuperscript{10} Open Magazine and Zheng Ming are political monthlies published in Hong Kong. The book titles mentioned are all politically sensitive due to their depictions of modern China.
peasantry. The reportage was first published by the literary magazine Dangdai (Modern Magazine) at the end of 2003. The magazine quickly sold 100,000 copies; all ten editions were sold out. The success of the piece promoted one of China’s main literary publishers, the People’s Literature (People’s Literature) Publishing House of Beijing, to reproduce the reportage in book format. In just one month the book sold over 150,000 copies before suddenly being taken off the shelf by Chinese authorities in March, 2004. Following the move, only pirated editions could be found on the streets. One source estimates that seven million pirated copies were sold throughout China (Kahn, 2004). In addition, electronic versions of the book were also spreading on the Internet. In October 2004, A Survey of Chinese Peasants won the first prize of the Lettre Ulysses Award, which is considered by some as the Nobel Prize for reportage literature. Since the book had already been banned, when Chen Guidi and Chuntao received the prize in Germany, the copies of the book displayed were pirated ones ("The Chinese Peasant Study : On The Eve Of The Verdict", 2004).

Another example came from the personal experience of the author. I got to know Li when I went back to China in the summer of 2002. I was anxiously searching for some Taiwanese film directors’ works that I couldn’t find anywhere else, then I came across Li’s little video store standing among fruit stands and tailor shops. I probably wouldn’t have noticed it if not for the imaginative store name that seemed very out of place: Blue Ostrich. His inventory and his knowledge about film impressed me because he knew the representative works of every single independent film maker I mentioned to him and he would throw to me one DVD after another while we were talking. “I am only here during nights and weekends, as I have a 9 to 5 day job. I make 50 cents for each DVD I sell, so
Li claimed that his store enjoyed great popularity among college students and professors, and they always came to him for getting non-mainstream films that were not widely available. “Real film fans in China never have any expectation from movie theaters. Most movies that show here are rubbish”, a college student flipping through piles of DVDs concurred with Li when he overheard our conversation. On one side of the wall, I did see several memos posted, with names like Jean-Luc Godard, Hsiao-hsien Hou or Kieslowski listed on them. “Those are requirements from my customers, I am gonna go down to Guangzhou later this week to look for those”, he told me. I visited Blue Ostrich again in 2004 only to find this little store had become the center of a movie lovers’ community, which was largely composed of people who took interest in independent and art films. The community had set up its own online forum and weekly screening activity (of pirated DVD movies, of course), and Blue Ostrich was the place people posted and exchanged all related information. Li gave me his card and asked me to write for their website, “you are a media person, you shall write film critiques for us!”

The Blue Ostrich story typifies a positive consequence of piracy—the availability of diverse content and a wider diffusion of creative works. Given the demographics of Li’s customers, not many of them could afford to purchase legal DVDs on a regular basis. Even with the new “flexible pricing” strategy adopted by some Hollywood majors, this community still has to rely on piracy for the type of content they prefer—the global dominance of Hollywood already determined that only mainstream blockbusters would enjoy the widest distribution. As Bettig (1996) contends, “the effects of concentrated ownership of the means of communication and of the messages themselves are the same:
high barriers to entry in the ‘marketplace of ideas’ and a narrow and limited range of informational and cultural works” (p.2). From this perspective, piracy could be an effective tactic to disturb the dominant communication order and facilitate the circulation of more or less marginalized content.

6.2 Piracy on Information Networks

6.2.1 Overview of Internet copyright regulation and Online Piracy

The rampancy of offline piracy in China dwarfs the online piracy, which appears to be less grave compared with that in Europe and the U.S. After all, in contrast to the Internet penetration of 36.1% in European Union (http://www.internetworldstats.com/stats4.htm) and that of 68.6% in the U.S. (http://www.internetworldstats.com/stats2.htm), only less than 10% percent of the Chinese population goes online. On the other hand, however, China is only second to the U.S. in the number of DSL/Broadband subscribers (http://www.internetworldstats.com/dsl.htm), due to the large population base and the fact that as a late-comer, China was able to leapfrog many countries by establishing a cutting edge telecommunications infrastructure. By the end of September 2005, there were 35 million broadband lines in China, with lines split between roughly 25 million DSL lines and 10 million cable lines (IIPA, 2006). According to the latest Internet development report from the China Internet Network Information Center (CNNIC), among the current 111 million Internet users, 64.3% of them get online through broadband connection (CNNIC, 2006), which makes China the world’s largest potential market in terms of Internet delivery of copyright content. In addition to hundreds of websites that offer streams, downloads or links to unauthorized files of copyrighted
materials, including music, software, films, and books, there are also many Bit Torrent (BT)\textsuperscript{11} sites; at least four emule servers; at least seven specialized mp3 search engines, which offer links to thousands of song files for instant downloading or streaming; and at least eight China based peer-to-peer services (IIPA, 2006).

Some of the copyright industries have begun concerted enforcement campaigns. MPA began such a program in May 2002, employing webcrawlers that can find pirate movies both in English and simplified Chinese characters. In 2003, 231 cease and desist letters were issued, although the 37\% compliance rate was labeled by the IIPA (2004) as “unacceptable”. The recording industry of the U.S. also has been sending cease and desist letters to offending ISPs and websites and the compliance rate was acknowledged as having “generally been good”. From September 2005 to February 2006, the NCA, the Ministry of Public Security, the Propaganda Department of the CCP, and the Ministry of Information Industry launched a joint campaign to crack down online piracy. During this effort, 18 criminal offence cases were handed over to police for investigation, 137 websites were ordered to remove any illegal content, and 29 websites were fined a total of RMB $789,000 (US$97,000) (Liu, 2006).

The most recent legislative development with respect to copyright protection on the Internet shows a significantly positive sign for global copyright industries. On May 29, 2006, the Chinese government passed a new Internet Copyright Regulation that is to take effect in July 1, 2006. The new regulation addresses most issues that have for a long time been criticized by the USTR and trade associations like IIPA or MPA when they complained about the inadequacy of Internet copyright regulation in China (IIPA, 2004;\textsuperscript{11} BT is a recent P2P architecture which allows for faster file sharing due to the way users cooperate in uploading and downloading content simultaneously.)
USTR, 2005a). The new Chinese regulation shows great consistence with the 1998 U.S. Digital Millennium Copyright Act (DMCA), which was formed under the heavy lobbying of U.S. copyright industries. Since the enactment of the DMCA, commentators have widely criticized the statute for stifling creativity. Two issues are especially controversial. First, the DMCA limits liability for copyright infringement for online service providers if they remove from their services material posted by users that copyright holders allege infringes on their rights. Critics argue that this creates a chilling effect by giving ISPs too much incentive to remove content even if the reproduction of such materials is permissible under existing copyright law (Jackson, 2000; Lessig, 2001; Litman, 2001). Second, The DMCA includes a provision prohibiting the circumvention of encryption technology copyright holders use to protect their creative works and the dissemination of information concerning how to defeat copy-protection technologies. This anti-circumvention provision of the statute prevents people from engaging in actions that traditionally have been considered fair use (Jackson, 2001; Lessig, 2001; Litman, 2001). Similar to the DMCA, Article 15 of China’s new Internet Copyright Regulation states that once the ISP receives a written notice from copyright owners, it should “immediately delete the alleged infringing work, performance, or audio-visual products, or disconnect links to such content”. Article 23 provides a “safe harbor” for the ISP as the DMCA does by stating that ISPs can be exempted from infringement liability if they remove the alleged infringing content right after getting written notice from copyright owners. As regards to the circumvention of copyright protection technologies, the regulation prohibits the intentional evasion or breach of technical measures to prevent copyright violations. The production, import and supply of devices capable of evading or breaching
technical measures of copyright protection and technical services are also banned ("Internet Copyright Regulation", 2006). Clearly, just as in the DMCA, the new regulation in China is also tilting toward the interest of copyright holders while sacrificing the public’s right to fair use and information access.

6.2.2 Online Piracy and Fair Use

Internet piracy in China manifests some characteristics that are distinctive from offline piracy, and thus poses more challenges to regulation. First, given the convenience of producing and publishing content in a digital communication environment, unauthorized usage of copyrighted material online is more likely to be mixed with creative labor that alters the original content in different ways. Under those circumstances, it is important to draw a line between fair use and copyright infringement without surrendering too much power to copyright owners. Second, the Internet, especially the P2P technologies have greatly facilitated a culture of sharing, which relies on a decentralized model of information distribution, that is, people get information not from a central source but from peers. In a country that performs strong censorship, it is especially important to preserve such an online community of sharing as an alternative channel to access diverse information. By the same token, since China has already established a complete censoring mechanism that has the potential to turn the Internet into a “full-blown panopticon” (Tsui, 2003, p.66), if this mechanism is fully utilized to enforce online copyright protection, it will further stifle the freedom to communicate in the digital environment. These two aspects will be illustrated respectively in this and the next section.
J.K. Rowling’s Harry Potter series has been enjoying a great fan base in China just like in anywhere else in the world. Three months before the official release of the Chinese version of *Harry Potter and the Order of the Phoenix*, unauthorized translation of the first ten chapters was already freely available on the Internet through book-club websites and university chat rooms. They were posted by fans who were able to purchase the English version after its worldwide release (Yan, 2003). While People’s Literature Publishing House, which owns the rights to the Chinese language version, expressed outrage at what they called the “obvious” and “absolute” infringement of copyright, Harry Potter fans maintained that providing an online version in Chinese is a labour of love, not a business opportunity. “We wanted to create this ourselves,” said one person involved in translating the book. "We wanted to encourage an exchange of views between fans. This is not a money-making operation. If anyone feels their rights are being infringed all they have to do is tell us and we will remove it” (Yan, 2003). Under the Berne Convention and the TRIPS, authors of literary or artistic works enjoy “the exclusive right of making and of authorizing the translation of their works”. Accordingly, one may contend that the online version could act as an economic substitute for the authorized translation, thus hurting the interest of People’s Literature as a derivative copyright owner. But anybody who has ever translated a literary piece from one language to another would know that translation is an interpretive and creative process that varies among different people. It is very unlikely for two separate translators to come up with identical texts. It is argued that the online translation of Harry Potter bears more resemblance to fan fictions than to regular unauthorized reproduction of the original texts. Just like fan fictions, the unauthorized translation gave translators and readers meaning
and enjoyment and allowed them to take part in the production of culture. The online translation was done collectively for the purpose of sharing rather than for making a profit and they contribute to the cultural production as a secondary creative text. If the creativity involved in translation is not convincing enough, the next example of parody invites further attention to fair use.

In December 2005, veteran director Chen Kaige’s newest blockbuster Promise (Wu Ji) was finally released in China after being heavily promoted in all types of media outlets. Chen is among the so-called “Fifth Generation” Chinese directors who drew instant international attention with their early works. In 1993, Chen’s film Farewell My Concubine won the Golden Palm award at the Cannes Film Festival. Yet for some reason, Chen’s works in the last decade or so have not been very successful. Promise topped all the previous domestic blockbusters with a budget of RMB 300 million ($37.5 million), and the media coverage before the premier all suggested this movie would be the great coming back of one of the best Chinese directors. Promise turned out to be a great disappointment instead. In addition to the overwhelmingly negative feedback from both critics and the audience, what upset Chen Kaige even more was a 20-minute video spoof that became a huge hit on the Internet soon after the movie’s release.

Titled The Bloody Case that Started from a Steamed Bun, the video was made by a 31-year-old sound engineer and freelancer named Hu Ge. Hu told The Times reporter that he was so disappointed after seeing The Promise that he decided to have a little fun with the convoluted epic of a girl transformed into a princess (MaCartney, 2006). Hu adopted the

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format of CCTV’s famous program “China Legal Reports” to organize edited sections from the *Promise*. He kept the names of original characters, but dubbed them with different speeches to develop his own story. *The Steamed Bun* not only parodies the most expensive film made in China, but also pokes fun at state television. Hu Ge uses a poker-faced presenter and stuffy communist terminology in his report of the investigation into the humble bun murder. His satire attracted millions of viewers on the Internet, almost certainly more than paid to see *The Promise* in theatres. Countless blogs provided links to or direct downloading of the short film. Although Hu Ge allegedly told one reporter that he did not expect so many people to watch his spoof, he became China’s first cyber hero overnight. Chen Kaige on the other hand was infuriated. Chen accused Hu of having no sense of morality for destroying the integrity of his work (MaCartney, 2006). It soon became widely reported that Chen filed lawsuit against Hu Ge based upon copyright violation. In response to a question from a reporter, the State Copyright Bureau chief Wang Ziqiang stated that this case will depend on whether the work exceeded the boundary of reasonable use, and that should be resolved by the judicial department to determine in the civil suit. At the time of this writing, there have not been further details reported on the case per se except that Hu Ge had stopped his work on account of the lawsuit.

The moral support for Hu Ge is quite strong. According to an online poll conducted by Netease, which is one of the biggest Internet portals in China, only 843 votes (=4%) sided with Chen Kaige while 14,760 (=85%) supported Hu Ge. Many netizens say that Chen’s $300 million movie provided them with much less enjoyment than Hu’s 20-minute spoof. Some even claimed that *The Bloody Case that Started from a Steamed Bun* actually
hyped up *The Promise* for a while, otherwise the original movie would quickly fade away after it went into public screening. There are now many people who go watching *The Promise* because they saw *The Steamed Bun* first (Q. Yu, 2006). Opinions expressed by legal experts, however, are much more divided (*see* the online forum dedicated to this topic—“*The Promise, The Steamed Bun* and Intellectual Property” at http://it.people.com.cn/GB/8219/58496/index.html). Some insist that Hu Ge’s work has gone beyond fair use and tarnished the integrity of the original movie, and moral support from the public should not help him win the case. Others argue that parody is a completely legitimate way of making comments on literary and artistic works, hence shall be protected as freedom of expression. I side with the latter group in this case. An appropriate precedent to draw upon is the 2 Live Crew case ruled by the U.S. Supreme Court. In 1989 the rap group 2 Live Crew recorded an obscene version of Roy Orbison's song “Pretty Woman.” Orbison's “Pretty Woman” became, successively, “big hairy woman”, “bald woman”, and “‘two-timin’ woman”. Orbison’s publishing company initially denied 2 Live Crew permission to parody the song, then sued the group for copyright infringement. The U.S. Supreme Court ruled unanimously that by ruling against the rap group, the appeals court had not balanced all the factors that play into fair use. The Supreme Court reversed the appeals court and ruled that the parody was fair use instead of infringement (*see* Vaidhyanathan, 2001, pp.145-148). It is true that these parodies make authors angry and may tarnish the reputation of the original characters. But what makes authors angry is precisely what they are least likely to write, and what copyright needs to permit for the purpose of encouraging creativity and diversity. Therefore, the court decision on “*The Steamed Bun*” case will have significant
implications on fair use in general, and on communication activities in a digital
environment in particular. If Chen wins, this will be yet another example of utilizing
copyright to exert private censorship. Without the help of copyright law, he gets to decide
what kind of expression about his original work can or cannot be spread.

6.2.3 Internet Piracy, Internet Censorship and Information Control

When *Brokeback Mountain* came to China, government censors decided that a gay-
cowboy romance was not appropriate for the Chinese audience and refused to approve
the release of the film. But for China’s net savvy generation, this was hardly an issue.
Major file-sharing websites started to provide “seeds” for P2P downloading only a couple
of weeks after the movie’s U.S. premiere. The earliest version available online was
without subtitles. Although the heavy accent of the Heath Ledger character was quite a
challenge to non-native speakers, the collective wisdom of Chinese netizens proved to be
powerful. One version after another, the subtitles got improved little by little. Then
finally somebody uploaded the “perfectly-subbed” version, which was made possible by
using the original E. Annie Proulx story as a reference. This is one of the many examples
of how Internet users in China try to evade official information control through file
sharing. China also has an estimated 16 million bloggers, posting about everything from
politics and sex to advertising and food. The blogging generation is considerably more
information savvy than their previous generations. They may seldom get information
through state media outlets like *People’s Daily*, yet they are fed by all kinds of online
information on a daily basis. Many of them routinely use a file-sharing protocol to
download films or television programs that the government officially rejects (Osnos,
2006). For many Chinese netizens, file sharing is the essential channel that leads to an
uncensored world, while for global copyright industries, it is the focal point for fighting online piracy.

In September 2005, the first high-profile case related to file-sharing was decided in China. Shanghai Busheng Music Culture Media Company, an affiliate of the EMI record label also known as Shanghai Push, filed a copyright infringement suit against Baidu.com, which is the largest search engine in China. Plaintiff alleged that Baidu offered a music download service on its website for 46 songs with copyrights owned by the plaintiff, this service harmed Busheng Music in its right and interests of distribution of these songs on the Internet. A court in Beijing's Haidian district ruled on September 16 in favor of Shanghai Busheng and ordered Baidu to stop providing such service and pay RMB $68,000 ($8,500) in damages. The argument supporting the decision is that unlike such search engines as Google that merely provide links to Web sites, Baidu offers deep-linking to unlicensed music files. Clicking the link triggers a download from a remote site while the user remains on Baidu. Baidu defended itself as a neutral search engine that is simply providing the basic service offered by all engines. Baidu said that it does not upload songs itself, nor does it provide online displays or download services to its users. But the court did not seem persuaded. Baidu is now appealing the case (J. Li, 2005).

Encouraged by the victory of Shanghai Busheng, EMI, Sony BMG Music Entertainment, Warner Music Group Corp., and Universal Music Group have all since filed lawsuits against Baidu in the Beijing Intermediate Court, seeking to stop the company from offering free music downloads. The four companies also asked for compensation of a total RMB 1.67 million (US$206,000) (R. Zhang, 2005).
The Baidu case was the first major attempt made by record companies to shape the governance of P2P file-sharing in China. An examination of the global music industry’s record of fighting piracy clearly reveals their long-term hostility toward file sharing technology and their ultimate goal of co-opting online sharing under their commercial framework. One of the most famous cases concerning file sharing involves Napster, which allowed users to search for music on the hard drives of other users and share music files with them while they were on the network. The recording companies successfully forced Napster to shut down its service and eventually file bankruptcy (Richtel, 2002). In November 2002, Roxio, a manufacturer of CD- and DVD-copying software, purchased Napster’s name and intellectual property assets. In October 2003, Roxio finally relaunched Napster as a subscription-based service, featuring music from the major music labels ("Roxio buys Napster assets", 2002). After the Napster litigation, more engines and services emerged, such as gnutella, KaZaA, AudioGalaxy, Morpheus/MusicCity, Grokster, and iMesh, which all can be used for the very same purposes as Napster, oftentimes with even greater efficiency and anonymity. Universal Music Australia and 29 other music companies brought an action against Sharman Network Ltd. Which provided the KaZaA software to users through its website. Universal Music Australia alleged Sharman Network was infringing copyright by authorizing the infringing conduct of KaZaA software users. On September 5, 2005, the Federal Court of Australia issued a landmark ruling that Sharman, though not itself guilty of copyright infringement, had "authorised" KaZaA users to illegally swap copyrighted songs. The company was ordered to modify the software within two months. Sharman and the other five parties also face

13 Unlike Napster, these services do not have a centralized server. Many of them allow users to transfer files among various locations while remain anonymous. Thus from the industry’s perspective, it is more difficult to shut them down.
paying millions of dollars. On December 5, 2005, the Federal Court of Australia ceased
downloads of Kazaa in Australia after Sharman Networks didn't modify their software by
the deadline (Austin, 2006). Around the same time when the KaZaA case was debated in
the Australian court, another suit was filed in the U.S. against the file sharing company
Grokster by the MGM Studio. The RIAA and MPAA both sided with MGM, while
computer and Internet technology companies supported Grokster. On June 27, 2005, the
Supreme Court of the U.S. unanimously decided that building businesses with the active
intent of encouraging copyright infringement should be held liable for their customers'
illegal actions. Justice David Souter wrote in the majority opinion, “We hold that one
who distributes a device with the object of promoting its use to infringe copyright, as
shown by clear expression or other affirmative steps taken to foster infringement, is liable
for the resulting acts of infringement” (Borland, 2005). On November 7, 2005, Grokster
announced that it would no longer offer its peer-to-peer file sharing service. As part of a
lawsuit permitted by the *MGM Studios v. Grokster* Supreme Court decision, Grokster was
forced to pay $50 million to the music and recording industries.

Although there has not been documentation indicating how the Judge at Haidian
District Court makes reference to all the previous litigations concerning file sharing while
pondering the Baidu case, it seems reasonable to infer the above mentioned cases provide
important context that sets the international norm about regulating file sharing. The
global nature of the Internet as well as dominant copyright industries means that
copyright governance has to eventually transcend geographical boundaries and extend to
foreign legal territory. A *Washington Post* article commenting on the Grokster decision
suggests that the Supreme Court has forced all P2P services to “face a choice: Go
legitimate, as the music industry says, shut down, or move outside the U.S. jurisdiction” (Ahrens, 2005). Ostensibly, the next step for the industry will be trying to exert influence on copyright legislation and jurisdiction in other countries. Austin (2006) discusses the increasingly extraterritorial effect of domestic copyright policies in a digital environment and contends that the recent suit against Baidu was an effort for copyright industries to “export Grokster”. The court decision in favor of the music company can be considered a modest success for such exportation.

The current regulatory model pursued by global copyright industries to either outlaw P2P file sharing or bring it under the control of corporate copyright holders will have unique implications in the Chinese context, given its interaction with China’s information censorship. Theoretically, copyright and censorship regulate different aspects of information products. Copyright grants authors exclusive right to their expressions for the purpose of encouraging creation, while censorship suppresses the dissemination of certain ideas by filtering out expressions. As Samuelson (2003) summarizes, the mainstream view in the west holds that copyright is in harmony with freedom of expression. First, copyright contributes to democratic discourse in providing rights that enable independent writers and artists to make a living from their expression. Second, copyright protects expressions but not ideas. Other authors are always free to express the same idea or reuse the information in a protected work in a different way than the first author. In this way, private censorship is avoided. Third, the fair use doctrine of copyright law prevents authors from censoring the content they disapprove. Nonetheless, the reality is much murkier than the seemingly clear-cut dichotomy of expression vs. idea. Patterson’s (1968) historical analysis suggests that copyright could be a means of
suppressing rather than promoting freedom of expression and speech, in other words, as a form of private censorship. The 2 Live Crew case and the Chen Kaige v. Hu Ge case discussed earlier in this chapter represent attempts of censoring content via copyright protection.

As for the relationship between file sharing and government censorship, first, outlawing services (e.g. baidu.com) or technologies that facilitate online file sharing will exacerbate the effect of censorship. A big portion of information products exchanged through P2P sharing in China are those censored by the Chinese government. In other words, they cannot be available to Chinese people in legitimate form, thus, banning the unauthorized sharing of such content will be more of a loss to the public than a gain to copyright industries. Second, censorship could also help copyright enforcement. Tsui (2003) argues that the Chinese government has been able to shape China’s Internet in a way that closely resembles the Panopticon, which is a concept first coined by Jeremy Betham, but did not gain attention until being elaborated by Michel Foucault. According to Foucault, the major function of a Panopticon is “to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power” (Foucault, 1995, p.201). James Boyle applies this concept to his analysis of cyberspace and argues that digital libertarianism is inadequate because of its blindness towards both the effects of private power, and the ways in which the state can often use privatized enforcement and state-backed technologies to evade some of the supposed practical restraints on the exercise of legal power over the Net (Boyle, 1997). Tsui (2003) points out the Panopticism on the Internet in China is established through self-regulation;
requiring users to connect through a government-controlled international gateway for foreign traffic; the logging of information and the registration of users; and intimidation.

Although this centralized censoring mechanism is commonly associated with governmental control on sexually explicit information or politically sensitive content, it could also be utilized to enforce copyright protection. For example, the newly passed Internet Copyright Regulation stipulates that copyright administrative agencies in China have the right to obtain from ISPs personal information of alleged copyright infringers, including real name, contact information and IP address. With an already sophisticated surveillance system in place, it will be easier to track down copyright offenders. We have already seen companies like Google, Yahoo, Cisco Systems, and Microsoft cooperate with the censorship of Chinese government by offering a censored search service, revealing identities of political dissidents, and deleting blogs that contain politically sensitive information (Zeller, 2006), all of which indicate that business interest and state interest oftentimes converge. Isn’t it also possible for the government to use its Panopticon on the Internet to protect the business interest of copyright holders? After all, China already realized the importance of intellectual property as an ambitious global competitor, an information proprietor and user. What is worrisome about this likely convergence between online copyright protection and government Internet censorship is the double restriction this will put on the public’s right to access information and to communicate. What kind of information will then be available to the public and through which channels? To what extent can the public freely engage in online communication through publishing, sharing, and receiving a wide range of information? These are questions an open, decentralized Internet
could adequately address, but the constant centralizing and enclosing efforts made by both the private sector and the state prevents being utopian.
CHAPTER 7
SUMMARY AND CONCLUSION

7.1 Looking Back: What Have We Learned?

This dissertation examines the development and implications of China’s copyright governance within the context of China’s integration into global capitalism. The purpose of this study is threefold. First, to shed light on the process of neo-liberal globalization in general by focusing on the power dynamics surrounding global copyright governance, in which the complex “antithesis-alliance” relationship between the transnational corporate interest, the nation-state and local industries is played out. Second, to critique the dominant discourse on copyright that prioritizes private property rights over preservation of commons, commercial interest over public access, and production over diffusion. It emphasizes that copyright is neither exclusively a property right as defined by corporate copyright holders nor a trade policy issue as framed by dominant copyright exporters. It is instead a developmental strategy that can be utilized by the state to stimulate economic growth and also a communication policy that has critical ramifications on the flow of information and the basic human right to communicate. Third, this study aims to deepen the understanding of the Chinese copyright regime per se by taking into consideration the unique political, economic and cultural conditions in China. On one hand, a careful analysis of local factors reveals the injustice and impracticability of harmonizing copyright regulation at the global level. On the other hand, concerns are raised about how ever-tightening global copyright governance will adversely affect the public interest in China.
The main body of this dissertation begins by reviewing the philosophical justifications of copyright as private property and highlighting problems with each of the three major justifications. None of them proves to be adequate to defend the absolute private control of intellectual products. It then looks at empirical evidence on the relationship between the strength of IP regimes and development of IP industries. Given the great difficulty of quantifying either variable, the severe lack of data and the absence of a satisfactory analytical model, the relationship is inconclusive at best. This led to the next step in Chapter 2 of trying to explain how the dominant discourse on copyright regulation is established globally even without strong enough theoretical and empirical support. Using a largely political economic approach and the Gramscian concept of hegemony, it traces how both consensus building and coercive strategies have been mobilized by the dominant power to secure a “global norm”.

Chapter 3 takes one step back from copyright law to examine the broader issue of globalization, development and the transformation of the nation-state, as China’s copyright law is clearly caught in tension among transnational force, national power, and the country’s need to achieve economic development. By comparing the Marxian and the neo-liberal views, insights are developed that deconstruct the neo-liberal myths of globalization and development. While neoliberalism promotes an extreme version of free-market ideology, it relies more on the regulatory power of the state than it is willing to admit. The case in point is global information economy’s reliance on the state’s role to enforce intellectual property protection. The global reach of the new IP regulations requires an elaborate state-sanctioned institutional architecture.
An encounter of the evolution of China’s copyright law before its WTO accession is provided in Chapter 4, with particular emphasis on the exogenous pressures exerted on the domestic legislation and how a new law was legitimized through mainstream discourse. As a process parallel to China’s gradual integration into global capitalism, the development of copyright legislation as well as enforcement has been intertwined with trade disputes and China’s desire to become a powerful global player. The 2001 Amendment to the old copyright law represents a major step made by China to bring its copyright regulation up to the international standard.

The next chapter raised the difficulties of enforcement in the specific Chinese context, then scrutinized respective efforts made by global copyright industries, the Chinese state and the domestic industries to address the enforcement issue. China’s WTO accession made it possible for the U.S.-based global copyright industries to convert pirates to partners and to adopt more flexible business strategies in the Chinese market in order to fight piracy. The post-WTO era has also seen the Chinese state trying to build a social norm on sanctity of copyright through educational campaigns, in addition to continuing performing a critical role in copyright legislation and enforcement. Last but not least, further privatization and liberalization of domestic copyright industries also created stronger incentives for local stakeholders to tighten copyright control with intellectual products becoming an increasingly profitable commodity.

Chapter 6 is an effort to add the missing link of the public in the discussion of China’s copyright. We are once again reminded that the ultimate goal of copyright law is to benefit the public in terms of encouraging creation, freedom of expression and diffusion of information and knowledge. While the Internet has great potential to help realize such
goals, emerging lawsuits against online piracy and the industry’s effort to “re-centralize”
information flow on the Internet pose significant threats to the public interest.

7.2 Looking Forward: What Shall We Expect?

At the very beginning of this study, the emergence of a global information society and
how it put intellectual property issue at a focal spot was mentioned. Now it seems a good
idea to return to the link between these two.

In 2003, the United Nations World Summit on the Information Society (WSIS)
released a Declaration of Principles after its first phase meeting in Geneva. This
document declared the “common desire and commitment to build a people-centred,
inclusive and development-oriented Information Society” (WSIS, 2003). It called upon
all stakeholders work together to improve access to information and communication
infrastructure and technologies as well as to information and knowledge. Nonetheless,
members of civil society, who for the very first time were included in a UN summit, felt
the official document reflected their voices and interests so poorly that they decided to
publish a declaration of their own (Gross, 2003). Titled “Shaping Information Societies
for Human Needs”, the civil society declaration “rejects at a fundamental level, the solely
profit-motivated and market-propelled promotion of information and communication
technologies for development” that currently exists (WSIS Civil Society Plenary, 2003).
Instead of simply describing a glorious vision of the information society as inclusive and
open for the broadest possible participation, the civil society emphasized, “Conscious and
purposeful actions need to be taken in order to ensure that new information and
communication technologies [ICTs] are not deployed to further perpetuate existing
negative trends of economic globalization and market monopolization” (WSIS Civil
Society Plenary, 2003). The civil society declaration specifically mentioned that recent developments in international copyright regulation are restricting information more and more in private hands rather strengthening or extending the global public domain.

In agreement with the major concerns of the civil society groups, Hamlink (2004) characterized the information society under construction in the following ways:

- The fundamental human right to free speech is universally violated through forms of political and commercial censorship;
- The Internet – in particular – has become the focus of censorship initiatives; The movements of citizens are at all times under surveillance from law enforcement agencies and intelligence bodies;
- The rights to corporate ownership of intellectual property are greatly extended;
- The access to information and knowledge is increasingly dependent upon the access to purchasing power;
- The consolidation of power in information and knowledge markets is consolidated in the hands of only a few conglomerates;
- There is minimal public accountability from the corporate actors controlling most of the technologies and the contents of the information society;
- Profitability more than human security drives ICT developments;
- The public sphere is increasingly limited (p.289).

Some may say this is too bleak a view on the prospect of information society. Yet our study of the development of China’s copyright governance has confirmed many of these points. By answering the research questions of why China adopted the current copyright regime and what are major characteristics of the regime, power relationship in copyright
policy making is explicated. The integration into global capitalism requires China to further commodify information and knowledge as well as to clarify the ownership of such commodity, yet these requirements have caused and will continue causing tensions and conflicts. At the risk of sounding overtly optimistic though, it is suggested that understanding the past and the current problems is an essential step that could lead to future solutions. A more inclusive and just information society needs a balance between private interest and public interest, between production of knowledge products and the diffusion those products, and between regulation and open access. With this in mind, the following propositions are offered for guiding China’s copyright policy:

1. As the largest developing country in the world, China possesses great bargaining power in bilateral or multilateral negotiations. The history of Sino-U.S. trade disputes has already demonstrated that trade sanctions on China will be too costly for developed countries to enact. China should take full advantage of this strategic position and build alliances with other developing countries to counter the power of the developed world in future multilateral negotiations on copyright-related issues.

2. China should selectively implement its international copyright commitments according to various local conditions, such as the developmental stage of different domestic copyright industries, and an evaluation of the cost and the benefit of enforcing copyright law. Priority should be given to strategically utilizing copyright regulation to stimulate the development of local industries rather than to upgrade the governance to meet international standard. If needed, market entry barriers can be combined with selective copyright enforcement to protect domestic industries.
3. More weight should be given to the public’s right to access information and to freely communicate in future copyright governance. For example, instead of holding a national educational campaign that only promotes the sanctity of copyright protection, public debate should also be initiated on issues like fair use, copyright as monopoly, sustaining public domain, etc.
Bibliography:


*China Rights Forum*, 3, 34-38 from


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Pacific Telecommunications Council Essay Prize Contest Top Paper Award, Jan. 2004
University Graduate Fellowship, Pennsylvania State University Aug. 2001-Aug.2004
Excellent Graduate Student Scholarship, Nanjing University, Oct. 1997-Oct.1999
“Best Debater” in the Annual Debate Contest of Nanjing University, Apr. 1996
Guanghua Scholarship, Nanjing University, Oct. 1995
Renmin Scholarship, Nanjing University, Oct. 1994-Oct.1995