

COPYRIGHTING CHINESE MEDIA: CULTURAL COMMODIFICATION IN A POLITICAL ECONOMIC  
CONTEXT

BY

DONG HAN

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Doctoral Committee:

Professor Dan Schiller, Chair  
Professor Robert W. McChesney  
Professor John Nerone  
Professor Yuezhi Zhao, Simon Fraser University

## **Abstract**

This dissertation documents the development of copyright in contemporary China in the context of social transformation and media growth and works to understand copyright in social and political economic perspectives. The chapters study the history of copyright, debates and conflicts in the making of the Copyright Law, copyright's role in production and labor in media institutions, copyright control and freedom of expression in the digital environment, business strategies and copyright enforcement, criminal prosecution of copyright infringements, as well as copyright collective management. I argue that the dynamics of copyright growth in China today manifest one dimension of cultural commodification in specific global and historical contexts. The development of intellectual property is shaped by, and contributes to, transforming global and Chinese political economy. Still unfolding, the Chinese copyright system has shown distinct pro-business and pro-property biases which work to the detriment of media labor and the public.

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## **Introduction: Does China have copyright and what does it look like?**

This is a study of copyright in China's booming communication industry. It offers a new window, both on the overall process of contemporary Chinese market reform and on its swiftly changing communication industry. It expands from the copyright-as-law approach that has dominated existing scholarship, toward a view of copyright as an often conflicted mode of control exercised by powerful political economic actors. An uncritical legal study of copyright that centers on textual analysis of legal codes, court documents or on law enforcement procedures and problems tends to focus on the law (either statutes or case law) as the pivot and foundation of social changes. Yet this dissertation works to situate law in changing social and historical circumstances and sees law not as the frame of reference but as one dimension of transforming social relationships. Copyright in contemporary China emerged out of persistent conflicts of cultural production and control and transformed in the context of social transformation and media growth. It needs to be documented as a component of the history and political economy of Chinese media and society, rather than detached from them.

Two trends were at work in contemporary China's copyright and communication landscape. One is the power and interest struggles on the new platform that the copyright law introduced. The introduction of copyright as a top-down initiative with influence from the West gave birth to new ideological concepts, institutions and new configurations of state and corporate powers and injected new dynamics to the persistent struggle over control and dissemination of cultural and media products. Another is the shaping and reshaping of copyright in media production

processes including contestations and changes in legal codes, market and production practices, court cases as well as the conceptualization of copyright in public discourse. In conversation with existing scholarship, my dissertation works to open up a window to look into the vast, under-researched area of copyright and communication in today's China apart from issues of "piracy," law enforcement and Sino-foreign conflicts on intellectual property rights (IPR). Copyright is not only about unauthorized copying and distribution of cultural and informational products in the consumer market. Neither is it a natural, abstract legal right that is inherently protective of individual talents and conducive of creation. Copyright is a legal form that defines the scope of proprietary control of cultural and information products. It was born under specific historical circumstances and underwent constant transformations as a result of social contestations between conflicting interests and forces (Jackson, 2002; Patterson, 1968; Rose, 1993). The focus of this dissertation is on this mutually constitutive relationship between copyright and cultural practices in today's China.

Most, if not all, "mainstream" accounts on copyright in China criticize China for its lax enforcement of the law. Criticisms from Western governments, trade associations and the media depict China as a lawless land of "piracies." They dominate the discursive space and to a large extent determined the agendas of academic research in this area. Many researchers work to explain China's resistance to Western copyright, to study law enforcement mechanisms, to document and criticize Western pressure regarding IPR or to argue for a Chinese path of copyright development. Individually, many of these research works are useful and informational contributions. As a whole, they focus on a very narrow area of research, tend to

apply and reinforce uncritical theories of copyright and (inadvertently) supplement “mainstream” media’s agenda-setting.

Copyright in China is a badly under-researched area. Too many issues and topics are inadequately studied, including the history of copyright, domestic initiatives and contestations (in contrast to foreign pressure) that transform the law and practice, the conflict between copyright and speech freedom (a widely discussed issue in the US), the role of copyright in media production and labor relationship, the “paradox” between “weak” copyright enforcement and dramatic, market-oriented media growth, copyright and new technology, copyright issues in the market of business users, copyright and China’s developmental strategy, and many others. The issue of “piracy” in the consumer market is just one topic in this vast area. The uneven distribution of research resources and efforts runs the risk of providing a lopsided account of intellectual property in China.

The disproportionate focus on issues of “piracy” may in effect result in the reinforcement of uncritical theories of copyright. Notions of “piracy” or intellectual “theft” are based on the righteousness and merits of copyright privileges. De-contextualized studies of unauthorized copying and distribution of copyrighted materials in the consumer market can easily slip into the understanding of copyright as an unchanging, inviolable legal right. Research works on administrative frictions and law enforcement problems provide unique insights on Chinese politics and bureaucratic structure. However, by focusing on the mechanism between the law and “unlawful” activities they may implicitly justify the status quo of the copyright regime and

neglect the historical and social contexts of its transformation. Studies on foreign pressure on China for the protection of Western IPR interests have generated useful insights, which echo critical research works that historicize IPR and industrial growth, challenge the “one-size-fits-all” global IPR regime and criticize the overriding trade-related concern in international IPR decision-making (Baker, 2002; Ben-Atar, 2004; May & Sell, 2006; Tian, 2008). Yet a focus on international politics and Western/US dominance may neglect the connections of copyright growth across national borders by (over-)emphasizing differences and conflicts. It is said that China developed its IPR laws “at gunpoint” (Alford, 1995). Without ample research works that document domestic dynamics to develop intellectual property, the image of China “at gunpoint” boils the political economy of copyright in China down to unified resistance to foreign aggressiveness. This is not to blame individual research works for failing to address the whole picture – perhaps no single scholarship or scholar is capable of it. The point is that the narrow and imbalanced research focus in this field does not only fail to provide a comprehensive understanding of copyright in China but may also work against the credibility of individual research works.

Furthermore, a literature review shows an interesting overlap between media and scholarly foci. Intellectual property in US-China trade, inadequate protection of US intellectual property in China and the bilateral frictions thus triggered regularly hit news headlines. Meanwhile, most research works on copyright in China reflect concerns expressed in those media stories. For example, the media have extensively reported on tremendous diplomatic and trade pressure on China regarding intellectual property as well as rampant “piracies” in the country, thus give

rise to the question of *why*: why is China so stubbornly resisting a global norm? To answer that question, two scholarly monologues have been published on intellectual property enforcement in China in the US since the mid-2000s (Mertha, 2005; Dimitrov, 2009). The concern on the compatibility/incompatibility of Chinese culture and copyright, raised sixteen years ago, is still echoing in today's publications (Alford, 1995; Lu, 2009). If there is nothing wrong for an individual scholar to pursue her/his research interests, the embrace of the main-stream agenda by the academic community as a whole will not contribute to critical interventions into the status quo.

A starting point to address the vast area of copyright-related social relationships in China is to recognize the existence and growth of copyright, both as law, industrial and cultural practices and ideology. It may sound non-sensible at first: why is this important or even relevant, or, is this not echoing the Chinese government's repeated statement on its achievements protecting IPR? First, this is to counter the general image created by main-stream Western media, which have almost totally ignored issue of copyright in China except for infringements of Western IPR interests. Second, different from the Chinese government's claims, which focus on legislative progresses and enforcement issues, this argument draws attention to the history and transformation of copyright in the context of changing social relationships. It examines copyright's role in cultural and media production processes, rather than in the retail market of consumer goods. It insists that copyright, as a legal form that privatizes and commodifies cultural labor and products, has had profound impacts on cultural and media sectors in contemporary China, while going through transformations during the process. The most

important issue is to recognize and to document copyright development in the context of contemporary China's social transformation and to analyze the features and implications of the growing Chinese copyright system. It is unquestionable that contemporary China has a fast-growing copyright system. At stake are its character, and where it is heading towards, questions to which my dissertation strives to give some answers.

### **Copyright as one dimension of cultural commodification**

Copyright is one dimension of cultural commodification, which exhibits the transformation of cultural products into privately owned properties and the introduction of market relations into the cultural sector (Schiller, 2007). The history of cultural commodification is a long story that covers different countries at different historical moments. It took various forms, and it was only due to specific historical circumstances that copyright, as a legal form that controls cultural production and distribution and regulates cultural market, was born and developed (Hesse, 1995; Jackson, 2002; Rose, 1993; Lessig, 2001, 2004; Litman, 2001; Vaidhyathan, 2001). With its scope of control and flexibility for marketing, copyright is now the cornerstone of commercial media in the West and is quickly expanding into a similar role all over the globe. In the case of contemporary China, when media and cultural sectors went through market reform (Zhao, 1998, 2008), how/if the commodification process picks up copyright as the major system of cultural control is an interesting and important question. It challenges the "general wisdom" that pre-supposes the universality of copyright and opens up a new way to think about copyright, media and China.

Copyright's role in cultural and industrial practices increased gradually. Its growth is a dual process: one is the marketization of social relations, and another is the rise of copyright as a legal form that regulates the market of labor and products. None of these takes place overnight or without conflicts. The birth of copyright in eighteenth century England was preceded by a long history of contestations, and triggered no less conflict and struggle afterwards (Patterson, 1968; Rose, 1993). The making of the law was a milestone and only a milestone – it was neither the beginning nor the end of the journey. The same goes for contemporary China. The birth of copyright is not an ahistorical story of law-making but must be situated in a long history of struggles over control and commodification of cultural and media sectors. Private control over and monetary compensation for cultural products existed before the Chinese Copyright Law was promulgated in 1990. The making of the Law did not fundamentally change the nature of contestations between different social interests by labeling some as “legal” and some “illegal,” though it injected new dynamics into the cultural sectors by allocating judicial support differently. The increasing importance of copyright in Chinese media and society today results from China's market-oriented reform, media commercialization, intellectuals' rising social status, as well as the development of media and information sectors as the new growing edge for global capitalist political economy and copyright's central role in Western media systems. Slowly and often fiercely contested, copyright became an important mechanism that governed the market of cultural labor and products in China. This is how the word “copyright” is used as a verb: “copyrighting” can better connote the dynamics and the on-going transformation of social relationships.

Copyright regulates social relationships in cultural production processes. The general account of copyright in China tends to focus on the retail market of consumer goods. However, beyond the notion of “piracy” which centers on optical disks or Internet downloads, there exist rich social relationships in the production of cultural and information products. For example, how is labor organized within a media company, who has control over the production process and output, how do media workers disagree and negotiate the control and ownership of their labor and production, and what are the social and historical contexts in which such contestations take place are all important questions that cannot be answered by focusing on how the end-product is distributed in the market.

Furthermore, cultural production includes not one but two processes. The first is the production within media institutions. The second takes place when media audience members interpret the products from the first process and create new meanings and texts. Labor is at the core of cultural and communication processes. There is no passive “consumption” of cultural goods but active “production” activities in which new cultural productions are made out of previous media experiences as source materials (Schiller, 1996). It is in this sense that copyright regulation in the consumer market is also an intervention into cultural production. In the US context, this is always analyzed under the framework of expressive or cultural freedom (e.g. Lessig, 2001, 2004; McLeod, 2005; Vaidhyathan, 2001). Yet almost no attention is paid to this issue in the Chinese context.

To view copyright as one dimension of cultural commodification and to focus on cultural production processes give rise to a closely related question: “does the law of copyright, or even of intellectual property in general, actually comprise the decisive, let alone the exclusive, basis for commodification” (Schiller, 2007, p. 30)? It is often taken for granted that copyright is the cornerstone system for commercial media systems in the West. However, it remains under-researched whether this is what it should be or simply what has happened. To put it differently, is copyright by nature the foundation stone of commercial media, or can we document or even imagine a media marketization process in which copyright plays only an insignificant or even irrelevant role? What were the specific social and historical factors that gave rise to copyright’s birth and development? What may have happened in a radically different context? Does contemporary China, with all its divergences from Western industrialized societies culturally, politically and economically, offer different historical and social settings for the development (or under-development) of copyright? Will China develop a commercial media system in which copyright only plays a secondary role, a copyright system “with Chinese characteristics” (to borrow from the Party slogan “socialism with Chinese characteristics”), or a media and copyright developmental path largely replicative of the West? In either case, what are the specific contexts in which such developments occur?

Copyright and communication in contemporary China are part of the global history of cultural commodification. Copyright development and media growth in China involve contestations and struggles between different social interests engaging in cultural production processes. Similar contestations and struggles took place in other countries, though with uneven progress and in

various forms in different historical moments. A story of copyright in today's China is not different in kind from a story of copyright in eighteenth century France or in today's US, where copyright imposes restraints on new technologies and "free culture" (Hesse, 1995; Lessig, 2004). With the rise of China as a potential global power and Chinese media corporations as emerging market forces on the international stage, however, understanding copyright in China is of urgent and significant importance for studies on media and communication in different social contexts in the global setting.

### **A political economic approach to copyright in contemporary China**

De-contextualized legal analyses are inadequate to address the rich dynamics of copyright and communication in contemporary China. Law is not static, and its enforcement backed by state violence is not by nature the most important, let alone the only, form of social conflicts.

Exegesis of legal codes and documents, if not situated in social and historical contexts, will not contribute much for understanding real social dynamics. This dissertation takes a political economic approach which works to contextualize copyright issues historically and socially. It helps to avoid a narrow focus on the law-enforcement nexus and to open up space for the analysis of broader social relationships and conflicts.

This dissertation examines copyright in the context of media and communication practices. A critical political economic approach to communications emphasizes production rather than consumption (Schiller, 1983), and labor is central to cultural and communication processes

(Schiller, 1996). These are the theoretical basis on which this dissertation examines the copyright reform at China Central Television (CCTV): it serves as a case study of how copyright shapes, and is shaped by, production practices in an institutional setting. The case of an online video in Chapter Five examines copyright's role in the production process by audience members in non-institutional settings. Drawing on critical communications and literary studies (Schiller, 1996; Woodmansee, 1994), I argue that the key conflict that copyright engenders is the tension between a market of copyrighted labor and a community of culture and creativity. In a media institution, it manifests as the clashes between media workers/artists and the corporation regarding the control over employment or contract labor (Chapter Four). In a non-institutional setting, it manifests as the burdens to obtain copyright authorizations to use existing works and the restraints on freedom of expression (Chapter Five).

The understanding of social change and history is a cornerstone of the political economy of communications (Mosco, 2009). This dissertation strives to provide a historical perspective to issues of copyright. China's market reform and social transformation in the last three decades are part of a century-long quest for a developmental path after China's involuntary encounter with Western capitalism in the nineteenth century. A review of copyright development in this history is indispensable for a historicized analysis of contemporary times (Chapter Two). I work to build senses of social change and persistent transformation into all chapters. They help to counter uncritical theories that see copyright as inevitable, unchanging or by nature just and righteous. They also contribute to the understanding of specific social circumstances in which copyright emerged and developed.

This dissertation documents actual copyright practices not to contrast them with an imagined, ideal “order of law” but to understand the dynamics and power relations behind the scenes. Social conflicts before and after the promulgation of the Copyright Law are examined as a continued process. The making of the law did not bring fundamental changes but adjusted social relations through different patterns of judicial support. This is the basis that I examine the pursuits of copyright privileges by individual media workers (Chapter Four), corporate powers (Chapter Five and Conclusion), or by collective management organizations (Conclusion). This is also how I incorporate discussions on criminal prosecution of copyright infringements (Conclusion). How the rights and privileges in the law are being realized (and by whom) are part of the law, seen not as legal codes on paper but power and social conflicts in action.

### **Research methods and chapter layout**

Facts and evidence in this dissertation are collected through both documentary research and personal interviews. I went through academic publications, trade journals, governmental publications, yearbooks, newspapers and other publicly available sources both in China and the US to compile a comprehensive account of copyright and communication in China. Some Chinese publications were collected through my trip back to China at the end of 2008 and early 2009. Some others were purchased online and shipped to Urbana, Illinois. Some Chinese journals, newspapers and magazines are available through China-based online databases on a subscription basis, including [www.cnki.net](http://www.cnki.net), [www.cqvip.com](http://www.cqvip.com), [www.chinaqking.com](http://www.chinaqking.com) and

[www.dooland.com](http://www.dooland.com). Some Chinese newspapers, including *People's Daily* and *China Intellectual Property News*, have scanned copies of current and historical issues online for free. The research for this dissertation benefited greatly from them.

I conducted a number of personal interviews during my trip to China at the end of 2008 and early 2009. My interviewees included administrative and programming staff in both state and private media corporations in television, radio, print and the Internet sectors. I also interviewed governmental officials, legal professionals and academic researchers. As promised in the written consent, I keep them anonymous in my work and only disclose their profession and sometimes employment status. I contacted them mostly through people I knew from previous working experience at China Central Television (CCTV) as a copyright lawyer. I had obtained the approval from the University of Illinois Institutional Review Board (IRB) prior to conducting my interviews, and I followed all IRB's instructions in my work.

Chapter One provides background information on China's social transformation, market reform and media commercialization since the late 1970s. I argue that China's market reform is part of a century-long endeavor to search for China's developmental path. The reform moved forward under an authoritarian state which ruthlessly repressed resistance from social classes and groups disenfranchised in the reform. Development of intellectual property was inherently part of the reform scheme and gradually rose in importance.

Chapter Two briefly reviews the development of copyright in the context of social transformation in China from mid-nineteenth century to the late 1970s. It works to reconceptualize Chinese copyright history by focusing on the transformation of cultural industries and cultural control. I argue that private control of cultural products has a long and continuous history in China, of which development of copyright law and practices in contemporary times is the latest chapter.

Chapter Three reviews the establishment of the copyright system in China after the late 1970s. I argue that domestic initiatives played a key role in copyright growth, while foreign pressure significantly limited the options that Chinese reformers had. After the 1970s Chinese elites have largely reached a consensus to develop copyright and only disagreed on strategy. Meanwhile, the Party-state's propaganda system helped to promote intellectual property through nationwide publicity campaigns.

Chapter Four examines the role of copyright in production and labor relations within media institutions. Specifically, it examines CCTV's copyright reform and argues that developmental strategies and market conditions may diminish or promote copyright's role in commercial media. CCTV's dominance vis-à-vis non-unionized media workers resulted in copyright reform that was slanted toward corporate interests. The implications of the path of CCTV's copyright reform are highly relevant for understanding media and copyright growth in contemporary China and in other media systems undergoing contested processes of marketization.

Chapter Five focuses on media audience/users' cultural production practices and the role of copyright. It examines the copyright controversy of an online video, as well as the dynamics and features of a social mobilization thus triggered. I argue that Chinese copyright law has a very strong bias toward proprietary control and hostility toward forms of cultural access that are public or non-market oriented. With the rise of capitalist interests and proprietary control mechanisms in Chinese communications sectors, intellectual property is coming to the core of cultural resistance and repression in China.

The concluding chapter discusses Chinese media growth, law enforcement and features of Chinese copyright development. I argue that it was under specific historical circumstances that copyright rose in importance in China's media growth and economic development. The growing Chinese copyright system has shown pro-business, pro-property biases and works with established interests rather than challenging them. State policy that pushes for further marketization and industrial growth may result in the dominance of a small number of monopolistic IPR owners in Chinese cultural and communication sectors.

## **Chapter 1 Market reform, media commercialization and the rise of intellectual property in contemporary China**

Given the popular account of rampant “piracies” and Western criticisms on lack of protection for intellectual property rights (IPR) in China today, it is hard to imagine that the making of a copyright law was one of the priorities on top-ranking Chinese reformers’ agenda in the late 1970s, when the market reform had barely begun. It was. In 1979 Communist Party General Secretary Hu Yaobang endorsed the making of a copyright law and initiated a long process of legislation.<sup>1</sup> During the three decades that followed, the issue of copyright underwent complicated and sharply contested debates in Chinese society. It was never simply a question of whether to ban unauthorized copying and distribution of books or recordings. Instead, debating copyright triggered disagreements and contentions on ideology and China’s developmental path. Instead of attributing this to a conservative mentality, or to clique interests that manipulated “political” terminologies to advance disguised agendas, copyright growth in China manifests an underlying theme of developmental and reform strategy, which sharply deviated from China’s developmental path designed after the 1949 revolution. Copyright is not merely an issue with writers, composers or performing artists. It is about the nature of, and control over, media and cultural production. In recent years it arrived at the core of economic policy as the Chinese government worked to promote the growth of “cultural industries” as a propellant of economic growth. This chapter sets the social and historical background for copyright and communication development. A brief review of China’s market reform, media

commercialization and social transformation in the recent three decades is indispensable for understanding copyright in China after the late 1970s.

### **The turn to the market**

The search for a developmental path is a continuous effort in Chinese history in the last one and a half centuries. The Opium War in mid-nineteenth century forced China to open to Western capitalism. Unwilling and unprepared encounter with the aggressive expansion of capitalism brought unprecedented challenges and crisis to Chinese politics, economics and society, and triggered the search of a developmental path for China. Political elites introduced Western-style military and industrial enterprises and carried out limited adjustments to the political system. Meanwhile, conflicts within Chinese society resulted in peasant uprisings and civil wars that swept through the nation. The failure of elite-driven reform sparked off a long and persistent social revolution, which eventually resulted in a socialist path of national development (Chen, 1992; Lin, 2006). By the end of the 1970s, China made a profound policy choice by introducing the market into various economic and social sectors, previously run by the state bureaucracy through centralized planning and command.

It is by now a cliché to refer to post-Mao (Zedong) China in the last three decades as being “in transition.” However, Chinese society after 1949 had always been in tumultuous flux. The coming into power of the Communist Party in 1949 started a nationwide movement to nationalize private sectors in the name of “socialist transformation.” Land reform in the

countryside eliminated private land ownership and set up People's Communes to manage farming collectively. In the cities, confiscation of foreign and Nationalist enterprises and buy-out of domestic private capital established a dominant public economic sector and set forth the basis for a Soviet-style central planning system. However, it is over-simplifying to conclude that China during this time was a "socialist" or "communist" society. As Meisner (1996, pp. 55-58) points out, Chinese society during this period lacked essential features of either capitalism or socialism. On the one hand, workers did not have control over the means and conditions of production. It was a bureaucratic system unaccountable to the public that dominated decision-making in almost all areas of social life. China was thus far from a genuine socialist society in both economic and political forms. On the other hand, it also lacked essential qualities of a capitalist society. No labor market existed, and the terms of commodity exchange and consumption were set explicitly by the state, rather than through the market. Member of the bureaucracy were unable to proprietize their privileges or to pass them onto their heirs, thus lacking the features of a bourgeois class. The hybrid social structure reflected the contradictions in post-revolutionary China and set the ground for further transformation.

China's market reform started amid serious social and economic problems in the 1970s. Social inequalities were severe and the economy was on the verge of collapse, yet structural deficiencies in the political and economic system were unable to tackle these problems. Instead of refining the Soviet-style system or building up socialist control of production and social life, China's reform headed toward marketization (Meisner, 1996, pp. 205-208). It was a developmental era that had extensive connections with various historical periods preceding it

and “synthesizes different elements from each successive phase” (Naughton, 2000, p. 52). The Chinese state remained powerful and to a large extent succeeded in managing an economic liberalization under an authoritarian political regime (Harvey, 2005). The bureaucracy as well as most of the social and economic institutions established before the reform era largely survived the reform to perform new functions (Naughton, 2000). In the media and communication sectors, marketization proceeded not by privatizing state-owned enterprises or allowing transnational or private competitors in the industry, but by transforming state media into dominating market powers (Zhao, 2008).

China’s turn to the market occurred at a time when international political economy and geopolitics were undergoing dramatic changes in the 1960s and 1970s. The People’s Republic after 1949 for a long time faced the embargo imposed by Western countries led by the US and took a pro-Soviet stance, while forging links with newly emerged developing countries. However, the split with the Soviet Union in the 1960s suddenly turned an old ally into a threatening menace and seriously undermined China’s development, which thus far had looked to the USSR for a developmental model and relied heavily on Soviet assistance. Meanwhile, the US suffered a series of setbacks vis-a-vis Soviet Union’s growth of power and influence worldwide. Early 1970s saw China and the US, once deadly enemies in the battlefields of Korea, began to walk together. Having restored formal diplomatic relationships with the US in 1979, China all of a sudden seemed to sense the possibility of accessing Western market, technology, and capital in a historical conjunction in search of a non-Soviet path of national development. In the 1980s and later, massive privatization of public sectors swept through the Western world with the rise

of neoliberalism (Harvey, 2005). Media and communication industries became the growing edge of global economy and intellectual property the key resource (May & Sell, 2006; McChesney & Schiller, 2003; Schiller, 1999, 2007). These constituted the international contexts of China's market reform and opening-up to the Western world.

### **Marketization, authoritarian politics and transforming class structure**

China's reform started in the countryside in the late 1970s. The "household responsibility system" reversed the collectivist initiatives under the People's Commune and made individual households into basic production units with economic incentives. Rising prices for agricultural produce resulted in a steady increase in peasants' income in the first few years, but the de facto privatization in agricultural production seeded disruptive problems that exploded later. In the urban areas, reform measures aimed at creating a commodity and labor market. The Party-state asked state-owned enterprises to operate on a for-profit basis, withdrew job security for factory workers and implemented price reform. By the mid-1980s, negative consequences of the reform, including decline in agricultural output, bureaucratic corruption and inflation, invoked widespread dissatisfaction both in the rural and urban areas, which eventually led to the pro-democracy movement in 1989 (Meisner, 1996, 1999).

Taking place concurrently with economic reform was not political liberalization but the institutionalization of bureaucratic interests and authoritarian politics. The Chinese state showed no hesitance backing market advance through the use of force. What marked the

beginning of the reform were not only rural reforms and the “household responsibility system” but also the crackdown on the pro-democracy movement at the end of the 1970s and the repression of debate on “commodity economy” in the early 1980s. When widespread dissatisfaction toward the negative consequences of the market reform culminated into mass protests in 1989, tanks and machine guns in the streets of Beijing dispersed unarmed rallies and laid the foundation for accelerated marketization in the following decade (Wang, 2003). During the 1990s and after, market reform in China sped up in the context of state repression of protests and resistance from peasants, laid-off workers and other social groups disenfranchised during the process of marketization (Zhao, 2005).

The disenfranchisement of the working classes, including the peasantry and state workers, is a distinct feature of contemporary China’s social transformation. As a matter of fact, peasants and factory workers had never really been the “masters” of the country after 1949 – it was the bureaucracy unaccountable to the public that controlled the power of decision-making. Yet they did have significantly better social and economic status than any other times, thanks to their support and sacrifices in the communist-led revolution. In the countryside, land reform in the 1950s eliminated private ownership and granted peasants some control over land, farming animals and tools. In state-owned factories in the cities, workers had job security and various welfare protections. However, market reform in contemporary China cast them back to the bottom of the social ladder. In the countryside, rural conditions continuously deteriorated under state policy that drained rural surplus in support of urban industrialization. Peasants were badly overburdened by excessive governmental expenditure and were deprived of social

and political rights (Li, 2003). Tens of millions of them had to leave their homes to work in the cities. Without state-sanctioned “legitimate” residential status in the cities, they became “migrant” workers in their own country and were subject to harsh working conditions, exploitations and discrimination (Solinger, 1999; Zhang, 2001). In the cities, state-owned factories underwent large-scale privatization, usually resulting in appropriation of state assets by the management. Massive layoffs took place nationwide. Having worked for years, sometimes decades, under low salaries, state workers had been told to rely on their factories for housing, health care, and retirement benefits. Yet many of them were driven out of the factories they built up with minuscule compensation (Wang, 2003). State workers who kept their jobs faced persistent deterioration of working and living conditions (Yu, 2006). From the 1990s, laid-off workers and peasants launched numerous protests and strikes in resistance to marketization reform and became the protagonists in social contestations (Zhao, 2005).

Intellectuals, however, had a different fate. As a social group, intellectuals, or *zhishi fenzi* (people with knowledge), had always had a unique role in Chinese society. When China’s modernization endeavor began on the ruins of the old imperial order, intellectuals cut off their traditional links to the landlord-gentry class and became a social group un-affiliated to any social classes. Their aloofness allowed them to launch sharp criticisms of both the Confucius order and Western capitalism; it also made them impotent politically (Meisner, 1999, pp. 10-19). After the 1949 revolution, Chinese intellectuals moved down on the social ladder vis-à-vis peasants and workers. Many of them expected to restore their social rank in the pre-revolutionary era and thus became allies to the Chinese state carrying out capitalist policies

after the late 1970s (Wang, Li, and Wang, 2003, pp. 317-318). Indeed, in the last three decades, the political and social status of intellectuals in China rose quickly. One index is the percentage of representatives from intellectuals in the National People's Congress (NPC). According to the *People's Daily*, in 1978, 14.96 percent of all NPC representatives were intellectuals. Yet in 1998 the percentage reached 21.1 percent ("Statistics chart of representative compositions of every National People's Congress," 2004).<sup>2</sup> It was in this context that the Chinese government started drafting the Copyright Law, which was hailed as a protection and a form of respect for intellectuals.

### **Transformation of media and communication sectors**

Media and communication sectors are at the core of contemporary China's reform and economic growth. First, the media largely retained their role as Party propaganda organs. The Party-state used the media to propagate market reform theories and measures, to reach the newly emerged social strata (e.g. entrepreneurs and business professionals) and to appease and manipulate disgruntled social groups and classes. Second, the Party-state saw media and communication industries as a key economic sector and pushed to deepen their marketization. Instead of privatizing state-owned media corporations or inviting competitions from transnational and private capital, the Party-state worked to transform state media into dominating market powers (Zhao, 2008). The propagandist function and the market-oriented transformation of state media had profound impacts on the shaping and reshaping of copyright in China's media growth.

If Party media in pre-reform China, e.g. *People's Daily*, played a central role in mobilizing political movements, marketized media and communication corporations in the reform era were at the forefront of promoting market-oriented goals and agendas. Media propaganda was a major component in every state-launched reform initiative. For example, when regional discrepancy between eastern and western provinces led the state to initiate “the great cultivation of the western regions (*xibu dakaiifa*)” in 2000, the Party’s mouthpiece in television (China Central Television, or CCTV) launched a whole new national television channel, “western regions channel (*xibu pindao*),” to promote the developmental project. Propaganda-oriented media corporations before and during the market shared one feature in common: they were top-down one-way communication institutions rather than media platforms for bottom-up communications or horizontal exchanges of local experiences and information. In a way the Chinese Party-state acted like a follower of Schramm (1963) by treating communication as the “mover” of modernization.<sup>3</sup> Propagandist media also played a central role in the promotion of intellectual property in China.

The Chinese state saw media and communication sectors as the propellant to economic growth. In a sharp deviation from pre-reform politics, which culminated in the *Cultural Revolution*, Chinese reformers aimed to engender an *information revolution* encompassing the growth of cultural and communication industries. As Schiller (1996, pp. 161-172) notes, the post-industrialist notion of “information,” understood as “data processing in the broadest sense” is indeed a synonym to “culture.” Yet it casts away culture’s humanistic and social connotations as

well as the sense of social contestation that the word “culture” tends to arouse. The substitutions of “culture” by “information” and “revolution” by “industry” showed a decided break-up with socialist ideologies and a resolute turn to grow a communication-related economy which ostensibly functions separately from “politics” or “culture.” It took place when China integrated into the global information capitalism originated from the US (Schiller, 2007). As “information” became the master of all “four modernizations” called for by Premier Zhou Enlai in 1975, namely agriculture, industry, national defense and science and technology, the Chinese state was not only recognizing communication and technology as productive forces but also viewing the integration into global information capitalism as *the* path to China’s development (Zhao, 2000a, p. 57). The importance of “cultural” industries was raised to a new height when the Chinese government made the Plan to Promote Cultural Industries and vowed to develop cultural and creative industries so as to lift Chinese economy out of the global crisis beginning in 2008 (“An important measure to promote the development of the cultural industries,” 2009). Today the information/cultural/creative industries are right at the core of state developmental policy.

The market reform of media and communication sectors emphasized the transformation of state media into dominating market powers. As Naughton (2000) points out, Chinese market reform was institutionally conservative, which means the Chinese state tended to keep old institutions and transform their functions and operations to adjust to changing circumstances, rather than introducing new institutions and competitions. This approach provided more elasticity and the possibility to rewind some reform measures when necessary. Yet it also

protected established interests and blocked the introduction of new market mechanisms. The transformation of state media into for-profit businesses that dominated the national market was a demonstration of this deliberate policy choice. Moreover, it was part of the Party-state's initiative to secure the "commanding heights" of the fast growing cultural and communication industries (Zhao, 2008). To remain in dominance of media and the public discursive space, Party media strived to command not only political influence but also market power. Pro-market propaganda themes and consumerist values helped the Party to reach its new supporting social strata including the entrepreneurs and business professionals. In addition, eyeing the market opportunities in the fast growing cultural industries, Party-controlled media expected to garner profits through their market adventures. As will be discussed in Chapter Four, the transformation of Party media into dominating market powers played a key role in shaping the development of copyright in Chinese media and cultural sectors.

### **Intellectual property in contemporary China**

IPR, short for intellectual property rights, includes patent, trademark, copyright and other legal forms of proprietary control to information and cultural products. IPR allows its holder to have some form of exclusive control over cultural and information goods and to trade them in the market for monetary returns. There are various theories that support and justify IPR, asserting that to allow creators to have proprietary control over their creations is not only righteous but is also the best way to provide incentives to creativity and to promote dissemination. Today, IPR's scope of control and flexibility for marketing make it the most widespread system to

regulate cultural and industrial production and market in major Western countries. Copyright, the branch of IPR that focuses on literary and cultural products, contributed significantly to the growth of commercial media in the US (Vaidhyathan, 2001). With media and communication industries coming to the forefront of global economic growth (McChesney & Schiller, 2003), copyright is playing an increasingly important role not only in media or in the West, but also in the global political economy. Taking off in this global context, how did China's market reform and media growth relate to the ascending role of communication industries and the aggressive expansion of IPR regimes on the international stage?

As a matter of fact, the Patent Law, Copyright Law and Trademark Law were all on the agenda of Chinese reformers in the late 1970s and early 1980s. Foreign pressure at that time was far less intense than in the 1990s, and the progress of IPR legislation was mostly pushed forward from within Chinese borders. The Trademark Law was made in 1982. The Patent Law was made in 1984. The Copyright Law, however, took much longer because of disagreements on a number of issues including publication control, music royalty and copyright protection for foreign works. The eventual birth of the Law came in response to intense US pressure. In May 1989, under threats of trade sanctions, China signed the US-China Memorandum of Understanding on Enactment and Scope of PRC copyright Law and promised to enact the Copyright Law shortly (Maruyama, 1999, p. 186). One year later, the Copyright Law was duly promulgated.

Many researchers believe that IPR laws in contemporary China largely resulted from foreign pressure (e.g. Alford, 1995; Li, 2007). This argument seems to carry some truth as foreign

pressure significantly impacted the legislative processes by accelerating the pace of law-making (as in the case of copyright law) and pushing for revisions of all the IPR laws. However, it must be noted that intellectual property is by no means in conflict with China's market reform. On the contrary, IPR was a key component in China's developmental and reform policies. The rising status of intellectuals and the reform ideology that encouraged private ownership and economic incentives worked together and extended a warm welcome to the notion of intellectual property – the protection of proprietized intellectual labor. As former director of the National Copyright Administration of China (NCAC) Song Muwen put it: "Under the instruction of Deng Xiaoping theory, respect for knowledge and talented people was on the rise, and intellectuals' creative labor began to win respect and attention from the society. *Inevitably*, the protection of intellectual property appeared on the agendas of the Party, the state, as well as relevant governmental agencies" (Song, 2007, p. 413, italics added). Since the outset of the market reform, Chinese elites had largely reached a consensus on the necessity and benefits of copyright development. Conflicts and disagreements during the last three decades focused on issues of strategies and tactics – they were about "hows," not "ifs."

During the three decades of market reform, it became increasingly apparent to Chinese reform leaders that intellectual property was key to China's market-oriented development in the global context. China's reform took place at a time when large-scale privatization swept many economic and social sectors in the West, and when informational and cultural industries became the propellant of global economy (Schiller, 2007; Zhao, 2007). China's re-entry into the global market inevitably involved a need to negotiate a relationship with Western copyright,

which had been the cornerstone system for media and communication markets in the US and major Western European countries. At the beginning of the 2000s, the idea of a national IPR strategy was widely discussed among Chinese political leaders. In January 2005, the Leadership Group for the Making of National IPR Strategy was established. It was headed by Vice Premier Wu Yi, China's chief negotiator in Sino-US trade/IPR conflicts, and included directors from twenty-eight different governmental agencies, including the State Intellectual Property Office (SIPO), State Administration of Industry and Commerce, National Copyright Administration of China (NCAC), Development and Reform Commission, Ministry of Science and Technology as well as Ministry of Commerce. In 2006, the first draft of the Strategy took shape (Office for the Leadership Group for the Making of National IPR Strategy, 2007). In 2008, the central government of China, the State Council, approved and published the Strategy Summary. According to the State Council, at a time when knowledge economy grew quickly and IPR came to the center of international competition, China needed a better IPR regime to foster creation and innovation and to turn China's huge population into a huge intellectual resource. The Summary of the National IPR Strategy states that IPR is the basic system in "cultivating and using knowledge resources."<sup>4</sup> Thus, China formally incorporated IPR into the core of state policies.

The Chinese state became even more resolute in market reform in the cultural sector in the context of global economic crisis at the end of the 2000s. In September 2009, the State Council promulgated The Plan to Promote Cultural Industries (*wenhua chanye zhenxing guihua*). It came after a series of Promotion Plans for key industrial sectors, including steel, automobile

and textile industries, which were expected to boost Chinese economy and to lead China out of the crisis (“An important measure to promote the development of the cultural industries,” 2009). Intellectual property was an inherent component of the Plan, which called “to perfect the state’s intellectual property protection system and to severely crack down on piracies and other infringements” (The Plan to Promote Cultural Industries, Section 5, Article 4). The importance of intellectual property in China’s development could not be stated more strongly.

The ascending role of intellectual property in Chinese media and society gives rise to a number of questions. How do we conceptualize the incongruence between China’s commitment to develop IPR and Western criticism of “piracies” in China? What were the historical contexts in which copyright emerged in China, and how was the Copyright Law debated and drafted during the reform era? How did Chinese media institutions and market interact with the Copyright Law, which was born largely as a top-down initiative and shaped by foreign pressure? How did new technologies and copyright development impact each other in the Chinese context? To what extent can we apply critical analyses of copyright in the Western contexts to China, and to what extent can we construct a contrast between China and the Western world? How do we make sense of, if only tentatively, copyright’s role in Chinese cultural and media sector, and what are the implications of the Chinese copyright regime already at work regulating cultural production practices? Can intellectual property rights, copyright in particular, contribute to China’s development as policy-makers expect? None of these questions can be answered by examining legal codes in isolation from history and the transformation of Chinese media and society, media and cultural production practices and labor relations, dynamics of communications in the

new technological environment, or the pursuits of copyright privileges by different social interests in the marketizing cultural and media sectors.

Before engaging in detailed documentation and analysis of copyright in contemporary times, it is necessary to first examine the history of copyright and the cultural industries in China since the mid-nineteenth century. If the market reform in China today is part of a continuous effort in search of a developmental path (Lin, 2006), the emergence and development of copyright after the 1970s cannot be cut off from more than a century's history of social transformation, Western influence, cultural industrial growth and copyright law-making. As will be discussed in Chapter Two and Chapter Three, copyright and media growth in contemporary times and historical periods showed undeniable continuity, even resemblance, as reformer leaders faced similar challenges and problems across a century-long time-span. Of course, history does not repeat itself and specific circumstances in different historical periods contributed to different dynamics of copyright development. However, it is only through longer perspectives can we arrive at informed analysis and appraisal of a contemporary history of copyright.

## **Chapter 2 Can I own my writings and sell them too? A brief history of copyright in China from late Qing to Mao's China**

This chapter briefly reviews the growth of copyright, as an idea, an industrial practice and a state policy, in the context of social transformation in China from mid-nineteenth century to the late 1970s. Whereas a comprehensive study on this topic may well generate a multi-volume work, this chapter draws on existing scholarship and selectively highlights and analyzes certain aspects, cases, and moments in this history. It aims to provoke new discussions and discoveries in historical research, and to open up new spaces for studies on copyright and media in contemporary China. Most, if not all, of existing research works in this area emphasize the importance of historical studies for present-day research and policy-making. For example, Zheng (2003) argues that history is a mirror and a reference for the present. Wang (2006) and Li (2006) emphasize the continuance of copyright development and argue that understanding history can help to analyze contemporary issues. In the same vein, this chapter studies the past for the present, aiming to provide “a much-needed perspective on some of the most pressing problems of our times” (Tosh, 2006, p. 52).

With this goal, this chapter presents a brief history which starts in mid-nineteenth century and ends before the reform era started in the late 1970s. Placing three historical periods divided by political systems, namely late Qing, the republican era, and China under Mao Zedong, in close proximity can help to highlight the continuity of history and to address some persistent issues in a less-fragmented manner. It begins in the nineteenth century because it is generally agreed

that “modern” copyright in China, in contrast to the controversial notion of ancient Chinese copyright, was imported from the West in the nineteenth century as part of China’s involuntary encounter with Western capitalism. It cuts off in the late 1970s, when Mao Zedong passed away and reform-minded leaders under Deng Xiaoping took over and started a profound market-oriented reform. The goal is to document the historical context of copyright and media growth in contemporary times and to open up new perspectives to reevaluate recent developments and trends.

Copyright is one dimension of cultural and informational commodification (Schiller, 2007). It is not an abstract, asocial, ahistorical concept, and its merits and problems cannot be treated as a given but need to be critically evaluated in a historical context. However, the majority of scholarship on copyright in China sees copyright in a positive light – supporting copyright is far-sighted and rational, and working against copyright is running against the grand historical and international trend. Of course, there is nothing wrong documenting copyright’s contributions to social and public good, but the near invisibility of critical scholarship is noteworthy and echoes the argument that there is a de facto censorship in China on critical studies of intellectual property (interview with legal researcher, January 15, 2009). This chapter contextualizes the history of copyright in China’s development and revolution, the fate of intellectuals as well as the transformation of the printing/media industry. Instead of uncritically treating copyright as an indispensable and righteous foundational system for today’s media and cultural sectors, it is of key importance to study the social, political, economic and technological circumstances that copyright was born and grew, as well as the contestations and conflicts along the way. This

chapter strives to re-conceptualize Chinese copyright history and to avoid being trapped in an unchangeable presupposition which may lead us to overstate some aspects of copyright and neglect some others.

### **Copyright in late Qing: Imported ideas, policy debates and the cultural market**

China in the second half of the nineteenth century underwent profound social changes. Gunboats from the West opened China to foreign commodities, capital and culture. Facing with China's urgent issue of development, Chinese reformers sought to learn from the West. Copyright was imported during this historical period. It was first introduced by Western missionaries, both as promotion of Western ideas and culture and as attempts to protect their writings and publications. While almost all Chinese reformers agreed to a certain extent on the usefulness of copyright for China's development, they disagreed on whether China should offer copyright protection to foreign works. Meanwhile, the growth of commercial press in coastal areas had adopted copyright in their business practices before the Law was formally promulgated in 1910. During the involuntary clash with the West, China ran into an all-around encounter with copyright as an imported idea, a controversial policy issue and an industrial practice all at the same time.

Western missionaries began to travel to China a few centuries before. However, it was in the late nineteenth century that their presence and influence became really significant. Young John Allen, a missionary from the United States, was one of the most well-known Western

missionaries and probably the first who introduced and advocated copyright in China. Known as Lin Lezhi (林乐知) in Chinese, he came to China in 1860 as a missionary from the Methodist Episcopal Church (South). He published many works in Chinese, some of which were informational reports and straightforward criticisms on Chinese politics including a book on the Sino-Japan War in 1895. These works were very popular among Chinese readers and unauthorized reprints were rampant. Allen made significant efforts to prevent unauthorized reprinting of his works. Through an American consulate in China, he made local officials issued orders that explicitly prohibited unauthorized reprints of his book. In his writings and publications, he introduced Western copyright systems and argued vigorously in support of copyright regulation in China. According to Li (2006, p. 89), Allen's advocacy of copyright not only contributed to the growth of copyright law in his time, but also shed light on future development of Chinese copyright.

As an early advocate, Allen addressed several fundamental issues in copyright. First, he argued that literary works were produced through both the author's hard work and the publisher's investment. In return to their contributions to the whole society, the society should allow both the author and the publisher to be rewarded through copyright. Second, he argued that copyright was a private right that the government should protect, rather than a revocable privilege granted by the state. Third, he argued that copyright could provide incentives to writing and publishing, thus benefiting Chinese society. Most interestingly, he argued that China had had a tradition of "copyright" protection. According to him, "unauthorized reprinting must all be prosecuted (*fanke bijiu*)" was an established norm in the Chinese publishing

industry. Therefore, copyright was not really “foreign” to China. As a matter of fact, Allen did have Chinese local officials issue an order prohibiting reprinting of his book (Li, 2003, pp. 16-18, pp. 78-84; Li, 2006, p. 86-90; Wang, 2006, pp. 50-53). As a missionary from the West, Allen paid much attention to “persuading” Chinese people to accept copyright. By tracing it into Chinese history and making use of Chinese legal and bureaucratic systems, he made unique efforts to “merge” copyright into Chinese society.

Besides missionaries, Chinese reformers and thinkers in late nineteenth century, some of them keen writers and translators of foreign works, brought the issue of copyright to the center of policy discussion. Yan Fu, the most important translator of foreign works in late Qing China, was an advent advocate of copyright. Once a student in England, he was the first in China who translated a series of Western classics, including Thomas Huxley's *Evolution and Ethics*, Adam Smith's *Wealth of Nations*, John Stuart Mill's *On Liberty* and Herbert Spencer's *Study of Sociology*. Yan argued forcefully in favor of copyright. He maintained that copyright was to compensate the author/translator for his/her hard work on writing and translating, which were very exhaustive and demanding. He also believed that copyright could encourage Chinese people to produce more and better works, which would in turn enlighten the masses and develop China (Li, 2002). Liang Qichao, the most prominent intellectual in early twentieth century China, passionately supported copyright from a developmental perspective. He argued that the key to develop and to reform China was to educate Chinese people with Western ideas and knowledge. Copyright protected creative works and was the essential system to encourage imports and translation of Western works. He also supported China's entry into copyright

treaties with other countries, arguing that this would facilitate the spread of Western knowledge in China (Li, 2003, pp. 31-36).

Besides writers and translators, some Qing officials also actively advocated copyright. Lianquan, an official of the Treasury Ministry (*hubu langzhong*), was in charge of a governmental publishing house that published textbooks and translated works for newly emerged schools all over China that taught Western ideas and knowledge. Faced massive unauthorized reprints and sometimes alterations of his publications, in 1903 he wrote to Zhang Baixi, then China's chief education administrator, asking him to protect the copyright (*banquan*) of his publishing house, Wenming Shuju. According to Lianquan, copyright was an international norm that rewarded creative work and facilitated research; and protecting copyright was essential for education in China. His request was promptly approved and orders were issued to protect his publishing house's exclusive rights to its publications. One year later, when another governmental publishing house reprinted four books by Wenming Shuju, Lianquan responded by writing to the Ministry of Commerce asking not only for protection of his publications but also for a general copyright law to be made. The Ministry agreed and made the first draft for the first copyright law in China in the same year (1904). According to Li (2001a), Wenming Shuju's copyright controversy was the most important event that led to the making of Qing's copyright law, the first in China.

Lianquan's copyright endeavors took place when Chinese reformers actively sought to learn from the West to cope with the overall crisis that Qing faced under Western imperialism.

Chinese political and intellectual elites had come to the consensus that China needed to “catch up” by learning from the West, though they disagreed on exactly what to learn and how. It was in this context that Lianquan emphasized that copyright was an “international” norm, and that it was of key importance to China’s education and development. As a matter of fact, during Lianquan’s two attempts to protect copyright, nobody in the Qing bureaucracy, including the governmental publishing house that “pirated” Wenming Shuju, made serious effort to challenge the righteousness of copyright protection. When Lianquan’s story was disclosed in Chinese newspapers, one paper commented that even “the most foolish and brazen official” knew better than to abuse copyright, which would “violate the most sacred rule under the heaven and block the progress of civilization” (Li, 2001a, p. 151). Thus, at the beginning of the twentieth century, Chinese political and intellectual elites had reached some sort of consensus on the merits, or usefulness, of copyright from a developmentalist perspective.

Nevertheless, when it came to the protection of foreign copyrights, sharp disagreements appeared. In 1902, the US and Japan both asked to add a copyright section in their commerce treaties with China, which required China to offer protection to their works. It triggered a large scale debate among Qing officials and intellectuals. Zhang Baixi, the chief education administrator who supported Lianquan in protecting Wenming Shuju’s copyright, was firmly against extending such protection to foreign works. He wrote to several Chinese officials, including leading treaty negotiators, and argued against the copyright section. According to him, education in China relied on translating and introducing Western works. Offering copyright privileges to foreign works would hinder such efforts and eventually harmed education of

Chinese youth. Zhang also wrote to the Japanese negotiator, trying to persuade him not to pressure China on protecting Japanese copyright. He argued very tactically. Among other arguments, Zhang stated that that the prosperity of China-foreign commerce was mutually beneficial, yet its growth depended on whether more Chinese people could learn about foreign affairs and businesses through reading foreign books, and copyright protection of foreign works would work against it (Li, 2001b; Li, 2006, pp. 96-98; also see Ling, 2007, p. 89). Qing negotiators worked very hard and tactically. Although late Qing China was always at a disadvantage vis-à-vis Western powers, they managed to negotiate a copyright clause which gave only nominal protection to foreign works. Court cases soon proved that the clause was of very limited use for US and Japanese copyright owners in China (Li, 2003, pp. 159-178).

Meanwhile, the rise of commercial press had already brought copyright practices into Chinese publishing industry and market years before the first Copyright Law was promulgated in 1910. As a matter of fact, China had had an active printing market at least a few centuries earlier (Brokaw & Chow, 2005; Chia, 2002). In late Qing, rapid social transformation fostered a growing market for non-traditional educational publications. Additionally, Western missionaries' activities contributed to the burgeoning of commercial presses (Li & Ng, 2009). China at the time witnessed the emergence and growth of commercial press and publishing companies that took on distinct Western looks. In 1872, the most influential commercial newspaper in China in the next several decades, *Shenbao*, was established in Shanghai by an English merchant and soon grew into a national paper. In 1897, The Commercial Press (Shangwu Yinshuguan) started to operate, which, according to many researchers, marked the beginning of modern Chinese

publishing industry. These newly emerged papers and publishing houses were mostly profit-seeking businesses modeled after their Western counterparts. Different from their precedents a few centuries earlier, who operated more-or-less outside the official cultural-political system (Chow, 2004), they were more often allied with political and cultural elites and began to rise as major players in the cultural sector. They deepened and expanded the market relationship between the printer and the author and brought copyright into the core of the market of intellectual labor. Soon after its establishment, *Shenbao* published a statement calling for contributions from its readers and offered to pay them for their writings or drawings, a first in Chinese history (Xu & Xu, 1988). In traditional China, getting paid for one's writings was contemptible. *Shenbao's* advertisement thus marked a profound change in general attitude toward the commodification of intellectual labor. However, it was The Commercial Press that brought copyright into the core of the relationship between author and printer at the turn of the century.

The Commercial Press was the first publishing house in China that entered into royalty contracts with the author/translator. At the end of the 1890s, Yan Fu started to translate Adam Smith's *The Wealth of Nations*, a multiple volume work that took five years to finish. Yan and the publisher engaged in a detailed discussion on remuneration and publication before the translation completed. Per Yan's request, when The Commercial Press published his translation in 1901, it entered into an agreement with Yan which paid him 2,000 taels for his work plus 20% of the sales total, an exceedingly high royalty ratio by any standard. In 1903, The Commercial Press and Yan signed a very detailed contract over another translation work, which specified

the author and the publisher's rights to the work, publisher's exclusive right to publish as well as profit calculations. At the beginning of the twentieth century, The Commercial Press had made copyright transfer an indispensable part of its business practices. Its business practices attracted many well-known intellectuals. Besides Yan Fu, Lin Shu<sup>5</sup> and Liang Qichao also published numerous works with The Commercial Press and were paid splendidly (Li, 2003, pp. 59-66). As a leader in Chinese publishing industry at the turn of the century, The Commercial Press's business practices contributed significantly to the reshaping of relationship between authors, the press and the market. Its relationship with China's top-ranking intellectuals, most of them copyright advocates in their times, helped not only with the growth of the market, but also with the growth of copyright in cultural and media industries.

In addition, it needs to be noted that the rise of commercial printing industry and new business practices took place concurrently with the changing social status of Chinese authors and translators. Traditionally, Chinese intellectuals were always recruited into the bureaucratic system and became scholar-bureaucrats. Their social rank ensured them stable income and high prestige. The economic potential of their writings were insignificant, even despicable, since Confucianism tended to demean profit-seeking activities. However, during the changing times of the late Qing era, when setting up factories and running profit-seeking businesses became part of the larger trend of "learning from the West," it became possible for writers and translators to make money out of their works even when they still held official positions. This was the context that Yan Fu negotiated his royalty contract. Indeed, in Yan's letters, he sounded confident and pushy, citing "Western copyright precedents" rather than Confucius doctrines as

the basis of his demands (Li, 2002). In addition, transforming Chinese society and the growth of the publishing industry provided some intellectuals, who were not recruited into the bureaucracy, with opportunities to make a living through the market. Liang Qichao started to make money through publishing a paper when he was forced to exile to Japan after a failed political reform in China. Wang Tao, after several failed attempts to join the bureaucracy, worked for English publishers in China and later started his own paper. Still, it was after Qing, when the publishing industry further grew and when more writers in Chinese society relied on writing as their major source of income, that copyright practices further developed. As the market grew, the terms and conditions of selling one's intellectual labor underwent conflicts and contestations.

### **The Republican Era: Terms and conditions of selling one's intellectual labor**

The first Chinese copyright law was promulgated in 1910 by the Qing government. This was six years after the Ministry of Commerce agreed to draft the law in response to Lianquan's request. The drafting of the law was first undertaken by the Ministry of Commerce, but was soon moved to the Ministry of Education. It was formally promulgated by the new Ministry of Civil Affairs, which was in charge of police and public security. The report of the Ministry of Civil Affairs stated that public assemblies, associations and publications were key issues of public security. Therefore, the making of a Copyright Law to regulate publication affairs fell into its jurisdiction. However, relying on its governmental background, Wenming Shuju had already started seeking enforcement of their "copyrights" years earlier without the existence of a formal law. In

addition, trade associations in the publishing industry had made efforts to prohibit unauthorized reprinting through industrial norms and disciplines before (Li, 2003, pp. 112-113). The idea and practice that treated publications as properties had already started to sink into Chinese media and society. Meanwhile, writers, editors, journalists and other people working in the booming cultural and media industries picked up the notion of copyright to frame and support their struggles to make a living through selling their intellectual labor.

Qing's Copyright Law was largely modeled after Japanese Copyright Law at the time. This was not surprising because the first decade in the twentieth century witnessed a close relationship between China and Japan, working together on China's modernization/Westernization.

Traditionally, Chinese elites had always seen Japan as a junior neighbor, learning from Chinese civilization and living in the shadows of the Chinese empire. During the nineteenth century, China and Japan, along with many other Asian countries, became the victims of Western imperialism. However, Japan's Meiji Restoration in the second half of the century successfully transformed Japan into a capitalist society and gradually built Japanese economic and military power. The wretched and unexpected defeat of China in its war with Japan in 1895 profoundly impacted Chinese political elites and intellectuals. Japan, a previous "junior neighbor," almost overnight became a model to learn from. Between 1900 and 1910, China invited several distinguished Japanese legal scholars to help China to draft Western-style laws, including criminal law, civil law and procedural laws. The making of the Copyright Law was only one example in this trend to learn from Japan. A comparative study shows that ninety-one percent

of all sections in Qing Copyright Law were transplanted from Japanese copyright law (Wang, 2006, pp. 99-132).

Qing rule was overthrown only one year after the making of its Copyright Law. Nonetheless, the new Republic of China declared the Law to be valid until a new one was made in 1915. The Nationalist government made another Copyright Law in 1928, the last one before the Communist Party came in power in 1949. According to Wang (2006), these three laws shared much in common. Thus, despite profound changes in political systems and Chinese society at the time, copyright law remained remarkably stable, at least in paper. Perhaps unsurprisingly, the implementation of the law was problematic. For one thing, the implementation of intellectual property required a legal structure non-existent in China at the time, and properly trained judges and legal professionals and staff on intellectual property were seriously inadequate (Alford, 1995, pp. 53-55). A distinguished Chinese legal scholar recalled that, during 1940s when he was a law student, he never came across the notion of intellectual property either in class lectures or readings (Guo, 1998, p. 199). For another, the first half of the twentieth century in China was marked by constant political and social turmoil and frequent warfare, including the Sino-Japan War from 1927 to 1937 and the civil war between Communists and Nationalists from 1946 to 1949. Nonetheless, market-oriented transformation of cultural and media sectors deepened and expanded. In addition to the market for ready-to-sell cultural products like books and journals, the market for intellectual labor significantly grew when the intellectual stratum in Chinese society underwent profound transformation.

Intellectuals in traditional Chinese society were part of the ruling landlord-gentry class. A typical life and career path of an intellectual was to read and memorize classics, to take and pass civil service examinations and to become governmental officials. He (only men could take part in the examinations and become officials) did not work for a living. He read and learned to train himself for civil services and all his work at a governmental post was a service to the emperor and the people. Writing was an essential component of his training and service as well as the key part of the civil service examination. It was not to be traded for money, nor was it desired, because one's governmental position won through his writing would ensure salary income and social prestige. However, the invasion of Western capitalism into Chinese political, economic and social life gradually eroded the old order. The civil service examination was abolished in 1905 in a hurry (Li, 2007), which all of a sudden shut down the traditional opportunity for intellectuals to move up the social ladder. At the same time, Western media practices and businesses were introduced into China, which opened up new channels for intellectuals to make a living and to fulfill their social and political responsibilities outside traditional paths.

The forerunner of Chinese newspaper, Wang Tao, was one of the earliest intellectuals who were forced to make a living outside the traditional career path. Having failed the civil service examination, Wang had to work for an English publishing house in Shanghai, trading his talents not with governmental posts but wages as a corporate employee. Nevertheless, he never gave up on his political responsibilities indoctrinated in him under traditional education. When he started his own Chinese language newspaper in Hong Kong in 1874, an important motivation besides making a living was to spread his political ideas and to contribute to national

development (Cohen, 1974). At roughly the same time, *Shenbao* in Shanghai employed a number of Chinese intellectuals who failed, or had yet to succeed in, the civil service examination (Xu & Xu, 1988). At the turn of the century, Liang Qichao was also forced into writing for a living when he was in exile in Japan and had to find ways to feed himself. He made a remarkable amount of money through publishing and writing in Japan and soon became an active advocate of copyright (Li, 2003, pp. 30-45). Gradually, getting paid through writing was no longer undesired or despicable. Rather, it became a decent means to obtain wealth and fame. The price of one's writings could reflect the value of his/her intellectual labor, which was how Yan Fu and Liang Qichao negotiated high royalty rates and manuscript remuneration for their translations and writings.

Copyright proved to be a very useful and beneficial system for authors like Yan and Liang. Due to their distinguished positions in Chinese politics and culture, their writings and translations were much sought-after by publishers. Their copyright-style control over their writings, even without state recognition and effective protection, functioned well enough to enable them to negotiate favorable terms with leading publishers like The Commercial Press. The imported, "international" norm of copyright at a time when China tried to learn from the West helped to fight off traditional contempt and to justify economic demands to their works. With copyright they could own their writings and sell them, too, effectively controlling the use and output of their intellectual labor. However, the benefits they enjoyed had to be attributed more to their social ranks and power, rather than an abstracted notion of copyright. Yan was the head of the Translating and Editing Bureau of the Imperial University (*Jingshi Daxuetang*) and later the head

of the University. He was also a leading figure in Chinese politics in the early 1910s. Liang was the most well-known writer and intellectual in his time and also held leading positions in several Chinese administrations. With or without an effectively functioning copyright system, their intellectual influence and social and political privileges could still carry their writing careers very far. As they were the most vocal advocates of copyright, it was not surprising that copyright privileges were at the core of their dealings with publishers, which rewarded them splendidly. Meanwhile, however, the majority of their peers were not as fortunate.

The growth of the commercial press, and the rising role of copyright, did not automatically bring well-being to the majority of Chinese intellectuals who turned to the market for a living. Not unlike the old civil examination system, which brought power and prestige to a few and kept the majority at the bottom of the social ladder, the market rewarded a small number of elite writers well, while left others struggling for a living. While copyright had come to the core of the author-printer relationship, it did not bring protection and welfare for the vast majority of writers, though advocates of copyright in China had based their arguments mostly on the protection and welfare of *all* authors. What really mattered were the terms and conditions of selling one's intellectual labor in the market, regardless whether the product was copyrighted or not. Unfortunately most Chinese writers at the time did not fare well in this regard.

According to Li (2003), during the Republican Era, from Qing's end to the founding of the People's Republic in 1949, most writers were more often than not living under the poverty line. Publishers at the time tended to accept only works by established writers, whose reputation promised better profiting opportunities. Large numbers of new and unknown writers had to

accept meager payments for their writings. An article published in 1941 estimated that only four writers in China at that time, namely Liang Qichao, Lu Xun, Hu Shi and Lin Yutang, could make a living by writing. One of the most important poets in modern Chinese literature, Guo Moruo, had to take on a second job to feed his family even after he was already a well-known poet. In the early 1940s some writers launched a movement for an increase on remuneration for writings. Their goal was pretty low, “one thousand words for one *dou* of rice (about 6 to 7 kilograms),” yet the movement still failed. As a matter of fact, most writers had to make ends meet by taking on jobs that paid regular salaries, e.g. as journalists. Selling intellectual labor in non-copyright ways was the major practice in the market for cultural labor.

With their social status undergoing significant changes, Chinese intellectuals at this time began to see themselves not as part of the ruling class but as proletarian laborers. This was a time when Western philosophies and ideas were introduced to China. Marxist theories of capitalist production and exploitation influenced a large number of writers. One writer called himself “an exploited worker of letters” and called publishers capitalists who exploited writers like him ruthlessly. In a sarcastic tone, he stated that such exploitation was how capitalism was supposed to be, so he, as a member of the proletarian class, really had nothing to complain about (Li, 2003, pp. 309-310). In another case, when commenting on the founding of an authors’ association in Shanghai in 1927, a writer argued that after a “book merchant class” had emerged, “authors’ spiritual products became commodified, and they were turned into peddlers or employees, exploited by capitalists and sharing exactly the same fate as manual workers” (ibid., p. 258). In 1925, following a large-scale strike by factory workers in Shanghai

and Qingdao, editors in The Commercial Press also went on a strike, which lasted for one week until the company gave in to the strikers' demands (ibid., p. 238).

The emergence of writers as a professional group that worked for monetary returns marked a distinct difference from traditional China. Writing no longer directly led to officialdom. It was a means to make a living, and for some, to achieve fame and to express their political ideas. Still, some intellectuals holding university or governmental positions did not rely solely on the income from writing, but many of them, e.g. Lu Xun, also actively sought to claim rights to their works. This was the social basis for the commodification of intellectual labor. The introduction of Western copyright ideas and law into China in the nineteenth century significantly impacted leading Chinese intellectuals and business people, who in turn impacted the publishing industry through their copyright practices. Nevertheless, some writers still held the traditional idea of writing and the role of an intellectual. In a tragic case, a well-known poet unwilling and unable to write to cater to the market committed suicide in desperation and poverty (Li, 2003, pp. 238-239). But increasingly large numbers of intellectuals were determined to claim their copyrights whenever possible. While some of them used Marxist critical analytical tools and identified with factory workers under capitalist exploitation, some others looked to the West and saw themselves on a par with Western intellectuals. Chen Xiyong stated that "Western authors...never give up a cent on what they are entitled to" (ibid, p. 323). These were two inter-related but different trends of copyright thinking, but to both stealing of their books was no "elegant offense."

Foreign pressure did not play a significantly role in copyright development in China during this period. As mentioned above, China entered into agreements with the US and Japan in 1903 and committed to protect their copyrights in China. However, copyright sections in both of the agreements offered only very limited protection for foreign works. For example, the agreement with the US stipulated that for works created by American people to be protected in China, they must be either created solely for use by Chinese people or written in Chinese. Court cases soon proved it to be of very limited use for US copyright owners. In several influential cases, one of which involved the translation of a *Webster's* dictionary, Japanese and US plaintiffs unexceptionally lost, for none of the alleged infringed works were “created solely for use by Chinese people” or “written in the Chinese language.” As a matter of fact, US soon realized the loophole in the copyright clause in the 1903 agreement and asked China to renegotiate in 1907. The Qing government flatly refused (Li, 2003, pp. 159-178).

Still, in the first half of the twentieth century, several Western countries including the US, France, Britain and Japan, repeatedly asked China to enter into international copyright conventions, especially the Berne Convention. Again it triggered large-scale debates in Chinese society. But this time, trade associations played an important role in decision making, and there began to emerge voices that support China's accession to international conventions. Shanghai Publishing Association (*Shanghai Shuye Shanghui*), a trade association of publishers in Shanghai, elaborately stated its opposition to entering into international copyright conventions in its report to the Chinese government in 1913, when the US asked China to enter into a copyright agreement. The letter listed ten reasons, which emphasized that China had a large deficit in

cultural trade and China's development and education needed massive, low-cost imports of foreign works. In 1919, a report by The Commercial Press reviewed US history of "pirating" British books and argued that a nation had to first achieve a balanced cultural trade and significant industrial strength before committing to protecting foreign copyrights. In 1920, in response to France's request to enter into copyright conventions, Shanghai Publishing Association again submitted a report to the Chinese government and argued that it would block the progress of education, research and industrial growth of China, which lagged behind and had to learn from the West. Nevertheless, some intellectuals voiced different opinions. Yang Duanliu argued that China could enter international conventions while making reservations to key sections. Wu Yugan argued that accession to international copyright conventions was an international trend, which would eventually benefit China. Amid sharply divided opinions, the interest of national publishing industries prevailed. After copyright sections in 1903 agreements with the US and Japan, China did not enter into any multilateral or bilateral copyright agreements until 1946, when the pro-US government under Kiang Kai-shek signed a new trade agreement with the US, which granted wide range of protection for US copyright properties (Li, 2003, pp. 139-202). But this was only three years away from the founding of the People's Republic, which started an entirely new era in the development of copyright in China.

### **Mao's China: State control and social hierarchy**

The history of copyright in the three decades after 1949 underwent a zigzag route. In the first few years after the Communist Party coming to power, Chinese intellectuals, as part of the

working class, received favorable treatments including decent monetary compensation from their writings. The Chinese government also made efforts to draft a copyright law in the 1950s. However, after the “socialist transformation” (*shehui zhuyi gaizao*) of capitalist industries and institutions concluded in 1956, China’s development embarked on a “socialist” route that emphasized state control and planning. *Gaochou* (or *gaofei*), namely monetary payments to authors for their writings, was reduced and later eliminated as a capitalist market practice after a series of back-and-forth debates and policy changes through the late 1950s and 1960s (Li, 2006, pp. 139-158). Eventually state patronage became the major mechanism of cultural production and control, and authors’ control over their writings and market-determined monetary incomes were eliminated. It needs to note that these transformations did not serve egalitarian purposes. Instead, they were subordinated to the new, constantly changing social hierarchy constructed under dramatic political and social turmoil.

Starting from the Yan’an era, Chinese Communist Party had always treated intellectuals well. Preferential treatments for writers included relatively better living and working conditions as well as monetary remuneration for their writings, because “a cultural worker is a soldier in the thought front” (Li & Chang, 2007, p. 4). Meanwhile, the Party also stated that intellectuals needed to be educated and reformed in order to serve the revolutionary cause (Li, 2006, pp. 142-144). After the Party came into power and at the first national conference on publication in 1950, Hu Yuzhi, then chief publication administrator, stated that publishers were to serve both the readers and the writers. He argued that the responsibility of the publisher was to decrease book prices on the one hand, and to increase remuneration to the writers on the

other. They needed to take readers' and writers' interests into full consideration. Soon the General Publication Administration issued an order prohibiting the transfer of copyright ownership to the publisher and ordered the major form of remuneration to the author be *gaochou*, or manuscript remuneration, calculated on the basis of genre, quality, length and the number of prints (Li & Chang, 2007, pp. 9-10).

The rise of social status vis-à-vis publishers and the new *gaochou* system rewarded some authors splendidly. The *gaochou* system in the 1950s was modeled after the Soviet Union. Under that system, an author's *gaochou* started at a fixed ratio to the length of the book. But if the print-run of the book exceeded a certain number, e.g. 30,000 copies for fictions, then the author would have her/his *gaochou* doubled, tripled or multiplied as the number of prints reached 60,000, 120,000 and each and every 30,000 threshold. In this way, some popular authors received large amounts of money in a very short period of time. In one case, after merely four books, fiction writer Liu Shaotang had accumulated a large sum of deposits in his bank account, the interests of which were equal to a middle rank governmental official's monthly salary. Several other authors also became very wealthy almost overnight due to the popularity of their writings (Li & Chang, 2007, pp. 83-84). Meanwhile, the Chinese government actively worked to draft a copyright law. After two administrative orders that regulated pre-1949 copyright issues and prohibited at-will reprints in the early 1950s, in 1954 the Publication Administration submitted to the State Council the Provisional Regulation on the Protection of Publications' Copyright (Draft). In 1957, the Ministry of Culture promulgated the Draft along with a detailed explanation for public discussion. Till then, pre-1949 practices in the publishing

industry largely remained, except that royalty was replaced by *gaochou* payable to writers then enjoying high social status as workers, the ruling class of a socialist country.

The turning point came in the late 1950s, when the *gaochou* system underwent a period of turbulent revisions. In 1958, the Ministry of Culture started an initiative to reduce *gaochou*. The new policy, promulgated in August, set forth new and much lower rates for *gaochou* as national standards. In only two months the Ministry issued another order to cut the already reduced *gaochou* rates by half. In 1960, the Ministry of Culture issued another order, which turned *gaochou* into a one-time payment completely delinked from the number of prints. It triggered a strong opposition from Chinese writers, translators and scholars in areas of natural sciences and technology, in response to which the Ministry of Culture issued another order in 1962 to reverse the previous one. However, in merely another two years, the Ministry again decided to make *gaochou* a one-time payment. In 1966, the rates of *gaochou* were further reduced and became uniform criteria all over the country.

This set of back-and-forth revisions of the *gaochou* system took place in the turbulent political atmosphere in the 1950s-1960s, the prelude of the Cultural Revolution that started in 1966. This was a time when the “socialist reform” of capitalist industrial sectors concluded and the all-around socialist construction began. Chinese leaders, though not without doubts or disagreements, believed that the state had all resources in control to speed up building a communist society. To achieve that lofty goal the state must and could reform the people’s backward mentality and eliminate all traces of capitalism. This was the context that *gaochou*

was targeted. Eager communist reformers identified several sins of *gaochou*, elaborated in the Ministry of Culture's report to reduce *gaochou* and in a *People's Daily* editorial in 1958 (Li & Chang, 2007, pp. 45-50, 60-62): first, it gave high income to writers and translators, which would then distance intellectuals from manual workers and result in contempt for manual labor and the corruption of intellectuals. Therefore, the reduction of *gaochou* income would in itself contribute to a pro-communism mentality. Second, for writers with communist awareness, writing was a natural pour of ideas and emotions, rather than a means to make money. In a communist society, which was believed to be China's imminent future, everybody had a secured life and writing was a leisure or amateur activity. Writing for money was simply not necessary for making a living. Third, *gaochou* and its underlying notion of privately owned copyright were but the remains of capitalist legal practices and thinking – and capitalist private ownership was sinful and must be eliminated. As a practical solution to compensate professional writers for their labor, it was proposed that all writers and translators in the country must work in state agencies and receive regular salaries instead of getting paid by the market through *gaochou*. This was not a novel idea, but the push on its complete and thorough implementation marked the dominance of state patronage as the major mechanism for cultural production and control.

Starting from the founding of the People's Republic, most writers and translators in China were employed at various state agencies or state-controlled organizations and received regular salaries from the government. The most influential one of these organizations was the Chinese Writers' Association. Established in 1949, a few months before the founding of the People's

Republic, the Association had full funding support from the state and was subject to top-down state control. On the one hand, state-recognized writers had regular salaries, *gaochou* incomes and sometimes reimbursements for their travel and living expenses, which made writing a much-envied career. On the other hand, the Association had significant power in organizing and evaluating writing projects, and more than once top-ranking state leadership stepped in to rule over the fate of writers or writings. The Association was organized in accordance with governmental structures. There was the national association as well as provincial, municipal associations, weaving a comprehensive network that included the majority of writers in China. At more or less the same time, artists, composers and performing artists were also organized into similar organizations (Li & Chang, 2007, pp. 78-83).

Besides eliminating remains of “capitalist legal practice,” state patronage through organizations like the Writer’s Association helped to build up state control over cultural production, replacing market inequalities with a new hierarchal structure. As Wang (2008) points out, the establishment of the Writers’ Association was part of a larger project to transform literature into a political vehicle in service of Party goals and agendas. Thus, to recruit writers into state agencies after 1949 was a continuance of Yan’an practice. It emphasized that writers were soldiers at the cultural front and needed to be trained and reformed to follow Party initiatives. Indeed, writers under the Party were to reform people’s mentality. They were “engineers that worked on people’s souls (*linghun gongchengshi*),” whose souls must be properly engineered in the first place (Zhang, 2007). At the same time, not all “soul engineers” were equal. They had different ranks and accordingly different benefits and privileges in a pyramidal, bureaucratic

structure. Top-rank writers enjoyed the same status as high-rank Party and governmental officials. It is in this sense that the replacement of *gaochou* with state patronage built a new, non-market inequality into cultural and media sectors after 1949, rather than simply imposing an unfavorable policy unto all intellectuals in a non-discriminatory manner.

The Cultural Revolution in 1966-1976 did not change the new hierarchal order but deepened it. Many writers lost minimum control over their works, while some others were rewarded splendidly. During the turmoil of political and mass campaigns, large numbers of literary works were determined to be politically wrong and were banned. Many writers were persecuted for allegedly holding wrong political ideas and were sent to labor camps and thus deprived of necessary working conditions. In some cases, when a work was deemed acceptable but the author was “politically problematic,” the work would still be used or published but the author’s name would be removed. *Gaochou* was virtually eliminated for ordinary writers during this period. For amateur writers, it always meant that necessary expenses incurred in writing and research could not be covered. However, at the same time, some authors still had copyright-style control over their works and were getting paid. “Revolutionary leaders,” including theoretical founders like Marx and Engels, as well as Mao Zedong himself, had their works reprinted massively with due authorship credits. In the case of Mao, his works were not only published widely in China but abroad also. It was estimated that there were several hundred versions of Mao Zedong’s publications in more than sixty languages, some of which purchased copyright from China (Li & Chang, 2007, pp. 89-100). As a matter of fact, whether Mao Zedong himself received massive *gaochou* income from the publication of his works was once a heated

topic in Chinese internet. Some argued that Mao received a staggering amount of *gaochou*, some of which were transferred to his daughters after his death. Some others argued that none of the sources on Mao's *gaochou* income was really reliable.<sup>6</sup> In addition, some authors, e.g. Zhang Shizhao, at the direct intervention from state leaders, also received remarkable monetary payments for their writings (ibid., pp. 109-110). What marked the history of copyright during the Cultural Revolution was not simply denial of author's rights and remuneration. Besides access to power and privileges, it was more of a discriminatory treatment based on authors' "political stances," an arbitrary but powerful criterion that differentiated some from the others.

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The development of copyright in one and a half centuries before contemporary China's reform and open-up, beginning in the late 1970s, is in many ways relevant to contemporary debates and issues on copyright and media in China. First, as a form of private control over publications, copyright is both familiar and novel to Chinese tradition and history. As a matter of fact, this has always been a heatedly debated issue. Historical research has found evidences showing that in some instances, Imperial governments and officials did grant some publishers exclusive privileges to the printing of certain materials. Some researchers believe that these were early examples of Chinese copyright regulation (e.g. Zheng, 2008). Others argue that these privileges were not intended to protect private property but were top-down initiatives to control the flow of ideas and information, therefor are by nature not copyright (e.g. Alford, 1995). Drawing on

both sides, a more recent research work argues that although the intention of these regulations and orders might be to control printing and culture, their implementation could still contribute to the construction of copyright-like privileges (Li, 2006). What is been contested at the core is the defining nature of copyright. The questions are: What is copyright? Is there a non-Western, ancient Chinese version of copyright? Is copyright by nature part of a liberal, capitalist market, or is it one way out of many to control media and culture?

This is where Young John Allen steps into the debate. More than one hundred years ago and as an early and zealous advocate of copyright in China, he argued that it was part of Chinese tradition and industrial norms to prohibit unauthorized copying of other's works. When a Qing official, per request from Allen through the US consulate, issued an order to prohibit reprinting of Allen's books, he also appealed to traditional ethics and moral principles. According to him, Allen worked very hard on these books, and it was unacceptable (for pirates) to make money in inappropriate ways (*quqiao fanban, xitu yuli*) (see Li, 2003, pp. 16-17). By emphasizing how hard the author had worked, the official implicitly argued that people should be entitled to some control over their works created by their labor. This was exactly the same argument made in a governmental order prohibiting unauthorized reprinting in the Song Dynasty (960-1279 AD) (see Zheng, 2008, p. 12). Therefore, the Lockean notion of copyright, which argues that people had control over what they created through labor, was inherently in line with Chinese tradition. Of course, this is not to say that copyright was the major system to ensure author's control in ancient China, but that private control over cultural products, both as a practice and an idea, was by no means alien to Chinese society and culture. Bringing Schiller (2007) into the debate --

if copyright is but one of several ways to control media and cultural products, then the question on copyright in China becomes: What were the contexts that copyright grew and developed, and under what conditions can it (or did it) become the major form of control in cultural and media sectors?

Second, the introduction of copyright was closely related to China's development in the context of global capitalist expansion. It was after China's involuntary encounter with Western capitalism in mid-nineteenth century that copyright, as an idea, a state policy and a business practice, began to grow. This was a time when China was eager to "catch up" with the West by learning Western technologies, business practices and political systems. For Chinese elites at the time, national development and the growth of Chinese industrial and economic powers were top priorities. This was the context that copyright was evaluated as an instrumental policy option for development. As Li (2006) puts it, copyright law in China was born out of "the anxiety for modernization."<sup>7</sup> Indeed, developmentalism ran through the center of Chinese history in the last century. Debates in the late Qing era regarding copyright strongly reflected the developmental mentality among political and intellectual elites. In debating whether China should protect foreign copyright interests, both supporters and opponents cited China's urgent need of development to support their arguments. Liang Qichao maintained that China must protect foreign copyright interests so that more Western works, badly needed for education in China, could be imported. At the same time, Zhang Baixi, the chief education administrator disagreed by saying that it would result in pricey books and fewer translation works, which would hurt China's development (Li, 2003, pp. 85-108). The pragmatic understanding of

copyright as a state policy continued today. In 2008, the Chinese government promulgated a national intellectual property strategy as a core developmental policy. One year later, facing with the global economic crisis, the Chinese government focused on creative industries and intellectual property, hoping they could help China out of the crisis. Does history repeat itself?

It needs to be noted that China's development in the recent century went through sharp turns. Late Qing China was constantly under the threats from Western capitalist powers. Learning from the West, beside learning technologies, also included learning business practices and the market as the means to grow economy. Reform measures during this period always aimed at encouraging the growth of industries and commerce. Copyright as the privatization and commodification of intellectual labor and cultural production fit well with the general policy. However, China never had a real chance to develop Western-style liberal capitalism. Specific historical and social circumstances gave rise to a communist revolution that swept through the country (Bianco, 1971; Lin, 2006). The victory of the Communist Party in 1949 put a halt to the development of capitalism and market, and initiated a new developmental policy that stressed centralized planning as well as reforming the masses' mentality and thinking for the sake of "socialist/communist" construction. The denial of *gaochou/royalty* and the rise of state patronage were also born out of "the anxiety for modernization," though based on different theories and strategic concerns. After China re-opened to the West in the 1970s and reinstalled market relationship in cultural and media sectors, how this socialist/statist past played into the contentious and tortuous growth of copyright in contemporary China is an inescapable question of paramount importance.

Third, the path of copyright in China displayed its proximity to power and its subordination to social hierarchies. Netanel (1996) argues for a democratic copyright system, maintaining that copyright can grant authors autonomy from both market powers and the state, thus contributes to independent creation and expression. However, history of Chinese copyright does not look good in this regard. From the very start, Lianquan and his Wenming Shuju were part of the bureaucratic apparatus, and their victory in fighting “piracies” was non-replicable because not many publishers could had easy and direct access to the chief education administrator in the country. In the republican era, copyright and the rise of the market did not bring universal welfare for writers. Instead, only a few elite intellectuals benefited from copyright practices due to their social ranks and privileges. Things changed significantly in Mao’s China, but not necessarily for the better.

More than one researcher cites a popular saying in the Cultural Revolution, “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?” (Alford, 1995, p. 56; see also Li, 2006, p. 139). This saying is both interesting and important in that it gives a hint to understanding copyright in China. On the one hand, it points to the superiority of workers as a “better” or “higher” social class during the Cultural Revolution. On the other hand, it crosses the line between manual and mental labor by drawing an unhesitant parallel between a steel ingot and a piece of writing. Yet, copyright growth in contemporary China was based on exactly the opposite: it emerged after the rise of

intellectuals in the social ladder vis-à-vis workers and peasants, and the division between mental and manual work was the key to the “uniqueness” of “intellectual labor.” It is in this sense that copyright in China needs to be fully contextualized in the reshuffling of social classes, and that to construct copyright on the basis of mental/manual division may implicate a concession to hierarchical social structure. Seen in this light, the history of copyright in post-1949 China can be viewed differently. The high *gaochou* standard for writers in the early 1950s resulted from the rising social status of authors, seen and treated as cultural workers. The elimination of *gaochou* took place alongside their recruitment into state agencies. Instead of a simple deprivation of intellectuals’ private rights, it also granted writers other monetary and social compensation. Thus it was more of a transformation: from copyright incentives to state patronage. Indeed, it was not even a move against *private* control over cultural products. Under the social hierarchy and the undemocratic bureaucratic system at the time (Meisner, 1999), state control of culture and media were by no means social and public, but more often than not in service of private interests and goals amid politically manipulated mass campaigns and movements. Therefore, the rebuilding of copyright in the reform era did not start on the simple and pure basis of denial of intellectuals’ private rights, but marks the start of a new transformation. The merits and problems of such a transformation will, again, need to be critically evaluated by taking the history fully into account.

### **Chapter 3 Domestic initiatives and global contexts: Reinventing copyright law in contemporary China**

The making and development of a copyright system in post-Mao China is a complicated and interesting story. It takes place in the context of China's market reform and re-insertion into global capitalist economy and reflects contestations and debates in China's social transformations. This chapter documents domestic initiatives to develop a copyright system, including early efforts to learn from the West, debates during the legislative process, the Chinese state's promotion campaigns as well as foreign pressure on China regarding intellectual property. I argue that domestic initiatives took the lead in the making of the copyright system, while intense pressure from the West (the US in particular) significantly limited China's options. As discussed in the previous chapter, copyright and commercial media already had a long history in China. The making of a copyright law in contemporary China was a new chapter that took place in contemporary global contexts. Features and implications of the Chinese copyright system cannot be revealed only by textual analysis of legal codes. Rather, it is through *how* legal codes took shape that we can have a glimpse of power relations and social conflicts in the making of a legal system of proprietary cultural control.

#### **Learning from the West, again?**

If Chinese reformers in the late Qing era focused on "learning from the West," their inheritors in contemporary China shared a very similar mentality. The birth and growth of today's Chinese

copyright system involved extensive efforts to learn from the West. In the late 1970s and 1980s, China worked closely with the World Intellectual Property Organization (WIPO) for training, education and legislative advice. The “learning” mentality ran through the last three decades and persisted today. Chinese elites in the 2000s still viewed the West (in particular, the US) as models of IPR development and Western practices and ideas as of tremendous importance and relevance to Chinese society.<sup>8</sup> Indeed, the history of, and China’s earnestness in, learning about intellectual property rights (IPR) from the West may seem odd when placed side-by-side with widespread “piracies” in the Chinese market and flaming criticisms from the West today.

Ren Jianxin, former chief justice of the Supreme People’s Court (SPC), traces the origin of contemporary Chinese IPR system to a visit to the WIPO in 1973. China Council for the Promotion of International Trade (CCPIT), also known today as China Chamber of International Commerce (CCOIC), was a “non-governmental” organization working under the Chinese state. Since its founding in 1952, CCPIT established trade relations with many countries including major Western countries. It administered patent and trademark issues in foreign trade and for a number of years was the de facto agency in charge of trademark registration in China. In 1973, upon an invitation from the WIPO, then Chinese Premier Zhou Enlai decided to send a small delegation from CCPIT to WIPO’s conference. The CCPIT delegation in 1973 engaged in in-depth discussion with then WIPO Director General Árpád Bogsch on intellectual property and China, and also visited intellectual property agencies in Switzerland and France. According to Ren, who was the head of the CCPIT delegation, the 1973 visit was an eye-opening journey. In Bogsch’s

words, it was like “Columbus discovering the new continent.” Upon returning from the trip, the delegation immediately reported to the Chinese government and recommended the establishment of a patent system in China (Ren, 1998, 2008; Wang, 2008).

Full-scale growth of IPR in China started in the late 1970s as part and parcel of China’s market reform. It took place in the context of two trends in contemporary China’s social transformation: the rise of intellectuals in the social ladder and the rise of the market in economic and social life. The dominant reform-oriented ideology took it for granted that copyright was inherently central to the protection of cultural creation and scientific research as well as people who undertook these tasks, namely intellectuals (Song, 2007). According to another key figure in China’s copyright development, Shen Rengan, it was in response to authors’ and artists’ request that the making of a copyright law was put on the state’s agenda in the late 1970s (Shen, 1998).

Nevertheless, the West triggered formal law-making. In 1978, the UK Publishers Association paid a visit to China and submitted a memorandum, which urged China to join international copyright conventions. In 1979, the US asked China to protect US copyright interests in the bilateral agreements between the two countries. In response, the Chinese National Publication Administration wrote a report to the State Council and proposed to make a copyright law and to accede to international conventions. General Secretary of the Communist Party Hu Yaobang approved the report and ordered that a copyright law be drafted. Hu’s decision initiated a series of endeavors toward the making of the Chinese Copyright Law (Song, 2007, p. 417; also see Shen, 1998, p. 391).

Early law-making endeavors were marked by extensive efforts to learn from the West. As a matter of fact, intellectual property was a strange idea to most Chinese in the late 1970s, including researchers specializing in economic or civil law. The Chinese National Publication Administration in the late 1970s/early 1980s took five measures to prepare to draft a copyright law. One of the measures was to establish a work team, and all other four measures emphasized cooperation with, and learning from, other countries (Song, 2007, pp. 416-421). In addition, the work team was headed by a specialist in English language and international affairs, rather than a legal expert (Shen, 1998, p. 30). The team collected copyright information from nearly one hundred nations through Chinese embassies and consulates abroad (Song, 2007, p. 418). Meanwhile, early Chinese IPR researchers boasted backgrounds in foreign relations or international law, rather than in civil law or economic law which in many ways related to intellectual property more closely (Zheng, 2008, p. 5).

IPR training and education in contemporary China exhibited extensive Western influence. Starting from 1979, copyright officials and researchers from Japan, the UK, the US and the United Nations Educational, Scientific and Cultural Organization (UNESCO) came to China to lecture on copyright (Song, 2007, pp. 417-421). Between 1979 and 1992, the WIPO organized more than 30 training sessions in China regarding patent, trademark and copyright. Most of China's first generation IPR officials and researchers first learned about IPR through these sessions. The training session on patent law in 1980 was unprecedented in WIPO's history in terms of scale and length. Top-ranking WIPO officials including Bogsch himself as well as

experts from Germany, the UK and Spain all lectured in the four-week session, which produced the first set of patent textbooks in China (Guo, 1998, pp. 204-205; Ren, 2008, pp. 12-13).

Meanwhile, many Chinese were sent abroad for IPR training and education, some of which later became top-ranking IPR officials and researchers in China (Song, 2007, pp. 417-21; also see Li & Chang, 2007, pp. 196-199).

The WIPO's involvement in China's IPR development was very deep and profound and its head, Árpád Bogsch, played a key role. As early as 1973, Bogsch discussed with the CCPIT delegation the terms and conditions for China's accession to the WIPO, and urged China to make a patent law. After 1979, Bogsch became the primary consultant for China's IPR development. He learned of and discussed the drafts of Chinese Patent Law and Copyright Law word-by-word with Chinese visitors before the laws were made (Guo, 1998, pp. 201-202; Li & Chang, 2007, pp. 195-196; Liu, 2008, pp. 444-445; Zhao, 2008, pp. 305-306), and also engaged extensively in the making of Chinese trademark law (Wu, 1998, p. 161). In the early 1980s, Bogsch made frequent visits to China. He met with Chinese leaders as well as officials at all levels, organized and personally lectured at a series of seminars and training sessions. With Bogsch's support, the WIPO even funded Chinese officials' trips to IPR training sessions held in other countries (Wang, 2008, pp. 359-364).<sup>9</sup>

Interestingly, profound international influence in China's IPR lawmaking took place along with sharp debates in China regarding intellectual property. There had been heated debates on whether a patent system could serve China's development. Preparation for the Patent Law was

once criticized as “a vain attempt to use a single model of the West to solve developmental problems in China’s science and technology.” During a training secession in Beijing in 1981, a trainee confronted Bogsch and argued that a patent system in China would only benefit Western countries. It was with funding support from the WIPO and foreign governments that the Chinese Patent Administration was able to send more than 200 people abroad for training and education (Wang, 2008, pp. 355-361). Several times Deng Xiaoping personally intervened to overcome oppositions to the Patent Law (Zhao, Yan, 2008). In ways both similar and different, the debate over copyright was no less dramatic.

### **Debating copyright**

It is generally acknowledged that the making of a copyright law in contemporary China involved lengthy, complicated, and above all, sharply contested, debates. The most important conflict, according to some (e.g. Alford, 1995; Obsenberg, Potter & Abnett, 1996), was the conflict between ideas of copyright and Chinese culture and ideology: both Confucianism and socialist ideology see culture as public and social instead of private and proprietary. If this is the case, debating copyright in China would have focused on the fundamental legitimacy of copyright. However, a review of the history does not reveal significant, if any, contestations regarding *whether* copyright growth is good or justified. Instead, the debate centered on *how* to develop copyright in China. It may sound presumptuous or wrongheaded to claim that there was a consensus on copyright in China after the late 1970s. But without such consensus, it is difficult to make sense of the invisibility of documented opposition based on either traditional ideas or

socialist/communist ideologies. Of course, it must be noted that the discussion here is based on documents composed or compiled by ardent copyright supporters, who have won the battle and thus become the triumphant historiographers. But when all of them point only to issues pertinent to the strategies and tactics in copyright development, the explanation can only be one or both of the following. First, all fundamentalist opponents were marginalized to such an extent that they became invisible for those at the center of power. Second, the hegemony of pro-copyright ideas was so overwhelming that the opponents had to choose to block copyright growth in a round-about way, rather than to strike right at the target. Either way, we must acknowledge the existence of a strong consensus among Chinese elites regarding the merits and benefits of copyright for contemporary China.

Some researchers like to cite a saying about copyright in China, which was circulated during the Cultural Revolution (as we saw in Chapter Two). The saying places “a steel worker” and “a member of the intelligentsia” side-by-side as equals and unhesitatingly crosses the gaps between different social classes and between mental and manual labor. This sense of class equality apparently did not exist in China after the late 1970s, when intellectuals quickly rose in the social ladder and peasants and workers gradually fell to the bottom. Meanwhile, monetary compensation for literary, artistic and scientific works quickly regained legitimacy and increased fast (Li & Chang, 2007). These two trends, the rise of social status for intellectuals, plus marketization in cultural sectors, together shaped the debate over copyright law in contemporary China.

Several accounts have it that it was intellectuals, mostly writers, who first asked to make a copyright law. According to Shen (1998, pp. 29-30), one of the key figures in copyright legislation and implementation, the major propellant to make the copyright law was demands from writers and artists. Li and Chang (2007, pp. 143-166) also documented the efforts by several distinguished writers and scholars to call for a copyright system in China. The major opposition to the making of a copyright law, according to both researchers and insiders, stemmed from concerns over royalty payments to foreign copyright holders (Li & Chang, 2006, pp. 167-206; Liu, 2008, pp. 472-474; Shen, 1998, pp. 31-32; Song, 2007, pp. 422-430).

The making of a copyright law formally started in 1979, when then Secretary General of the Communist Party Hu Yaobang approved the proposal from the National Publication Administration. The first draft was finished in 1980. Two years later, the National Publication Administration was merged into the Ministry of Culture, which then submitted the draft to the State Council in 1983. In contemporary China, the making of a law generally starts with a governmental agency, in this case the Ministry of Culture. The agency submits the law draft to the Central Government, known as the State Council, which reviews and approves it. Then the State Council will submit the draft to the National People's Congress (NPC). If passed, the draft will then become law. Thus, as early as 1983 the copyright law was merely one step away from being reviewed by the supreme legislative body. What delayed the process was an administrative problem: there was not a special governmental agency that oversaw copyright issues. In response, the National Copyright Administration of China (NCAC) was set up in 1985 (Li & Chang, 2007, pp. 167-206; Liu, 2008, pp. 472-474; Shen, 1998, pp. 30-33; Song, 2007, pp.

422-430). One year later, China's General Principles of Civil Law, a very concise version of what would have been the Civil Code in a Western country, stipulated the general principles of copyright protection. In 1987, China's Copyright Law was on the verge of being passed. On April 25, 1987, the Party's mouthpiece paper, *People's Daily*, reported that the State Council was about to submit the draft of the Copyright Law to the NPC. This high-profile coverage demonstrated the determination as well as optimism of copyright supporters in China.

However, there were powerful actors trying to slow or block its passage behind the scenes. On August 8, 1987, four state agencies, including the National Science Commission, the National Education Commission, the Chinese Academy of Science and the Chinese Association of Science and Technology, jointly submitted a report to the State Council and asked to delay the making of the law. The report argued that the copyright law would force Chinese educational and research institutions to pay staggering figures to foreign copyright owners, whose textbooks and other works were being widely used in China. The report estimated that the expense thus incurred would be around 600 million US dollars per year. Some researchers stated that such an expenditure would be "devastating to scientific research and education" and "was pertinent to the future of development of science and technology in China" (Li & Chang, 2007, pp. 167-169; Song, 2007, pp. 422-430). It gave a hard brake to the legislative process.

The NCAC worked hard to push through the Copyright Law. It organized a series of seminars and workshops and carefully calculated the gains and losses of extending copyright protection to foreign works. It also worked to lobby governmental agencies and distinguished scholars and

discussed the issue extensively with foreign governments and the WIPO. As the result of a joint effort between NCAC, the State Council's Legal Bureau, the Party's Propaganda Department, and the Chinese Academy of Social Sciences, a new report in October 1988 estimated the expenses of royalty payments to foreign copyright holders to be 3 million US dollars annually, way below the 600 million US dollars previously estimated. According to the report, part of the discrepancy was because the previous calculation was based on copyright transfers, yet to use foreign books China only needed to pay royalties (Li & Chang, 2007, pp. 167-169; Song, 2007, pp. 422-430). The new report cleared the way of law-making. The Chinese Copyright Law was promulgated in September 1990 and entered into force on June 1, 1991.

China's "political culture," the center of which is the state's control over the flow of information (Alford, 1995), shaped copyright in China but did not kill it. State control of publication and the protection of authors were bound together in early law-making efforts. The very first draft of the copyright law came as the second half of a two-part "publication law" (Shen, 1998). The debate on publication control and copyright protection persisted into the last minutes before the law was passed. At the NPC in 1990, some representatives argued that copyright law should not protect works that were politically subversive, otherwise it would grant power to those who were against the Party's cause. They asked to add a special clause to exclude those works from copyright protection. The NCAC, the State Council, as well as the Education, Science, Culture and Health Commission of the NPC disagreed from a technical perspective. They insisted on the dichotomy of expression and ideas and argued that copyright was not concerned with ideas. As a result, the regulation and control of politically subversive publications should not be included

in the Copyright Law. Months of debate resulted in the controversial Article 4, which stipulates: “Works that are prohibited by law to publish or to distribute are not protected by this Law. The exertion of copyright should not violate the Constitution and laws, and should not infringe public interest” (Liu, 2008, pp. 475-477; Shen, 1998, pp. 34-35; Song, 2007, pp. 434-438).

Article 4 soon proved to be a “trouble-maker” rather than a problem-solver. For an informed legal professional or media practitioner in China, “works that are prohibited by law to publish or to distribute” clearly refer to politically sensitive works that may invoke state censorship. At the same time, however, governments and legal researchers in the West read it as a threat to foreign media products in the Chinese market: given China’s strict control on importing foreign media products, did a foreign media company own the copyright of its products that were not approved to enter the Chinese market but were “pirated” nonetheless? A well-known Chinese scholar believed that this was simply a misreading of the Law (Liu, 2008). Nevertheless, in 2010 China revised Article 4 after the US raised the issue with the World Trade Organization (WTO). The revision no longer explicitly excluded some works from copyright protection. Instead, it stated that “The state supervises and regulates the publication and distribution of works in accordance with the law.” Jiang Zhipei, former head of the Intellectual Property Branch of the Supreme People’s Court, maintained that the revision did not in any way impact state regulation over publication (Gao, 2010).

This debate reveals interesting aspects regarding political control and copyright privileges. First, both sides in the debate agreed that “politically subversive” works must be banned. They only

disagreed on whether and how this should be stipulated in the Copyright Law. The “political culture” did not kill the Copyright Law but shaped it in an interesting way: it granted copyright privileges to some but not to others. The debate was on *how* to exclude certain works or people from benefiting from copyright. A sense of exclusion was thus built into the Law. In a way, this was not unlike the situation in the several decades before the late 1970s, when one’s social and political status determined whether and how she/he could claim authorship or receive compensation for her/his work (see Chapter Two). Of course, this is not to say that the state patronage system before the late 1970s had no significant difference from the market system in today’s China, but that the senses of division and exclusion underlying both historical periods showed strong continuity.

Another widely controversial issue was the broadcast music royalty. The disagreement persisted through the development of the Copyright Law. According to Shen (1998), broadcasters in China strongly opposed paying music royalties. They argued that radio and television in China were propaganda and educational institutions, who did not charge subscription fees to audience and thus were not obligated (and lacked the financial means) to pay for music. Debates between broadcasters and authors lasted till the last minute before the law was passed in 1990 and ended in favor of the former. In merely a few years’ time, it again became a key issue that called for the revision of the Law.

As early as 1995, four years after the Copyright Law entered into effect, the NCAC began to prepare for a revision. Meanwhile, members of the NPC also pushed to revise Article 43, which

stipulated that broadcasters did not need to pay music royalties. At the end of 1998, the State Council submitted a revision proposal to the NPC, which did not recommend changing Article 43. The proposal met with strong criticism at NPC. Gu Jianfen, a composer and an NPC member, made a very strong speech on “the notorious Article 43.” Many other NPC members joined her, and the conference room was “almost boiling” (Li & Chang, 2007, p. 296-297). In June 1999, merely seven months after submission, the State Council withdrew the proposal because “there are still important disagreements which, after repeated discussions, cannot be resolved” (Song, 2008, p. 427).

A strong push came from overseas: 1999 and 2000 were key years when China negotiated for its accession to the WTO. Decades of market reform had resulted in a transforming Chinese economy that relied on export and foreign direct investments (Harvey, 2005). A membership in the WTO could, in the eyes of Chinese reform leaders, help to eliminate trade barriers to Chinese exports (e.g. the US’ annual review of China’s Most Favored Nation status) and to facilitate the in-flow of foreign investments and technology, which were vital to Chinese economic growth and development. During WTO negotiations, China promised to revise its intellectual property laws to meet with “international standards.” The Education, Science, Culture and Health Commission of the NPC insisted that the old Article 43 was in conflict with both the Berne Convention and Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was part of the WTO agreement that governed intellectual property issues. In 2000, the State Council prepared and submitted a new proposal to the NPC, which recommended revising

Article 43 to require broadcasters to pay music royalties to composers (Song, 2008). The proposal was passed in 2001. However, the tug-of-war did not end here.

The revised Article 43 left an unresolved issue: it stated that broadcasters need to pay music royalties, but did not specify *how*. Instead, it authorized the State Council to work out a detailed plan. The State Council asked the NCAC and the State Administration of Radio, Film and Television (SARFT) to negotiate a plan, focusing on how to calculate music royalties. It proved to be a difficult negotiation for both sides. NCAC was in an awkward, dual-role position. It was not an organization of authors, and its role in the negotiation was more like an enforcer of copyright obligations, rather than a stakeholder. Meanwhile, however, it was the sponsor of China's newly emerging copyright collective agencies, including the Music Copyright Society of China (MCSC), and therefore had some connections to the stakeholders in the industry. SARFT was faced with a different situation. In a negotiation where stakeholder rivalry was largely invisible, backed by the powerful Propaganda Department of the Party, SARFT had a larger say in determining the path and pace of the negotiation. At the same time, it understood very well that it could not forever refuse to pay for music. The challenge was to determine when the best timing was and how to get the best deal for Chinese broadcasters, especially those directly under its supervision, e.g. China Central Television (CCTV).

Here again, foreign pressure played an interesting role. Before the Law was revised, it was the NCAC which felt most acutely the pressure because it was recognized as the agency which

actually drafted the law. Afterwards, however, Chinese broadcasters' resistance became widely known and triggered direct and vehement criticisms. In one instance, Peter Mandelson, then EU trade commissioner, attacked Chinese broadcasters at a press conference in Beijing. Apparently well informed, he not only specifically mentioned CCTV, the No. 1 television corporation and a giant market power, but also stated that the EU had been told to expect the resolution of the matter in 2006 ("LEAD: China's biggest broadcaster accused of not paying royalties to EU,"2006). After a lengthy and much contested negotiation, the NCAC and the SARFT reached an agreement, and the State Council then made the Provisional Measures on Remuneration for Using Phonograms in Radio and Television Programming in 2009. The Provisional Measures set up default rates for broadcast music royalties. Under the Provisional Measures, music royalties are calculated on the basis of broadcasters' advertising revenues or the amount of music recordings used. Broadcasters need to make the payments to copyright collective societies (in this case, the MCSC) on an annual basis. In September 2010, the MCSC and CCTV reached an agreement on payments and held a grand ceremony, which was attended by top-ranking officials from both the SARFT and the NCAC (Music Copyright Society of China, 2011).

The making of the Copyright Law in contemporary China was a complicated and contentious process. According to Wang Hanbin, Director of the Legal Commission of the NPC, "The Copyright Law is the most complicated one among all laws reviewed by the Standing Committee of the NPC. It regulates the broadest array of social relations and took the longest time to review" (Shen, 2008, p. 457). A copyright veteran who took part in every step of law-making, Shen Rengan (2008) points out that almost every section of the Law underwent intense

debate. He lists ten most disputed issues, including software, neighboring rights and other topics in addition to the ones discussed above. None of these issues questioned the “compatibility” of copyright with socialism or Chinese culture.

### **Nurturing an IPR culture**

While Chinese elites had reached a consensus on the necessity and benefit of copyright, they apparently believed that the “masses” needed some education to catch up. According to the director of the State Intellectual Property Office (SIPO), the very first step to implement the national IPR strategy is to “further strengthen IPR propaganda and education,” including “making full use of television, newspapers and other media” and “further prioritize training and education” (Wang, 2005, p. 19). A more recent argument came from Vice Premier Wang Qishan, who published an article in the *Wall Street Journal* in July 2008 during his trip to the US for the fourth round of Strategic Economic Dialogue between China and US. He argued that one of the key measures needed for the implementation of China’s National IPR Strategy was to “launch extensive educational programs among the public to further encourage innovation, promote such moral standards as honesty and credibility, and to condemn plagiarism, piracy and counterfeiting.” According to Wang (2008), China needs to “raise people's IPR awareness and foster an innovation-friendly IPR culture in which knowledge and integrity are respected and laws and regulations are complied with.” In the last three decades the Chinese state made tremendous efforts to promote IPR among Chinese people.

Propaganda themes in contemporary China changed as political and social circumstances changed. As Meisner (1999) notes, the reform era was prefaced by the repression of the pro-democratic movement in the late 1970s, and the Party's notion of "socialist democracy" emphasized not bottom-up political participation but the stabilization of the state bureaucracy. Starting with the Criminal Law and the Criminal Procedural Law in 1978, which built up policing and prosecution criteria and procedures, a number of new laws and regulations were made and implemented. Against this background, "rule of law (*fazhi*)" became a key slogan, and propaganda for a new "socialist legal system" gradually gained momentum.

Known as "*pufa*," which is translated into "law popularization" by the Ministry of Justice on its website, national propaganda/education campaigns swept through China in five-year cycles beginning 1986. The Party's Propaganda Department and the Ministry of Justice worked together to plan and to lead *pufa* activities. State-controlled media outlets, including newspapers, television, radio and later the Internet, all worked to promote legal knowledge. Governmental organs and state-owned corporations organized *pufa* educational activities for their employees and sent out propaganda squads to the streets to distribute pamphlets and put up posters. Since 1986, five five-year *pufa* plans have been implemented, and the sixth one is expected to be made in the first half of 2011. The theme of each *pufa* plan changed as Party and state policy changed. For example, when Party and state leadership called for deepening market reform in China in the early 1990s, the Second Five-Year *Pufa* Plan emphasized general market and economy-related legal knowledge; and after China's accession to the WTO in 2001, WTO and international trade-related laws and regulations became priorities (Xiao, 2008). When

IPR growth became a key state policy in the recent few years, its importance rose significantly in *pufa* campaigns.

Besides incorporating IPR laws into regular *pufa* campaigns, the Chinese state also allocated great resources to promote IPR. In 2001, China and Algeria proposed the adoption of an international day to promote the awareness of intellectual property to the WIPO, which duly designated April 26 as the “World Intellectual Property Day” (Li & Chang, 2007, p. 264). In 2004, China established the “IPR Protection Publicity Week,” which was an annual national event during the week before April 26. Working with a number of Party and governmental organs, the SIPO coordinated a series of activities all over the country during the Week. Governmental agencies in charge of intellectual property and propaganda affairs organized training sessions, seminars, and on-street workshops to distribute information pamphlets. In some cases they organized legal professionals to provide free consultations in booths on the streets. In 2005, the “IPR Protection Publicity Week” hosted over 900 IPR training sessions, posted 600,000 posters, handed out 1.2 million information materials and received 350,000 consultation requests all over China (Xiao, 2008). In 2008, “more than 810 events under the framework of ‘IPR Protection Publicity Week’ were staged by competent authorities in different localities to enhance public awareness. More than 1.3 million people were directly involved in these activities” (Wang, 2008).

The Chinese National IPR Strategy lists “the nurturing of an IPR culture” as a key task and calls “to strengthen IPR promotion, to raise IPR awareness in the whole society, to widely carry out

general IPR education, to add IPR-related contents to the creation of spiritual civilization and national legal education, so as to nurture an IPR culture that...respects knowledge, advocates innovation, and abides by law honestly and sincerely" (National Intellectual Property Strategy Summary, Article 15). According to the associate director of the NCAC, the notion of "culture" in the context of "IPR culture" "is a powerful, invisible force...a force that influences the forming of social and moral rules...promotes self-discipline in people's minds and actions (*sixiang xingwei de zilv*)" (Lin, 2007b). Another leading advocate of IPR culture and a SIPO official, Ma Weiye (2007) argues that IPR culture is basically about "values," and is a "soft power" that can promote IPR. In other words, the essence of the IPR culture is to indoctrinate the law so as to promote the protection of intellectual property.

Chinese state's effort to nurture the IPR culture echoes the sentiments of some Western research works. For example, Oksenberg et al (1996) attribute lax enforcement of IPR in China to the mindset of Chinese people, and argue that "respect for property must be a notion well-engraved not only in law but in the minds of political leaders and citizens alike" (p. 9). In addition, most US companies deemed "investment in IPR awareness, training, and education to be a major part of their companies' 'coping strategy'" in regard to IPR enforcement in China (ibid., pp. 26-27). Meanwhile, the use of media to disseminate knowledge from top down is nothing strange for Chinese media following the "Party line" (Zhao, 1998). During *pufa* campaigns and the "IPR Protection Publicity Week," the Party's propaganda department and its media networks played a key role. The organizing and strategies of IPR promotions, e.g.

ubiquitous media presence and the participation from educational and industrial sectors, had typical features of Party propaganda campaigns.

### **Between Beijing and Washington: Different modes of IPR development?**

Pressure from abroad, especially the US, played a significant role in Chinese IPR growth.

Different from the WIPO, which focused on providing assistance to domestic initiatives, the US made full use of its political and economic power to shape IPR laws and enforcement in China.

As early as 1979, the US insisted on adding copyright sections into two agreements between the two countries, including the trade agreement and the agreement on high-energy physics (Li & Chang, 2007, pp. 174-178). However, there was no substantial US pressure until after the mid-1980s, when the US pushed harder for the protection of American IPR interests and left distinct marks in Chinese IPR laws and practices. It must be noted, however, that US pressure co-existed with China's active pursuit of IPR development. The conflicts between the two countries were essentially contestations between different interests and agendas in IPR development instead of fundamental disagreement over the legitimacy of intellectual property.

China began to develop its IPR system before meaningful US pressure came along. As discussed earlier, China started to draft a copyright law in 1979, and passed the Trademark Law and Patent Law in 1982 and 1984, respectively. Yet it was not until 1985 that the US exerted substantial pressure regarding IPR to China (Maruyama, 1999, p. 186; Yu, 2002, pp. 8-9). Citing Alford (1995), Yu (2002) thinks that this is because the U.S. in the early 1980s was eager to

normalize relation with China and “to lure China into the ‘family of nations’” (p. 8). Maruyama (1999) notes that during the early 1980s, US-China trade was limited and IPR in China did not cause much concerns on the US side. However, as Sell (2003, p. 178) points out, the US did not play an active role in international IPR issues until 1982. Intensified pressure on China after the mid-1980s reflected a policy change from the US, which faced soaring trade deficit as well as increasing importance of copyright industries in US economy.

The U.S. trade deficit saw a radical increase in the mid-1980s, when the strong US dollar resulted in decreasing exports and increasing imports. The US trade deficit rose from \$44.7 billion in 1980 to \$136.3 billion in 1985 and \$159 billion in 1987 (Maruyama, 1999, p. 175). As US-China trade grew, US deficit to China increased drastically from \$4.5 billion in 1980 to \$22.8 billion in 1993 and \$34 billion in 1995 (United States General Accounting Office, 1995, p. 3; United States Congress, 1997, p. 6). In 2005, US trade deficit reached a staggering \$201.6 billion (Bajaj, 2006). Meanwhile, the portion of copyright industry in US economy saw a fast, steady growth after the late 1970s. In 2007 copyright industries contributed 11.05% of US GDP (Siwek, 2009). As Shao (2007) argues, US pressure on China was mostly driven by US businesses in need of opening up China’s market.

IPR was formally linked to trade in US foreign policy in 1984. The Trade and Tariff Act of 1984, which amended the Trade Act of 1974, extended the application of Section 301 of the Trade Act to IPR issues. Section 301 stipulated that if the US Trade Representative (USTR) believed that a foreign country conducted “unreasonable” trade practices, the US could then impose a trade

sanction on that country. The Trade and Tariff Act of 1984 enlarged the scope of “unreasonable” trade practice to include lack of IPR protection by a foreign country or denial of market access to IPR owners in the US. In 1988, the Omnibus Trade and Competitiveness Act further amended Section 301 of the Trade Act. Known as “Special 301,” it authorized the USTR to designate “priority foreign countries” if he/she believed these countries had serious IPR problems and refused to enter into good faith negotiations. Once a “priority foreign country” was identified, the next move by the US would be a Section 301 investigation followed by a trade sanction.

During the 1980s and 1990s, the US used “Special 301” to force China into four agreements on intellectual property. In May 18-19, 1989, the two countries negotiated the “U.S.-China Memorandum of Understanding on Enactment and Scope of PRC Copyright Law” (1989 MOU) -- two weeks before Tiananmen Square. This was a largely unknown MOU, compared with the three MOUs in the 1990s. Perhaps embarrassed at having focused on protecting its copyright industries exactly when the Chinese government declared Martial Law, the US government stubbornly refused to disclose the details of the negotiation (Alford, 1995, pp. 112-113). Some researchers believe that China signed the MOU to prevent an immediate trade sanction, and some others argue that the MOU was never signed into effect (Li, 2007, p. 174; Li, 2000, pp. 175-176; Murayama, 1999, p. 186). Nevertheless, Chinese government later abided by its commitments in the 1989 MOU by accelerating the making of the Copyright Law and offering copyright protection for software products.

In April 1991, China became the first country ever identified as “Priority Foreign Country” under Special 301. After a protracted negotiation, the two countries entered into the “Memorandum of Understanding Between the U.S. of America and the People’s Republic of China Concerning Intellectual Property Rights” in 1992 (1992 MOU), in which China agreed to modify IPR laws and to accede to a number of international conventions. Another two years later, China once again became a “Priority Foreign Country.” In 1995, the US and China entered into a new MOU on enforcement issues (1995 MOU), and the US closely monitored its implementation. According to Michael Kantor, then USTR, after the 1995 MOU US and Chinese governmental officials met 18 times in 11 months, “clearly the most intense set of meetings we have ever had with any country on any trade agreement in American history” (United States Congress, 1997, p. 7). In 1996, China signed the “China Implementation of the 1995 Intellectual Property Rights Agreement” (1996 Accord) again under threat of trade sanctions by the US,

US pressure thus unquestionably impacted China’s copyright system. The Regulation for Computer Software Copyright Protection was a direct response to the 1989 MOU. Per a request from the 1992 MOU, China acceded to three international copyright conventions, including the Berne Convention, the Universal Copyright Convention and the Convention for the Protection of Phonogram Producers against Unauthorised Reproduction of their Phonograms. However, the Rome Convention, another important convention based on European copyright tradition, was of little interest to the US and was left out (Ganea, 2005, p. 210).

Chinese domestic initiatives worked hard to advance their agendas in the face of intense US pressure. In some cases, China moved to promote IPR in the absence of noticeable foreign intervention. For example, China incorporated copyright protection sections in its agreement with the Philippines in 1979 and proposed an “intellectual property day” to the WIPO in 2001 (Li & Chang, 2007, p. 178, 264). As a result of both domestic initiatives and US demands, China’s IPR system had largely met with requirements under the TRIPS two years before China’s accession to WTO in 2001 (Maruyama, 1999, pp. 198-201). For China, demands from the US come not as fundamental challenges to China’s development but as attempts to hasten and to shape IPR growth in specific ways. In the words of a Chinese researcher on IPR and Sino-US relationship, “The protection of intellectual property is an issue that receives intense attention from the US, as well as a problem that China needs to solve step-by-step in its reform and open-up. It is only a matter of time that China took measures to protect IPR, thus China and the US share much in common in this regard” (Ling, 2007, p. 233).

\* \* \*

Intellectual property is a top priority for reform leaders in contemporary China. The Chinese state does not oppose copyright growth. On the contrary, it actively pursues the development of IPR systems. Conflicts between China and the US have their roots in US-China relations within the global political economy. Drastic growth of the US trade deficit to China, the rise of copyright industries in US economy and global trade, and massive replication of Western music, movies and software products in China all worked together and led the US to expect to sell

copyrighted goods to China so as to balance trade flow. This was the context in which IPR issues emerged in US-China trade relations and were placed side by side with the re-evaluation of the Chinese yuan and market access (e.g. Bajaj, 2006; Dougherty, 2011). In addition, international politics also contributed to the central role of IPR between the US and China. Both countries need to maintain a stable bilateral relationship: China needs US market, investment and technology, and the US needs the Chinese market as well as China's collaboration in a number of thorny international issues, e.g. North Korea's nuclear project. However, between China and the US there are a series of conflicts that are difficult, if not impossible, to reconcile, e.g. human rights and the Taiwan issue. The best strategy for both is to focus on issues with less conflicting interests, e.g. intellectual property (Ling, 2007). As a result, each round of Sino-US conflicts on IPR in the 1990s ended up with compromises and agreements, in spite of threats of trade sanctions and yelling and banging at the negotiation table (Dong, 2008; Ling, 2007). Chinese political leaders perceive no fundamental challenges from US pressure on IPR issues. Intellectual property growth is an inherent part of China's developmental strategy. To mold it in response to US demands is always an affordable sacrifice for Sino-US relations and China's economic growth.

China's political culture did not appear to be a significant problem for copyright growth.

Debates during the legislative process did not attack the legitimacy of copyright from either socialist perspectives or Confucius traditions. There were no perceivable protests against copyright that held to the public or social nature of culture; and the Confucius tradition that admires the ancient and emphasizes learning from classics did not play a role in the making of

the Copyright Law. Indeed, Confucianism has been under vehement attack since the New Cultural Movement and the May Fourth Movement in the 1910s (Chow, 1964). The Chinese Communist Party, born in the aftermath of the May Fourth Movement, strongly opposes Confucius thinking. After the late 1970s there existed no visible opposition to treating cultural production as private, proprietizable processes. The dominant ideology in the reform era facilitated, rather than curbed, the growth of copyright.

Nevertheless, state control over publication was an important concern in the legislative process. However, it did not target *all* publications but only *some* of them. Therefore, efforts to control information flows did not come in conflict with private control of cultural products as long as a pre-publication censorship mechanism exists. The debate on Article 4 was essentially about where to place this censorship mechanism. In the 1990 Copyright Law, the mechanism was built into copyright when it stated that: “Works that are prohibited by law to publish or to distribute are not protected by this law.” In response to US challenge at the WTO, which complained that Article 4 constituted “the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings and performances that have not been authorized for publication or distribution within China” (World Trade Organization, 2007), China revised the Law in 2010 to move the censorship mechanism out of the copyright system. Yet copyright and censorship continued to co-exist, rather than working against each other.

Copyright growth in contemporary China was largely an elite-driven process that involved extensive efforts to propagate ideas of intellectual property to the “masses.” As part of the

socialist legal system, laws of intellectual property were important components of the Party's propaganda campaigns to promote the Party's new causes under the market reform. During the frenzy to nurture an IPR culture, critical studies of intellectual property were marginalized. In one instance, the 2007 China IPR Culture Forum hosted by the SIPO attracted attendees from governmental agencies, universities, research institutions, state-owned and private businesses from all over China. Not a single paper published by the Forum mentioned possible negative impacts of aggressive IPR regimes and the balance between IPR owners and the general public (see Lin, 2007a). The promotion of the IPR culture did not focus on fostering lively, widely participated discussions and debates, but worked to push a top-down flow of ideas aiming to indoctrinate rules of intellectual property.

Top-down imposed Copyright Law with extensive Western influence resulted in widespread "incompatibility" between the law and actual media production practices in the Chinese society. Copyright growth as domestic initiatives did not necessarily mean that there had been a comprehensive (let alone a democratic) process of deliberation that accommodated the interests and demands of all parties, or that copyright would "naturally" become the foundational system for media growth. On the contrary, before copyright gradually took shape to become more clear-cut, enforceable rules in 1990 and after, market-oriented media reform in China had resulted in dramatic industrial growth and the emergence of large, profit-seeking corporations, which had developed sophisticated ways to manage and organize production and labor. The clash between institutionalized media production practices and the Copyright Law triggered significant controversies in the late 1990s and 2000s. The next chapter discusses how

a leading Chinese media corporation, facing changing circumstances in the industry and market, worked to reform its production processes in response to copyright requirements and pressure.

## **Chapter 4 Copyrighting media labor and production: A case of Chinese television**

This chapter examines copyright's role in production and reform within a media institution:

China Central Television (CCTV), China's only national TV network and its leading media company. It shows how previously non-market labor and collaborative production underwent market-oriented, and eventually copyright-oriented, transformations. It also shows how media marketization in contemporary China could have neglected copyright under specific circumstances. I argue that the copyright reform at CCTV is a gradual process of "copyrightization" within a media institution, in which the law and practice of copyright came to the center of the marketization. "Copyrighting" media labor and production is an essential part of "copyrighting culture" (Bettig, 1996). Political economic and global contexts shaped the process, while "copyrightization" at CCTV contributed significantly to the features of copyright in China.

### **Copyright on the Backburner**

CCTV is the only national TV network in China. It owns more than a dozen national channels including CCTV-1, the flagship channel and a must-carry for all cable operators and relay stations nationwide. CCTV is the mouthpiece organ of the Chinese Communist Party, speaking for the Party's Central Committee. Starting in the late 1970s, Chinese media started a massive market-oriented reform when the state reduced or cut off funding for media corporations and

asked them to generate revenues either through advertising or other means through the market. CCTV was one of the leaders in the reform. In 1979, CCTV ran the first advertisement in its programming. In the three decades thereafter, CCTV's leading role in China's propaganda system gave it an unrivaled advantage in the new television advertising market. Its omnipresence in Chinese free-to-air television and cable networks, mandated by state policy, made it the best national platform for advertisers. Its close links to top-level decision-makers in China could easily be exploited to bend state policies in its favor. Last but not least, its foremost role in the Party-state's propaganda scheme helped CCTV to control substantial production and distribution resources, which contributed greatly to its market dominance. Through three decades CCTV's annual advertising revenue amounted to one-fourth (and at times, one-third) of the total national television advertising. In 2006, CCTV advertising sales totaled 9.2 billion yuan--22.9 percent of the national total--while Shanghai Media Group, the runner-up, made only 3.4 billion, roughly one third of CCTV's sales (Huang, 2008, p. 8).

Indeed, advertising revenue had always amounted to an overwhelming portion in CCTV's income (Chen & Tang, 2006). Researchers estimate that in 2004-2005, advertising revenue accounted for more than 80 percent of total income for major Chinese media corporations in the newspaper, magazine, radio and television sectors (Cui, Lu & Li, 2006). However, the percentage at CCTV was even higher. According to the statistics provided by CCTV on its website, from 1999 to 2005, its revenue rose from 5.1 billion yuan to 9.4 billion yuan (China Central Television, 2006), while its advertising sales during the same period increased from 4.8

billion to 8.6 billion yuan (Huang, 2008, p. 10). A year-by-year comparison in table 1 demonstrates advertising's consistent substantial contribution to total revenue.

Table 1 CCTV's advertising sales and total revenues 1999-2005

Year	Total revenue (¥)	Advertising sales (¥)	Percentage of advertising in total revenue
1999	5.13 billion	4.84 billion	94.35%
2000	5.74 billion	5.29 billion	92.16%
2001	6.10 billion	5.65 billion	92.62%
2002	7.04 billion	6.38 billion	90.63%
2003	8.10 billion	7.53 billion	92.96%
2004	8.70 billion	8.00 billion	91.95%
2005	9.40 billion	8.60 billion	91.49%

*Source:* (China Central Television, 2006; Huang, 2008)

*Note:* ¥ is the expression of currency for the yuan, or renminbi (RMB).

The dominating role of advertising could be attributed to several reasons. First, charging for subscription fees was never an easy or even possible option for CCTV. As the “throat and tongue” of the Party, CCTV programming took messages from the Communist Party to everybody in the country. The Party wanted people to watch CCTV rather than to deny service or turn them away when they did not pay.<sup>10</sup> Secondly, selling time slots to advertisers was easy. It did not require many changes in CCTV's management and production, which in a way eased

the transition from a non-market propaganda organ to a profit-seeking corporation. The Advertising Department was the single most important unit for revenue-generation, and no other significant adjustment was needed for the administrative structure of the corporation (e.g., a robust marketing department that might involve itself in not only distribution but also production). Moreover, advertising was very lucrative for CCTV, and there were no significant incentives to explore other sources of revenue. Developed and supported by the Party-state as a propaganda-oriented media corporation, CCTV fit naturally as a national advertising platform. In addition to its national coverage, CCTV's production resources enabled it to produce some of the best or most desired TV viewing experiences in China including exclusive rights to cover important political events and sporting activities. CCTV's advertising sales multiplied over two thousand times from 1981 to 2006 from 4 million yuan to 9.27 billion yuan (Huang, 2008, p. 10). For CCTV executives, their top priorities in market-related decision making were to concentrate on advertising and fully exploit its potential.<sup>11</sup>

This was the context when CCTV put copyright issues on the back burner in the 1990s, despite the fact that Chinese Copyright Law entered into force in 1991. CCTV had effective control over its programming and networks as a top-rank, Party-state organ rather than as a proprietary owner. Its role as the foremost propaganda organ and its close linkage to State Administration of Radio, Film and Television (SARFT) and the Party's Central Propaganda Department ensured its dominance in the television sector. The uninterrupted, omnipresence of CCTV programs (at least CCTV-1) through cable or free-to-air television networks was guaranteed as a political

mission. Advertising, technically not part of Party propaganda, was nonetheless well-protected as an important funding source for the Party's No.1 television outlet.

Meanwhile, Chinese media's relationship with the Party and the government channeled most (potential) copyright disputes through non-judicial negotiations and coordination between administrative governmental/Party organs, rather than through the court. Except for recently emerged private production companies that had no control over networks, Chinese TV corporations are all owned by the Party-state, and their executives are appointed by their supervising Party and governmental organs. These executives were well connected within the government. They were typically Party and governmental officials before their tenure as television managers and will most likely rise again to governmental posts after their tenure. They tended to be well-connected in the government and were familiar with administrative procedures and operations. As part of their personal networks, managers and directors of various television corporations were always former, current or future colleagues, acquaintances and friends. In cases of disputes, which otherwise could be framed and solved as legal and copyright controversies, making a call to the right person in the right governmental agency was always more effective than hiring lawyers to confront each other in court. Additionally, administrative organs had extensive and effective control over television resources that they oversaw, thus had the means and power to speak and act for television corporations. Dispute resolution through the bureaucratic structure discouraged the use of new ideas and concepts to understand and to run television production and distribution. Indeed, mobilizing support from people promoted under the existing system relied more on resorting to generally

acknowledged benefit-loss definitions than on invoking novel terms, e.g. copyright, which was unfamiliar to one's personal networks.

However, this did not mean that CCTV was free from copyright worries through the 1990s. For instance, copyright was always a key issue in CCTV's overseas distribution. As part of China's endeavor to enhance its presence in the global communication landscape, CCTV made persistent efforts to distribute its programs to the international market where copyright was the cornerstone system, at least in the Western world. CCTV's goal to reach overseas audiences started as early as the 1980s when in 1986, its *Chunjie Lianhuan Wanhui* (CW, or in English translation, Spring Festival Happy Gathering) was broadcast live through China Radio International to a global audience.<sup>12</sup> Beginning in the 1990s, CCTV's International Channel, CCTV-4 was broadcast around the globe through satellites. In 1996, CCTV began working with a US-based media corporation, Encore International, to distribute its programming to North America. All of CCTV's foreign business partners (primarily in North America and Europe) saw copyright protections as the very basis of doing business and asked to be assured that CCTV had copyright control over its programming. Although CCTV did not always own the "copyright" of its productions (as will be discussed later), it always included copyright sections in legal documents. For one thing, to break into foreign markets was a Party mandate. For another, CCTV believed it had full control over its programs, though not necessarily as a copyright owner. In other words, it had the power and resources to settle any and all problems, copyright or otherwise.

CCTV's confidence gradually eroded as Chinese media reform moved forward. At some point during the late 1990s, decision-makers began to realize the problem. With the advance of market reform in cultural and media sectors, the market for TV programming, particularly in TV dramas, began to grow and prosper (Bai, 2008). More CCTV shows were produced in cooperation with or purchased from production companies unaffiliated with governmental TV networks. CCTV had to pay more attention to the market, rather than simply maneuvering through bureaucratic structures. Meanwhile, the market slowly picked up copyright as a major form of control over television products. Some disputes, which otherwise could have been resolved through non-judiciary negotiation or adjudications, were raised using copyright terms and forced CCTV to resolve issues through the court, a previously unfamiliar platform. Among other thorny copyright problems, two cases were particularly important and interesting. One of them brought CCTV's highest-rated show into a copyright controversy, and another threatened CCTV's control over its long-term corporate logo. These two cases exemplified copyright conflicts between CCTV and individual artists and between CCTV and its employees. Together with a series of other intellectual property disputes and lawsuits, they exposed the "incompatibility" with copyright in CCTV's production and management, which was not all that surprising for a propaganda organ born at a time when state planning and command dominated all social and economic sectors. Starting in the late 1990s, CCTV embarked on a long and tortuous path to reform its production and management to meet copyright requirements. Although this pursuit was slow to progress at first, it sped up after the mid-2000s. Before moving to the details of the reform, we first turn to copyright controversies regarding the

production of one of the most important TV shows in China, which will allow us to have a glimpse at the much-contested transformations in Chinese TV production.

### **Top-Down Commands, Collaborative Production, and Copyright Conflicts**

CCTV's *Chunjie Lianhuan Wanhui* (*CW*, or in English translation, Spring Festival Happy Gathering) is one of the most important and intriguing variety shows in Chinese television. Each year, it is produced and broadcast by CCTV on the eve of the Spring Festival, the New Year Day for the Han Chinese--the ethnic group with the largest population in the country. *CW* has the highest ratings, the highest advertising rates, and creates one of the best platforms for state propaganda in China today. Spring Festival for Han Chinese is the most important festival of the year: a day for family reunions, banquets and celebrations, much like Thanksgiving, Christmas and New Year's Day in the US rolled into one. Every year, the show has hundreds of millions of viewers. Watching the show has become an indispensable part of the Spring Festival celebration for the majority of Chinese families. For CCTV, high ratings brought high advertising revenues, which amounted to a significant percentage of CCTV's annual advertising total. For example, in 2004, the four-hour show brought in about 290 million yuan (Huang, 2005), roughly 3.6 percent of CCTV's annual total, which amounted to 8.0 billion yuan (Huang, 2008, p. 10). In addition, the popularity of *CW* and the role of television in the Chinese state's propaganda scheme make *CW* a key platform for state and Party propaganda. The theme of the show is generally reflective of the Party-state's propaganda theme of the year. Each year, senior Party

officials reviewed the show before it was aired, and sometimes top-ranking Party and state leaders personally appeared in the show to bid the national audience “Happy New Year.”<sup>13</sup>

CW was born in the early 1980s when Chinese television rapidly grew under the Party-state’s initiative to use television--then a new technology in China-- to boost propaganda. In 1981, the Central Party Secretariat stated that “radio and television are the most powerful modern tools to educate and inspire the Party, the army, and all the nationalities within the country toward building a socialist civilization. They are also the most effective means for the Party and government to be in touch with the masses” (Yu, 1990, p. 72). One year later, the Central Broadcasting Administrative Bureau was elevated to a higher rank in the administrative structure and became the Ministry of Radio and Television (the predecessor of today’s State Administration of Radio, Film and Television, or SARFT). In the pyramidal structure of Chinese government, this was a substantial rise in the bureaucratic hierarchy, which meant a significant growth of power and influence. Starting in 1983, TV networks all over the country grew by leaps and bounds (Wei, 2000, p. 327). Between 1983 and 1985, the number of relay stations in China increased by 40 times. Meanwhile, the popularity of TV sets saw a steady increase in both rural and urban areas. From 1981 to 1986, more than 13 million TV sets, together with color television production lines, were imported (Yu, 1990, pp. 72-73).

In the propaganda-oriented growth era, television programming and production were under stringent top-down control. CCTV, as the mouthpiece organ of the Party’s Central Committee (*dang zhongyang*), worked directly under the Party’s Propaganda Department. CCTV’s key

decisions regarding programming, personnel and management had to be approved by SARFT, which was headed by the deputy chief of the Propaganda Department. The production of key programs, like prime time news, was censored by members from CCTV's decision-making body, who also held senior posts as Party's propaganda cadres. *CW*, important as it has been, was a focus of control and monitoring. Many programming decisions were made by top-level CCTV managers rather than by the production team. More often than not, these decisions did not fit well with actual production circumstances and plans. Rushed changes and adjustments, sometimes unreasonable and difficult to implement production-wise, were quite common in the production of *CW* shows.

Economic concerns were insignificant in early *CW* shows. On the one hand, the production and exhibition of television programming were propaganda missions, for which political concerns outweighed economic considerations. On the other hand, while the production of *CW* shows always included many artists, their participation was seldom based on contracts or monetary returns. In the 1980s no real market existed for TV production labor. Most, if not all, writers, singers, dancers, composers and other artists worked at various state agencies, rather than private corporations or as free-lancing individuals. They were state employees on the cultural front, working for Party's cultural and political missions. Taking part in the production of *CW*, when approved by their own corporations, was inherently part of their work and was already compensated by the state through regular salaries. Therefore, to recruit them for *CW*, CCTV needed to obtain the cooperation from different state agencies, where these artists worked. With the importance of *CW* and CCTV's paramount role in television propaganda, it was not

difficult to persuade other state agencies, which were also headed by propaganda cadres. As a result, CCTV was generally able to recruit the best national talents for the production of *CW* without negotiating complicated contracts and paying large remuneration as would have happened in a developed market for media labor.

The market reform in cultural and media sectors profoundly changed the relationship between CCTV and individual artists. When the output of media production was no longer only propagandist messages but also market profits, production management became a hybrid of politically-oriented, non-negotiable, top-down commands as well as economically-conscious, calculated uses of monetary incentives. On the part of media workers, market adventures of the media sent a distinct ideological message, which justified profit motives not only for corporations but also for individuals working for them. In the case of CCTV, when advertising revenues rocketed in the 1990s, it became ideologically untenable to ask its workers to continue accepting low salaries as politically-motivated state workers. To share some of its economic gains with individuals who produced the very commodity that CCTV sold for money served not only to appease potential disgruntlement but also to boost productivity. Beginning in the mid-1990s, CCTV employees' salaries were on the rise (though unevenly among different positions and ranks) and extra remuneration on top of regular pay checks drastically increased the income of programming staff. When it came to production projects like *CW*, CCTV began to pay compensation to writers, performers and other people in the name of stipends or "labor remuneration (*laowu fei*)."

Due to its dominant role in the industry, CCTV was largely able to

take charge setting the terms and conditions in the exchange of cash for labor, until a lawsuit that placed CCTV in a very embarrassing situation.

Starting in the 1990s, CCTV's wholly owned subsidiary, China International TV Corporation (CITVC), began to produce and distribute audio-visual products made from *CW* shows. Set up as an affiliate to cultivate market potentials of CCTV programming, CITVC saw popular *CW* shows as a gold mine. It not only produced and sold recordings of *CW* shows as a whole, but also selected and edited some performances to make special productions, one of which was a series of mini stage dramas by two comedy artists, Chen Peisi and Zhu Shimao. In the 1980s and 1990s, Chen and Zhu were the most well-known comedy artists in *CW* shows. They wrote and performed comedy dramas, and their hilarious performances won hearty welcomes from television audiences. CITVC produced and sold video recordings made from their dramas, but neither CITVC nor CCTV asked Chen and Zhu for copyright authorizations. Zhu raised the issue with CITVC through internal channels and reached an agreement in 1994, in which CITVC apologized and paid compensation. In merely two years, however, CITVC was distributing the said recordings again. Chen and Zhu sued CITVC in the Beijing First Intermediate People's Court in 1999.<sup>14</sup> The Copyright Law had straightforward clauses governing such issues, and the court ruled that Chen and Zhu owned the copyrights to their works and performances, and CITVC had violated them (Sun & Luo, 1998).

The lawsuit was a heavy blow to CCTV/CITVC. It came as a surprise that Chen and Zhu quit "traditional" channels of dispute-settlement by suing at the court. Indeed, at the time both

Chen and Zhu worked at the China Broadcasting Art Society (*zhongguo guangbo yishu tuan*), a state cultural agency under the auspices of the SARFT. Belonging to the same state propaganda/cultural system meant that, between the two sides, there were extensive connections through which disputes could be negotiated and settled. Yet Chen and Zhu picked up the notion of copyright and sued in the People's Court, a previously strange problem-solving platform for CCTV. In addition, the bluntness with which CCTV/CITVC got into trouble was shocking. Legal issues involved in the case were not complicated and CCTV/CITVC understood them well -- the agreement between CITVC and Zhu in 1994 had made it very clear for both parties. To repeat the same mistake in a short interval only reflected the insignificance of copyright and legal concerns in CCTV production and management during the 1990s.

Interestingly, CCTV was probably the first major media corporation in China that had a legal department. Perhaps due to a key decision-maker's individual experience and preference, CCTV had its first in-house lawyer as early as 1995. At the time Chinese media, while actively pursuing market profits, largely relied on their parent Party/governmental organ for problem-solving. Having in-house lawyers working for a corporation that did not care much about legal issues resulted in the marginalization of legal services. CCTV decision-makers only occasionally sought opinions from their lawyers. One of the first CCTV lawyers soon switched to a programming department, which seemed to promise better career perspectives (Interview with CCTV administrative staff, December 22, 2008). The case of Chen and Zhu prompted CCTV decision-makers to seek advice from their lawyers, who explained that if CITVC's market practices were to remain unchanged, all participants in *CW* productions must sign a standard agreement to

transfer their copyright and other rights in their works/performances to CCTV/CITVC. It then became the official policy in the production of *CW* shows.

However, implementing the policy soon proved to be much more difficult than anticipated. During preparation, *CW* productions always had more artists and performances than actually needed so as to allow maximum flexibility and control. In addition, unexpected orders from above sometimes brought about abrupt changes. An artist might find her/himself working on a very different project the next day, or find that his/her performance was taken off (in Chinese, *na xia*) and he/she could go home. Such changes could happen anytime during the production, even the last few days before the show was aired. It made the copyright transfer difficult – if anybody could be removed at any time and their contributions to *CW* were always changing, then who should sign the form, and what would the subject of copyright transfer be? To further complicate the issue, CCTV paid remuneration to artists who signed the form – but how could the remuneration be calculated if no contributor knew for sure which/if the works were to be included in the show? To solve the problem, CCTV set forth a standard (later tiered) remuneration rate for all transfer forms and asked everybody to sign it, regardless one's actual contribution.

The copyright transfer had features of a forced, unequal agreement. It was rushed and left virtually no chance to negotiate. The transfer form was presented to artists only a few days before the show, because the production staff did not want to spend time dealing with a large pool of candidates before having a better idea who would be chosen. It was virtually impossible

to negotiate with an industrial giant on a standard agreement in merely a few days. Moreover, determined to make sure that CITVC had full freedom in marketing, CCTV asked everybody to sign the form or they would be kicked out of *CW*, which was a tough and effective measure. For junior and established artists alike, showing up in an important and influential show as the *CW* was an important mark in their career. Seldom could anyone afford to lose the opportunity because of a copyright transfer. As a result, nobody openly refused to sign the form, although many were unhappy about the ways it was forced on them. The story was brought to the media and generated significant criticism. Articles and comments in newspapers and Internet portals highlighted the mandatory, nonnegotiable standard form, as well as the flat remuneration rate. They framed CCTV as a greedy industrial monopoly that exploited helpless individual artists to generate maximum profits. Some comments went as far as to call the copyright transfer an indenture that forced people into servitude (in Chinese, *maishenqi*) (Chen, 2001; Li, 2003).

Contextualized historically, copyright conflict in *CW* productions was one instance of media reform in which production practices and labor relations transformed and adjusted. If during most of the 1980s the production of *CW* did not involve many economic concerns, in the 1990s and later, private and market interests negotiated and contested to divide up the economic value of *CW*. The law of copyright played an interesting role in this process. On the one hand, individual artists like Chen and Zhu used it to challenge CCTV's control and in effect forced CCTV to give up some interests by paying remuneration for copyright transfers. On the other hand, CCTV had unrivaled advantages in the negotiation process. The terms and conditions of copyright transfer were determined by CCTV without any input from those who were asked to

sign them. CCTV was thus able to obtain copyright control over *CW* shows at a relatively low cost. If CCTV's non-copyright control over *CW* productions and output still left room for negotiating individual gains and interests, the completion of copyright transfer largely closed the deal in the favor of the media giant when individual artists were not on an equal footing with CCTV. As a matter of fact, after Chen and Zhu won the lawsuit, they both disappeared from all CCTV programming for years. When CCTV monopolized the best television channels and other resources in the country, extended invisibility in CCTV shows resulted in a sharp downturn in their popularity.

### **Copyrighting Employment Labor**

If the lawsuit by Chen and Zhu was launched from outside, the lawsuit targeting CCTV's long term corporate logo in 2001 was a challenge from the inside. Zhang Desheng, a retired employee who previously worked at CCTV's News Department, sued over the ownership of CCTV's logo. He argued that he, as the designer, had the copyright to the logo and asked CCTV to obtain his permission to use the logo and pay royalties. Zhang must have been very confident that the Copyright Law sided with him, otherwise he would not have challenged his (previous) employer, whom he still relied on for retirement benefits. However, both the trial court and the appeals court ruled against Zhang on largely the same ground. According to court findings, in 1978, Zhang designed the logo not as part of his duties but in response to a public design contest held by CCTV. Thus, the logo was not a "work for hire" but a specially commissioned work. While Chinese copyright law stated that in the absence of an agreement, the copyright of

a commissioned work rested with the actual author, the court came to the conclusion that there was a de facto agreement between Zhang and CCTV, which in effect, transferred the logo's copyright (or the "rights and benefits") to CCTV. Zhang and his lawyer disagreed strongly. They argued that by the late 1970s, China had no copyright law and Zhang could not be aware of his right, and therefore, could not possibly have reached an agreement with CCTV, implicit or not, regarding the copyright of the logo. But the court emphasized two issues. First, the court argued that even without a copyright law, there were still similar civil and private rights and interests at the time Zhang designed the logo. Second, "under historical circumstances at the time, and taking Zhang's position and duties into consideration," the court deduced that Zhang had no intention to claim logo ownership when he designed it. Plus the fact that he never raised the issue until almost two decades later, the court maintained, it was reasonable enough to assume that Zhang's intention was to allow CCTV to control and to use the logo (Beijing Supreme People's Court Third Civil Branch, 2005, pp. 371-377).

It needs to note that, in this case, a court ruling in favor of CCTV was not really surprising. This was a lawsuit that CCTV could not afford to lose. The People's Court, not being a fully independent judiciary because it was under the leadership of the Party's Politics and Law Committee, also would have liked to lend a hand to CCTV. This lawsuit was different from the case of Chen and Zhu in two aspects. First, CCTV, not CITVC, was the defendant. As the only national TV network and the Party's foremost mouthpiece, CCTV represented the Party-state on the television screen, while CITVC, though owned and controlled by CCTV, had more of a non-governmental, market-oriented public image. Second, the case of Chen and Zhu targeted

comedy dramas in a variety show, while Zhang Desheng sued for CCTV's logo, which was central to CCTV's mission and public profile. It would be embarrassingly ironic to publicly announce that the only "national" TV station/Party's mouthpiece in a "socialist" state under a "communist party" had been illegitimately using a logo which was "private property."

Moreover, the imbalance of power between the two litigants was obvious: On one side was the giant in Party propaganda and media industry; on the other side was an "obscure," retired media worker holding to a few lines in the Copyright Law. Indeed, in this regard Zhang Desheng was in a worse position than Chen and Zhu, who, being well-known actors, had relatively greater resources and influence that worked to their benefit, e.g., mobilizing some supportive media publicity and retaining more powerful attorneys. Nevertheless, the court's arguments, struggling and stretching to defend the adjudication, were worthy of scrutiny.

The court's analysis, in an effort to skew its interpretation of the law in favor of the powerful defendant, worked to contextualize the dispute historically so as to subject legal codes to social circumstances, despite the law's apparent favoring of the plaintiff at face value. It drew two interesting conclusions. First, both the trial court and the appeals court argued that there was some sort of private control over cultural products in the late 1970s when the logo was designed and when the market reform had barely begun. According to the appeals court, there existed "rights and interests" to the logo before the Copyright Law was made in 1990, and the de facto agreement regarding such "rights and interests" in the late 1970s had a direct bearing on the disposal of copyright control and interests in the 2000s (Beijing Supreme People's Court Third Civil Branch, 2005, pp. 371-377). In this way, the court actually argued that copyright in

the People's Republic China had a continuous, rather than interrupted, history in that private "rights and interests" in late 1970s shared the same essence with the concept of copyright. It also inadvertently downplayed the significance of the Copyright Law by suggesting the continuity of private cultural control through the last three decades. Second, the court insisted that there was an agreement, though not in writing, regarding the ownership and control of the CCTV logo when it was designed in 1978. The basis of that agreement, according to the trial court, was "historical circumstances at the time" and "Zhang's position and duties" when he designed the logo (Beijing Supreme People's Court Third Civil Branch, 2005, p. 374). The court, then, grappling with law and media production practices, inadvertently touched on the historical and socioeconomic contexts in which Zhang designed the logo.

The logo was designed in 1978, right at the onset of the market reform. Under the pre-reform system, a corporation like CCTV was not only an employer that paid its employees a salary and other benefits, but a "*danwei*" in which a worker was personally affiliated. Historically, after the Communist Party came to power in 1949, China under Mao Zedong sought to eliminate a capitalist wage-labor relationship and the labor market. Under the alternative system China adopted, a worker for the state earned very low monetary compensation in exchange for free job security, housing, health care, education, child care, retirement and other welfare and benefits provided by the state. This deal between the socialist state and its workers, thus known as "*zhigong*" or "tenure workers," was implemented through the corporation workers worked at, known as "*danwei*," which literally meant "(working) unit(s)." A typical Chinese *danwei* had *zhigong* apartments, dining halls, medical centers, daycare and kindergarten,

convenient stores and other welfare facilities. In exchange, the *danwei* took away a worker's output at work on behalf of the state (Naughton, 1997; Walder, 1986). This was the "agreement" that every worker "entered into" with the Chinese state represented by *danwei*, and this was the context in which Zhang designed the logo. Zhang would not and could not, assume any control over the logo: from the very beginning, it belonged to his *danwei*, and he was already paid by CCTV through regular salaries and welfare benefits. Of course, as Zhang argued twenty years later on the basis of the Copyright Law, the logo was not part of his duties at work. He was taking part in a public contest, which *happened* to be held by his *danwei*, thus the logo must be treated in accordance with different rules. However, even if he had been right about the Law, how could an ordinary media worker convince his powerful *danwei* that the salaries and welfare benefits he received did not suffice to compensate for *all* his labor, especially when the court insisted on subjecting legal codes to historical circumstances in a manner divergent from general judicial practices?

During the three decades thereafter, the relationship between CCTV and its workers changed profoundly. Xie and Wu (2008) pointed out that the *danwei*-worker relationship during the market reform transformed in an interesting fashion. On the one hand, personal control by *danwei* weakened due to the rise of a private sector and the marketization of previously *danwei*-monopolized resources, e.g., housing. It was possible, if not always desirable, to quit one's *danwei* and to work for a private company. On the other hand, *danwei* still mattered significantly because it directly related to one's income level. Income disparities within a *danwei* were always significantly less than income disparities between different *danweis*. In

other words, one's income was determined more by one's *danwei* and less by occupation and rank. Thus, the economic relationship between workers and *danwei* was in effect strengthened, and workers became less dependent on the state but more dependent on the *danwei*. In the case of CCTV, the drastic growth of advertising revenue led to significant increases in employee's incomes. It made working at CCTV a lucrative job compared to similar positions in the industry. At the same time, as with many other state-owned *danweis*, CCTV still exhibited some characteristics of an all-around well-being provider that was expected to protect their workers beyond work-related issues. Because of its wide connections in the governmental and industrial sectors, CCTV was always better equipped to help its people in case of emergencies and unexpected incidents. Thus, most CCTV employees were reluctant to quit their jobs not because of the constraint under the old *danwei*-worker relationship, but because of the monetary and non-monetary benefits. In exchange, CCTV maintained significant control over its work force, which cared more about losing jobs than giving up "secondary" interests, e.g., intellectual property rights. To borrow the wording from the court, this was the de facto "agreement" between CCTV and its workers, including Zhang Desheng, in the 2000s.

By suing for the logo, Zhang Desheng challenged this "agreement," citing the copyright law and fighting for more than his *danwei* had given him. The stakes were very high. Zhang was suing his *danwei*, on whom he relied for retirement benefits, but if he won, the monetary and non-monetary benefits could be enormous. Indeed in the eye of a media worker, the social and economic transformations since the late 1970s conveyed very encouraging messages for the protection of private interests and properties. Very soon after the Cultural Revolution officially

ended in 1976, the practice of *gaochou*, remuneration that authors received for their publications, was restored, and the state-set rates rose quickly. In effect, it confirmed that one was entitled to monetary compensation for her/his intellectual work from outside her/his *danwei*.

This was significant in two aspects. First, after decades of political and mass movements to eliminate “capitalist” remnants and practices, it was again permitted, and even encouraged, to exchange one’s intellectual labor for money. Second, the legal status of this work was also shifting. In pre-reform Chinese society, *danwei* was the basic working unit where one worked for the state. Working outside of one’s *danwei* (except on a voluntary basis without remuneration) was prohibited and condemned. Even several years into the market reform, taking on ad hoc, supplemental jobs was still a “grey area,” but writing and publishing for compensation was encouraged from the very start. After 1990, the Copyright Law further strengthened the protection of intellectual works as private properties. While *gaochou* only granted monetary remuneration to certain forms of works including writing, painting and music, copyright covered a large variety of literary, artistic and other intellectual works, and the scope and conditions of proprietary control were defined in a much broader and more detailed manner. The Copyright Law was the basis of Zhang’s case, prior to which he would have had problems explaining and justifying his demands, had he ever decided to do so. With the introduction of copyright, he could say that specific remuneration for his creation was his right, granted by the law of the socialist state.

The court case, while striking a heavy blow to Zhang, also rang an alarm for CCTV decision-makers. It demonstrated how the new Copyright Law granted unexpected, though limited, power to media workers and provided a new platform (the court) on which they could negotiate and contest with their *danwei*. Employment reform at CCTV moved forward. By 2002, CCTV had had all its workers sign employment contracts with the corporation and turned all “tenure workers” into employees with fixed-term, renewable contracts. Meanwhile, an intellectual property section was incorporated in the contract, stating that all intellectual property created in one’s work at CCTV belonged to the corporation.<sup>15</sup> There were no visible attempts from CCTV employees to negotiate or to dispute this section (Interview with CCTV administrative staff, December 22, 2008). Indeed, Zhang’s challenge was a rare case. Considering the imbalance of power between CCTV and individual employees as well as the monetary and non-monetary benefits CCTV offered, most people preferred to avoid confronting their employer openly. As a matter of fact, in spite of his disadvantageous position facing his *danwei*, Zhang was nonetheless one of the privileged among CCTV workers. The majority of his fellow workers were in a worse situation.

Zhang Desheng was one of the regular, or “formal,” employees at CCTV. By the early 2000s, regular employees only amounted to a small portion of CCTV’s work force. Ad hoc labor, known as “temporary personnel (*linshi renyuan*),” undertook the major portion of work at the corporation. Being a state propaganda organ, CCTV did not have the power to recruit regular employees beyond the number and positions set by the government, known as *bianzhi*, or organizational chart. To cope with the fast-growing production and service needs, CCTV

employed a large amount of “temporary” workers. Different from regular employees who were generally referred to as “formal (*zhengshi*)” workers, “temporary” workers received only monetary payments for their work, but not welfare benefits, e.g., health care and pension. Many of them worked regularly for years at CCTV, yet remained “temporary” workers. Throughout the 2000s, “formal” employees at CCTV amounted to two to three thousand, while “temporary” workers amounted to about three or four times as many (Interview with CCTV administrative staff, January 12, 2009). They worked with “formal” employees, often under their supervision. More often than not, they were treated as “second-class” workers, and their promotion opportunities were rare, and were capped. While the treatment of temporary workers at different departments could be very different, in general, they constituted a subordinate tier of the labor force at the corporation.<sup>16</sup>

With some exceptions, “temporary” workers at CCTV were generally also vulnerable vis-à-vis the corporation in other ways.<sup>17</sup> “Temporary” meant they might be fired at any time, though many of them did manage to keep their jobs for quite some time, thanks to CCTV’s fast growth which required a constantly growing labor force. They were always paid less than “formal” workers at similar posts, and their relationship with CCTV was more like a straight-forward market exchange: labor for cash. They tended to have fewer personal networks and support, particularly if they chose to negotiate with their employer, while Zhang Desheng persuaded a few colleagues to testify against CCTV. In addition, most “temporary” workers had strong incentives to keep their jobs. Some of them were attracted to CCTV because they were paid relatively well. For some others, a job at CCTV offered them the opportunity to produce for and

to communicate with a national audience. Working at another TV corporation could hardly provide a comparable media stage. As a result, “temporary” workers tended to be even less inclined than “formal” workers to demand anything from their employer, justified or not. In one case, a “temporary” cameraman was not credited in a TV program he produced. According to him, he would not have even raised the issue with his supervisor had he not risked his life more than once shooting key footage for the show. His request was, “You don’t have to pay me (for my work), but please do put my name there” (Interview with CCTV programming staff, December 26, 2008).

The case of the CCTV logo was an instance in which a media worker attempted to negotiate with and to challenge his employer on issues of intellectual property. In spite of his confidence and trust in the copyright law, he lost the lawsuit when the court interpreted the law in a way that saved CCTV’s face and money. Here, the implementation of copyright in contemporary China showed a decided slant towards established political and industrial interests. China does not have a case-law system, which means this case did not have a legally-binding force.<sup>18</sup> Yet the message delivered was clear and straightforward: copyright law did not offer much help to an individual worker when the balance of power between her/him and the employer was lopsided. CCTV’s control over the output of its employees’ labor was, in effect, strengthened when the court demonstrated how far it was willing to go. It was in this sense that the case contributed to a pro-corporate “copyrightization” of labor relations and production control within media institutions. After CCTV’s copyright reform transformed its control over media labor into explicit ownership of intellectual property, CCTV would be able to articulate and

claim its interests in the marketplace by using copyright concepts, which had been cast in a totally positive light by repeated propaganda campaigns; if exploiting its power for excessive market gains could still be criticized, to protect its copyright property was righteous and laudable. CCTV's copyright reform moved forward vigorously after the mid-2000s, transforming its unproprietized political and industrial power into legally defensible intellectual properties.

### **Copyright with Chinese Characteristics?**

CCTV's effort to reform its production and management to meet with copyright requirements started in the late 1990s when the legal office (a predecessor of the legal department) drafted policies regarding copyright issues in the production of TV programs (Interview with CCTV administrative staff, December 22, 2008). However, until the early 2000s, copyright management in the corporation was largely inadequate. At the decision-making level, copyright issues were unfamiliar and ranked after propaganda and advertising in importance. In the administrative structure of CCTV, the Legal Department reported to the General Administrative Office (*taibanshi*), which had no direct say in media production but was responsible for providing logistical support for programming departments and projects. For television producers, editors and journalists trained without much knowledge or concerns for copyright, to change their way of working to meet requirements from a "remote" Legal Department was not a priority. Before 2004, meetings and workshops, lectures and seminars, and educational pamphlets and flyers did not make much progress in reforming media production. It was an adjustment in the administrative structure that changed the landscape.

The Copyright Department was established in 2004, not under the General Administrative Office but instead the Chief Editorial Office (*zongbianshi*), which was in charge of television production, planning and content. Working side-by-side with departments that reviewed and approved production budgets and plans or monitored and evaluated programs and shows, the new Copyright Department had a much tighter grip on television production. It moved swiftly to transform production practices at CCTV. Copyright policies were refined, and their implementation was closely monitored. New production control mechanisms were in place with more specific requirements on issues of copyright transfer and more detailed instructions on responsibilities and disciplines. More intensive training was held for producers and staff, and large-scale surveys and investigations regarding the ownership and control of historical programs were carried out. By the end of 2008, CCTV could claim to have a sophisticated and well-managed copyright system (Interview with CCTV administrative staff, January 8, 2009).

Of course, the real motivation and power for copyright reform came from CCTV decision-makers when earlier circumstances rendering copyright less significant in actual terms changed. In the 2000s, it became increasingly noticeable that the reliance on advertising as the major source of revenue was not a sustainable strategy in the long run. First, it was clear that growth of advertising revenue would probably slow down significantly at CCTV. The advertising industry in contemporary China underwent high-speed growth over the previous decades, yet the growth rates were persistently on the decline, falling from 97.57 percent in 1993 to 14.36 percent in 1997-2002 (Yan, 2005, p. 53). Furthermore, advertising sales in Chinese media were

closely related to the general economic situation and fluctuated along with economic ups-and-downs and policy changes. For example, during 2000 and 2001, the growth rate of television advertising sales significantly decelerated due to the economic slow-down in China (Chen, 2009, p. 53). CCTV's advertising growth rates dropped to 9.3 percent in 2000 and 6.8 percent in 2001, while the rates in 1999 and 2002 were 11.8 percent and 12.9 percent, respectively (Huang, 2008, p.10). According to a business analyst, by the mid-2000s the growth potential of television advertising had largely been exhausted. In 1997-2001, the growth of television advertising lagged behind not only new media, but also newspapers, magazines and radio (Yan, 2005). With industry-wide growth decline and fluctuations, CCTV could foresee its advertising growth cut back and becoming unsteady in the years to come.

Second, the competition from other media businesses, especially over the Internet, was growing fierce. Provincial TV networks such as Hunan Satellite TV and Shanghai Media Group competed powerfully in the national advertising market. With annual growth rates exceeding 50 percent for three consecutive years after 2006, Internet services such as Baidu would soon become a substantial competitor in the advertising market against "traditional" media (Chen, 2009, p. 54). While CCTV's advertising revenue continued to grow, its market share decreased by about 40 percent in ten years after the mid-1990s. CCTV's market share reached its peak in 1996 when it amounted to 9.6 percent in national advertising industrial total and 38.6 percent in national television advertising income. Afterwards, its share in the advertising industrial total witnessed a steady decline and dropped to 5.9 percent in 2006. Its share in television advertising income dropped to 22.9 percent in 2006 (Huang, 2008, p. 10). In the 2000s, it was

generally acknowledged among CCTV managers that dependence on advertising was becoming more and more problematic.<sup>19</sup> Ever-increasing pressure from the market pushed CCTV decision-makers to seek new sources of revenue. Yet when they turned to cultivate the market potentials of CCTV programs, copyright became the key issue, as they had learned from multiple copyright disputes and lawsuits.

Pressure from the international market and CCTV's transnational business partners did not play a significant role in CCTV's copyright reform, although they had made CCTV to warrant copyright ownership on paper. In foreign markets, CCTV programming has not had significant market successes, and thus has not attracted much attention from local stakeholders. In China, transnational media corporations who have started working on or are eyeing the Chinese television market are unwilling to confront CCTV. Given CCTV's dominance in Chinese television and its close ties to the government, to do business in China requires working with, not competing against, CCTV. Giving CCTV too much pressure regarding copyright, e.g., suing in the court, will jeopardize relationships and negatively impact an outside transnational corporation's opportunities in the Chinese market. Thus, when problems regarding the ownership and control of TV programming arise, transnational media tend to contact CCTV to negotiate in a non-confrontational manner. This business practice exerts some pressure regarding copyright, yet it also provides CCTV with opportunities to offer non-copyright-related compensation through closed-door meetings. As a result, for CCTV decision-makers, their transnational business partners seem less nerve-wracking than individual artists and media workers who have demonstrated their persistence in pursuing benefits under the copyright law.

CCTV's copyright problem and reform show how copyright played a significant role in the commodification of production labor at a major media company. As a propaganda organ born and grown under a command economy (CCTV was founded in 1958), CCTV's production was always subject to top-down, propaganda-oriented intervention, which did not leave much room for negotiating private interests of individual workers and artists. In the case of *CW*, CCTV's dominating power vis-à-vis individual artists resulted in a compulsory, standard copyright transfer. It was impossible to imagine what the terms and conditions of the copyright transfer would have been if there had been ideally "free" and "equal" negotiations between CCTV and artists. However, the fact that the two parties were on unequal footing could have led to an unbalanced contract. This is not to blame CCTV decision-makers or lawyers for unfairly exploiting individual workers and artists. To the contrary, many of them wanted to negotiate in a fair and reasonable fashion both out of personal desire as well as out of concerns for media and popular criticisms. It would be hard to believe, however, that CCTV's unilateral move to concentrate copyright control would result in a balanced agreement that would take proper care of the other party, who never had a real chance to raise demands. Looking at the case of Chen and Zhu in retrospect, they may have believed it to be a moment of victory for individual artists when they won the lawsuit, but their subsequent disappearance from the national screen and the controversial copyright transfer at *CW* suggests otherwise. Copyright does not level the playground between individuals and media corporations: when the power relation is unbalanced, copyright as a legal form of proprietary control does not necessarily remedy this inequality but may worsen it.

Copyright disputes on CCTV's logo and IPR-related employment reform are additional aspects of the copyrightization of media labor and production. CCTV's relation with its employees was more like non-market control and protection offered by a "socialist" *danwei* rather than an employer-employee relationship under an ideal, free market of labor. When CCTV added an IPR section in its standard employment contract, nobody objected, which was a sharp contrast to Zhang Desheng's bold move to sue at the court. What silenced the majority of CCTV employees was probably not the fairness of the IPR section, but rather their reliance on a monopoly power for a career and a living. This was by no means unique to CCTV; it also happened at a state-owned provincial media group, as one employee explained with some sarcasm: "We've got used to being exploited" (Interview with media administrative staff, January 4, 2009). The transformation of non-copyright to copyright control over media production at a time when media corporations had decisive advantages over non-unionized, individual employees led to the fixation of corporate power in copyright terms. With help from the court, as demonstrated in the case of CCTV's logo, will copyright in China continue to develop via a pro-business, pro-control model?

It must be noted that CCTV's relationship with its labor force is more complicated than a simple oppositional one. "Formal" workers at CCTV may identify more with corporate interests than with their colleagues who are mostly "temporary" workers. Many "formal" CCTV employees either have been promoted to managerial positions or are very likely to be promoted. For instance, in the 2000s, CCTV had a small pool of young "formal" workers, but a relatively large

number of mid-rank managerial positions open only to “formal” employees. Therefore, “formal” workers are unlikely to bargain with their employer in a confrontational manner not only because of its power, but also because they may themselves eventually become managers. In addition, the star system that came into being in the 1990s resulted in a small number of elite artists with unequal amounts of power. A few “star” artists, anchorpersons or producers -- either CCTV employees or temporarily working in a production project like *CW* -- have the power to negotiate with CCTV more aggressively, yet this occurs most often in a way that does not affect CCTV’s dealings with ordinary workers. For instance, regarding the copyright transfer at *CW* production, at least one “star” artist managed to escalate the matter and negotiate directly with top-rank CCTV decision-makers,<sup>20</sup> which gave him more opportunities to raise his demands. Nonetheless, privileged members of the work force, either “formal” workers or “star” artists, are more like “exceptions” compared to ordinary or “temporary” workers who outnumber them by a large margin and undertake far more substantial work as a whole. They may contribute to future changes in labor relations at CCTV, yet for the moment at least, they do not threaten overall corporate control. Here, the case of Chen and Zhu again serves as a useful example. Their popularity as comedy stars might help in their lawsuit. Yet it did not contribute to the rights and benefits of artists as a whole but inadvertently triggered aggressive corporate initiatives to concentrate control through the compulsory copyright transfer.

The “copyrightization” of media labor and production control at CCTV further strengthened its dominance in the industry and helped CCTV to fully exploit its un-proprietarized political and economic powers. The market of TV dramas is a good example. As one of the most

commercialized components of TV programming, TV dramas were among the earliest spin-offs from propaganda media to the market. While state censorship and content control still played formidable roles, by the 2000s, funding, production and marketing of TV dramas were significantly marketized (Bai, 2008). State-owned media generally do not directly produce TV dramas. Instead, profit-oriented enterprises, some of which are affiliated with state media, undertake the productions and get investment money from or sell them to state media. CCTV's political influence and economic power, including its monopoly of the only national TV platform, have always helped it to garner market gains otherwise unavailable through less unequal partnerships. With carefully calculated and better implemented copyright strategy and control, CCTV may create even more favorable opportunities to translate its advantageous position into financial gains.

The role of the copyright law in CCTV's market reform is important, but not in itself decisive. Indeed, the Copyright Law was made in 1990, yet copyright reform did not make a breakthrough until after 2004. Business strategy and market conditions played the key role in CCTV's attitude toward copyright. If CCTV had not faced the crisis in advertising growth, it is questionable whether or when it would have turned to further cultivate the market potentials of its programs. Of course, pressures from foreign markets, which held copyright as the cornerstone system, in addition to the ascending role of copyright in the domestic market, were also indispensable. However, international pressure and copyright disputes in the distribution of audiovisual products had existed for almost a decade before 2004, and the time-lag cannot be explained only by bureaucratic inertia. Examining cultural commodification as a long and

global historical transformation, Schiller (2007) asks, “Does the law of copyright, or even of intellectual property in general, actually comprise the decisive, let alone the exclusive, basis for commodification” (p. 30)? The early history of CCTV’s market reform seems to support his skepticism by putting copyright in the backseat. Indeed, CCTV in the 1980s and 1990s was a perfect example for Garnham (1990, p. 161) when he argues that big media could use non-copyright strategies to restrict access and to profit from a market thus constructed, including the monopoly of distribution channels and the bundling of advertising and content. It is interesting to imagine where CCTV’s market reform would have headed, had there not been a Copyright Law or had the international and domestic markets not picked up copyright as the cornerstone system.

Of course, this is not to assert that China could have a commercial media system without copyright, but to point to multiple possibilities of media marketization and to highlight the specific histories that copyright sank into media productions and labor relations in China. The case of CCTV, a major television corporation under the party-state, provides a very good opportunity to look into this process. On the one hand, television was a “new” medium in China, compared to the printing industry. The print media in today’s China generally set up in-house legal offices in the mid- or late 1990s, roughly the same time as CCTV, yet they seldom had complicated legal challenges and issues of “copyright reform” (Interview with media administrative staff, December 24, 2008). This is partly because copyright issues in publishing tend to involve fewer parties and are relatively straightforward, unlike television production which always includes various forms of collective creative input. In addition, as discussed in

Chapter Two, China has had a long history of copyright in the printing sector, and media companies and authors today can quickly pick up old norms and practices. Television in China was born under the Communist Party without a legacy of copyright. Its corporate organization, labor relations and production control have relatively less influence from the West, the market or ideas of copyright. As a result, the conflicts tended to be sharper and more visible. On the other hand, state-owned media corporations dominated Chinese media sectors both as propaganda organs and market powers. The conflicts between top-down command and market practices, and between a monopolistic industrial power and un-unionized media workers, as reflected at CCTV, are not uncommon among state-owned media sectors. It is in this sense that a study of CCTV can contribute to our understanding of labor relations and production processes of Chinese media in ways different from studies on private media companies in China, which remain largely at the “peripheries” of Chinese media landscape (Zhao, 2008).

If CCTV’s copyright model, which reinforces existing market monopolies and hinders individual rights and interests, is typical for all Chinese media, it does not bode well for the prosperity of individual freedom and creativity, as advocates of copyright have argued. The question on copyright in China is not only whether a Western, liberal model of copyright system can take root in China, but also to determine what the features of the Chinese copyright system are and what implications exist for media labor and production in and beyond Chinese borders.

Conflicts and contestations during the processes of copyright development and cultural commodification are by no means unique to China or to contemporary times. Understanding the ways that copyright law and practice have registered and been reshaped in the process of

Chinese media growth can shed light onto studies of other media systems undergoing contested processes of marketization. The conflicts in copyright growth may be more visible and dramatic in television production practices in contemporary China, but different social and sectoral settings do not render such conflicts irrelevant. In addition, with the rise of China as a global power and Chinese media as increasingly important political, economic and cultural institutions internationally, features of the Chinese copyright system including its balancing of private control and public access, creative labor and capital interests may well come to possess substantial influence on the international stage.

## **Chapter 5 “Use” is an anagram of “sue”: Cultural control, resistance, and the role of copyright in Chinese cyberspace**

Copyright’s role in cultural production processes does not only pertain to labor relations and production management within media institutions, but also to the use of copyrighted materials in non-institutionalized creative activities and communication processes. Contemporary copyright law has very stringent restrictions on using existing works for a new creation. While all creative activities are by nature “collaborative” as we learn and borrow from each other, the idea of copyright is based on the notion of “solitary” authorship (Woodmansee, 1994). Instead of viewing cultural production as a social process, the legal concept of copyright sees only privately owned pieces in a market of cultural products. Creators are seen as users, not fellow authors or artists, when they use other people’s works in their creations, and are required to obtain permissions and pay remuneration. It results in extra burden and expenses for cultural production and becomes a major problem in the digital environment and for some forms of art (Lessig, 2004; McLeod, 2007).

The conflict between private copyright control and cultural creation is often discussed using the concept of speech freedom in the US context, and has produced substantial critical scholarship (e.g. Boyle, 1996, 2008; Lessig, 2001, 2004; McLeod, 2007; Netanel, 2008). However, there is almost no similar research in regard to China. This is probably not surprising. Firstly, copyright in China is generally seen as a “weak” legal system and is poorly enforced. It seems

counterintuitive to think that copyright has the power to pose threats to anything. Secondly, issues of culture freedom and creativity in China tend to focus on state censorship, in the face of which copyright as a private privilege appears to be a resistant force standing side-by-side with freedom of expression (Alford, 1995). However, copyright growth, as one dimension of cultural and informational commodification (Schiller, 2007), engenders social conflicts when the previously non-privatized, non-market cultural sector gets divided up into proprietary parts and fragments. These conflicts are not necessarily between a politically coercive state and abstract individual freedoms. Historically they took place between authors and printers (Patterson, 1968; Rose, 1993), and between individual acts of copying and copyright proprietorship long before electronic technologies, including video recorders and photocopiers, came into being (Netanel, 2008). In the age of the Internet, when digital technology blurs the line between “individual” and “commercial” reproduction and distribution, and when “borrowing” becomes more frequently used and easily identified, copyright law that governs replicative and transformative uses of copyrighted works reaches deep into individual experiences and life, resulting in conflicts between individual authors and big media in the new technological environment (Lessig, 2001, 2004). In this sense, digital technology does not “create” a new problem, but makes an old one more noticeable and dramatic.

The rapid growth of the Internet has brought profound changes to Chinese and global media and cultural landscapes. After more than a decade of double-digit growth, by the end of June 2010 China had 420 million Internet users with a penetration rate of 31.8% (China Internet Network Information Center, 2010b). The growth of blogs, social network services (SNS), and

twitter-style microblogging in recent years has been nothing short of spectacular (China Internet Network Information Center, 2009, 2010a). With the largest group of users in the world, the Internet in China is a key component of global communications. Social and cultural resistance against various forms of inequality and domination in Chinese cyberspace is a significant part of the global social movement to democratize media and communication (Hackett and Zhao, 2005). Meanwhile, Chinese Internet companies are aggressively expanding into oversea markets, bringing with them their business models and control mechanisms (Chao, 2010; "Tencent to Acquire 49.9 pct Stake in Thai Web Portal," 2010; "The Emerging Online Giants," 2010). The dynamics of digital communication in China are of key importance for understanding changes in Chinese society and culture, as well as the development of copyright and new media in non-Chinese contexts worldwide.

Political implications of Internet growth in China have received substantial attention from politicians and researchers alike. Some researchers hold a firm belief that the Internet has the power to change China and Chinese politics (e.g. Tai, 2006), while some others work to weave more historical and social background into their analyses (Yang, 2009; Zhou, 2006). Underlying many research concerns is the technological potential and possibility for individual freedom of expression without coercive state intervention. As a result, state censorship and surveillance receive significant attention. In a different research trajectory, Zhao (2008) works to understand class divisions and transforming ideologies in Chinese cyberspace by studying cases of online mobilizations and discourses. Her work points to a new research perspective: examining online discursive dynamics in relation to concrete social reality, rather than focusing

on state censorship and (sometimes) presuming the liberalizing nature of technology. In a similar vein, this chapter studies popular expressions, exchange of information and ideas, the formation and sharing of opinions in and beyond the cyberspace and the role of copyright in this sphere. It maintains that state control is never total, and bottom-up movements to challenge dominance and inequality, sometimes tactical or playful, merit careful scrutiny. The dynamics of these popular efforts reveal for us the agency, creativity, limitations and restraints of public participation and social mobilizations in Chinese cyberspace.

The focus in this chapter is on a short online video which triggered a series of media and social events in early 2006. *Yige mantou yinfa de xue'an* (*a mantou that caused bloodsheds*), generally known as *Mantou*, used clips from a well-known film and produced a funny parody. In a very short time it became extremely popular in Chinese cyberspace. Some observers later called it “one of the classics in China’s cultural transformation” (Ding, 2006), which started a “revolution” in the cultural arena (Zhou, 2006). However, soon after birth *Mantou* became the center of a copyright controversy, when the movie director threatened to sue in the court. Online discourse overwhelmingly supported *Mantou*, while media and legal professionals and researchers engaged in a heated debate. Based on the case of *Mantou*, this chapter examines the features and social contexts of cultural control and resistance in and beyond cyberspace, as well as the repressive role of Chinese copyright law.

## Copyright vs. criticism in Chinese cyberspace

On December 31, 2005, a young man in Shanghai finished a 20-minute video and sent it to several friends by email. Later known as *Mantou*,<sup>21</sup> *Yige mantou yinfa de xue'an* (a mantou that caused bloodsheds) parodied the film *Wuji* (English title: *The Promise*), then the most well-known movie in China. Hu Ge, author of *Mantou*, edited movie clips and dubbed them all by himself and put together a short story making fun of the movie as well as the director. One of his friends posted *Mantou* online. By January 3, 2006, Hu Ge found his video to be well-known nationwide. In ten days after January 6, search results for *Mantou* rocketed from 1,660 to 978,000 on Baidu.com, the largest Chinese language search engine (Zhang, 2006). Internet users showed spectacular enthusiasm about the video. Postings in web forums passionately praised *Mantou* and laughed at *Wuji*. At the web forum of Sina.com, one of the largest Chinese web portals, the thread on *Mantou* was read 1,697,244 times. Among all 1,373 postings in the thread, the majority applauded the video and hardly any showed any sympathy for the movie (Meici Dou Diyi, 2006).

However, *Wuji* was not just an ordinary film. In fact, it might be the last movie that one wanted to embarrass -- it was one of the most spectacular financial adventures in China's movie industry. *Wuji* was the most expensive movie at its time. Backed by China Film Group Corporation (CFG), the state-owned industrial giant, it was estimated to have cost more than 300 million yuan (US\$ 45 million) (Yin and Zhan, 2006), a stunning figure in Chinese movie industry; and it became the leader in "a mad tide of competition between entertainment

capital” (Zhu, 2006). The major investor, CFGC, made fully use of its resources, including several national distribution networks and its connections in the media sector, to secure the market success of the movie. Months before it was released, word had spread that the Chinese government appointed *Wuji* to be the only movie to “represent China” to run for the Academy Award in 2006 (Zhang, 2005). It received lavish praises from the media before and immediately after it appeared in theatres. *Mantou* was the first audible voice that suggested a different view.

*Mantou* used a mocking tone to retell the story of *Wuji*. While the movie company claimed *Wuji* to be a “grand, epic-style” love tragedy,<sup>22</sup> *Mantou* edited scenes from the movie and told a story about a blood-thirsty general who had mental problems. It highlighted the loopholes and problems in *Wuji*’s storyline and had the blood-thirsty general declare, at the end of the video, that the director should be responsible for all of these. This straightforward criticism of the movie infuriated the director, Chen Kaige, one of the most well-known movie directors in China. Chen did not bother to discuss and to evaluate *Mantou*’s criticism of his work but picked up copyright as a weapon. He threatened to sue for copyright, and his lawyers started to send cease-and-desist letters to websites that published the video. Some websites soon obliged (Bai, 2006).

McLeod (2007) argues that intellectual property (IPR) control helps corporate interests to contain criticisms and negative publicity. Promotional use of corporate marks, logos or other intellectual property items is generally encouraged (with or without permission). But when they are used to criticize the owner the law may be ruthlessly invoked. In these cases, “‘use’ is an

anagram of 'sue'" (Striphas & McLeod, 2006, p. 131). Selective exertion of intellectual property control thus makes IPR a handy tool to repress freedom of expression. *Mantou* was a good example, in which criticism met up with repression, not reasoning. Chen Kaige did not spend time to argue that *Mantou* was wrong or that it misinterpreted his movie. His lawyers simply told Hu Ge to shut up because Chen owned the substance of what he had to say, and would not let him use it.

But could the copyright controversy have been avoided, if Hu Ge wanted to share a critique of the movie at all? This is not a critical question, because it assumes copyright to be a necessary concern before we speak up. As Netanel (2008, p. 43) puts it: "Appropriation lies at the heart, not the margins, of freedom of speech." Mass-media-produced expressions and products dominate our cultural landscape, and it is really difficult to avoid using them when commenting on anything. However, pushing the argument this far helps to clarify the circumstances in which *Mantou* emerged to become popular. On the one hand, if Hu Ge had written a textual analysis of the movie, it would not have argued nearly as powerfully as his video did. As Striphas and McLeod (2006) put it: "How do we, with high fidelity, transcribe or translate in one medium a description of a cultural text that exists in another medium?" (p. 132). On the other hand, there were no visible critical comments on *Wuji* before *Mantou* emerged. Given the fact that criticisms volcanoed soon after *Mantou* had paved the way, it was reasonable to conclude that these criticisms had existed for a while but were repressed. *Mantou* as a short online video broke out of the siege precisely because it was a new media form under relatively less control by either the state or corporate powers.

In January 2006, video-sharing websites like YouTube or Tudou.com, the Chinese counterpart of YouTube, were less than one-year-old and much less popular than today. *Mantou* was distributed through web forums, a very popular interactive technology in Chinese cyberspace. Started as BBSes (bulletin board systems) in the Chinese Internet before the World Wide Web came along, online forums that allowed users to post threads on classified message boards were the most important channels for interactive communication, at least before blogging, social network services and microblogging were born. *Mantou* was distributed through thousands of online forums when users downloaded a copy from one place and posted it at another. State censorship did not pay attention because *Mantou* had no explicit political messages, and corporate publicity campaigns apparently overlooked this new media form. The funny and smart *Mantou* was distributed widely and rapidly, until caught by copyright.

### **“Fair use” and Chinese copyright law**

Confrontation between a well-known movie and a popular video soon became a hot topic in Chinese media and Internet. The online population overwhelmingly sided with the video, while a debate broke out between legal and media professionals and researchers regarding copyright issues. Many argued vigorously in favor of the video. A forum posting described it as “a battle to defend *Mantou*” (Liu, 2006). Unfortunately, after looking into every detail and possibility, it became clear that Chinese copyright law could not tolerate a parody work like *Mantou*.

It was easy to notice how *Mantou* might have offended the law. Chinese copyright law included extensive privileges for authors and producers. Unauthorized reproduction and distribution of copyrighted works were explicitly prohibited. It was only under certain circumstances, mostly cases of “fair use,” that a trespass could be forgiven. The case of *Mantou* was basically about whether it could fall in the category of “fair use.” If yes, then its use of copyrighted properties in *Wuji* was pardoned; otherwise it was “piracy.” As a matter of fact, “fair use” was often cited by *Mantou* defenders, including Hu Ge himself, who repeatedly stated that he made the video for fun, not for money.

“Fair use” in copyright generally refers to cases in which copyrighted works can be used free of charge and without authorization from the copyright owner. It is a limitation on copyright control, designed to allow some public access to copyrighted works and to prevent monopoly. For some (though disagreeing on its effectiveness), “fair use” is an important “safety valve,” a built-in mechanism, that balances private control and public access, copyright and free speech (Vaidhyathan, 2001; Goldstein, 2003). Just as its name suggests, “fair use” means that some uses, otherwise prohibited, are “fair,” therefore must be allowed. In the US Copyright Act, “fair use” is determined by four criteria: purpose and character of the use, nature of the copyrighted work, the amount used, and the effect of the use. In Chinese Copyright Law, Article 22 lists twelve specific cases of “fair use.” Private uses of copyrighted works, or “appropriate” citations for introductory and commentary purposes, are allowed, but *Mantou* used substantial movie clips and was available everywhere online.

*Mantou* defenders introduced the notion of “parody work” from US and European copyright systems. A media critic listed several similar cases in the US and argued that parodies were common forms of artistic critique and did not violate copyrights (Zhou, 2006). At a website devoted to civil and commercial law studies and founded by a distinguished law professor, [www.civillaw.com.cn](http://www.civillaw.com.cn), legal researchers engaged in back-and-forth debates. Ji (2006) studied US Copyright Act and Supreme Court cases and pointed out that under the American system, *Mantou* could be protected. Han and Xu (2006) researched relevant provisions in US and European copyright laws and argued that parodies were generally part of “fair use.” However, their efforts to research foreign laws and cases reflected the lack of support from Chinese copyright law. Works of “parody” claimed no established standing in Chinese law. “Parody work” was not one of the twelve cases of “fair use,” and the law left no room for expansionary interpretation that could accommodate additional “fair uses.” Even a critic who favored *Mantou* argued that it was unlikely that Chinese judges would ignore explicit legal codes and rule in favor of the video. According to him, this was common sense to legal professionals and researchers, as well as university students “with minimal knowledge on law” (Liu, 2006).

Nevertheless, the debate was heated as the pro-*Mantou* camp drew from non-copyright sources and situated the controversy in a larger social context. A law professor in constitution studies argued that *Mantou* was an expression of criticism. The right to free speech was of higher social value than economic rights like copyright. If *Mantou* were found to be an infringement, it would mean a repression of free speech (Cai, 2006). A post-doc researcher, also in constitutional studies, argued that Hu Ge was only exercising his freedom of artistic creation

when producing *Mantou*. While artistic creation was a basic human right stipulated in Chinese Constitution and copyright was not, the essence of the dispute was how and whether a constitutional right could be subject to a non-constitutional right (Zhang, 2006). A sociologist situated the dispute in the context of monopoly commercial power vis-à-vis the public. In his words, “this commercial movie (*Wuji*)... (through its marketing campaigns) ‘manipulates’ what we see, think, and speak...why can’t the general public have the right to make fun of it and to criticize it?” (Hou, 2006) At the other side of the Pacific, Richard Stallman, founder of the Free Software Foundation, said in an interview: “People should have the right to make parodies of anything. That is an important part of freedom of expression.”<sup>23</sup> Feeling less restrained by Chinese intellectual property law, constitutional scholars, sociologists, and copyright critics in the US became the most vocal defenders of the video.

The issue of moral rights was also raised and debated. Chinese copyright law is a hybrid of common law and civil law traditions, and Chinese authors are entitled to the right to prohibit distortion and mutilation of their works – a fuzzy term never fully explained in the law. Again it seemed self-explanatory how *Mantou* might have distorted *Wuji* – it retold the story in a mocking tone and edited movie clips in ways that their meanings were changed significantly. Was this a “distortion” of the movie that “would be prejudicial to” Chen’s “honor or reputation?” (Berne Convention for the Protection of Literary and Artistic Works, Article 6bis (1)). For some, the case of *Mantou* was all about moral rights, and *Mantou* certainly was an infringement (Yang, 2007). But ardent supporters of *Mantou* argued against it. For example, Han and Xu (2006) maintained that *Mantou* was an independent work that provided proper

citations for Chen's movie. It made it very clear that it was a different work, not an adaptation. The use of movie clips was not a distortion of *Wuji* but a necessary method to quote and to comment on the movie. Again the issue boiled down to the questions of "fair use": was *Mantou* a commentary of *Wuji*, and was its use of the clips "fair" enough to be tolerated by the law?

The debate extensively explored "fair use" in Chinese copyright law, and revealed some interesting, and disturbing, features of copyright in China. "Fair use" is narrowly defined into a limited number of specific circumstances. Whereas the US Copyright Act sets forth a four-component test for "fair use," the Chinese law leaves no room for expansionary interpretations that can accommodate new forms of "fair" use. Article 22 of Chinese Copyright Law does not stipulate the general goal, purpose and criteria of "fair use," and does not even bother to add one line to include "other" possible conditions of "fair use." It firmly eliminates the possibility to adjust the law in response to legislative overlook or changing social or technological circumstances. If "fair use" is a "safety valve" in copyright (Vaidhyanathan, 2001; Goldstein, 2003), then the Chinese law-makers have worked hard to prevent it from leaking.

Critical scholars in the US sharply criticize the expansion of copyright control and the powerless "fair use" clause in the US Copyright Act. Vaidhyanathan (2001) argues that the copyright law must be "porous" or "leaky" so as to promote public access to culture. Netanel (2008) points out that "fair use" in the US law is unpredictable, open-ended and case-specific. It discourages the use of other people's works because the legal risk is unfathomable. In Laurence Lessig's words, the "fair use" section only grants one "the right to hire a lawyer" (quoted in Netanel,

2008, pp. 62-66). However, as shown in the case of *Mantou*, in the Chinese context things can get even worse: there is no room for judicial argumentation and deliberation regarding “fair use.” One can still hire a lawyer, as Hu Ge did, but there is not much that the lawyer, or even a sympathetic judge, can do. The law is stringent and inelastic.

Of course, this is not to counter the arguments by critical scholars in the US, but to highlight some features of copyright in China. China is not unique in having a pro-control copyright law – “balance in copyright is threatened everywhere in the world, from the least developed countries to the major copyright exporting nations” (Jaszi, 2005, p. 23, quoted in Striphas & McLeod, 2006, p. 136). By setting stringent limitations on “fair use,” Chinese copyright law not only consolidates the power to define “public interest exceptions” to the legislative process, but also shows a strong hostility to unpredicted trespassing into the terrain of copyright property. The general “quality of enforcement” (Dimitrov, 2009) is largely irrelevant here, because copyright repression of expressive freedom is always selective (McLeod, 2007; Striphas & McLeod, 2006). In a case-specific scenario, the power balance between the two parties typically dictates.

### **Popular opinion and social mobilization**

Copyright did not deter Chinese netizens’ love for *Mantou*. Provoked by Chen’s threats, Internet users responded with overwhelming support for Hu Ge and his video. Online forums, usually where *Mantou* was posted, became the sites where people discussed the case,

exchanged opinions and proposed solutions. Knowing that *Mantou* was not on the radar of state censorship, Chinese Internet users engaged in an active, widely participative discussion and arrived at an (almost) unanimous opinion in support of Hu Ge. Indeed, the formation of popular opinion on *Mantou* was no trivial matter – the social dynamics in video-sharing and public discussion must be contextualized in the transforming political economy of Chinese movie industry and society. It reflected the social conflicts and antagonism, as well as the strength and limits, of online mobilizations.

The enthusiasm of Chinese Internet users involved in the case of *Mantou* was spectacular. At one of China's most popular online communities, Tianya.cn, tens of thousands of users put their names down in response to a thread calling for support of the video. At Sina.com, another popular web portal and online forum, postings showed overwhelming support for *Mantou*. In response to the question "What will you do if Hu Ge loses the lawsuit," 26.58 percent of Internet users said they would make donations to Hu so that he could pay for penalties, and 53.6 percent stated that they would sue Chen for producing a low-quality movie and ask for refunds for tickets. Numerous Internet users asked Hu Ge to designate a bank account so that they could make donations to cover his litigation expenses (Song, 2006a). Besides the fact that *Mantou* was indeed an excellent parody work, criticism of Chen and *Wuji* actually channeled public disgruntlement toward the Chinese movie industry, which took off as a profit-seeking business sector and failed miserably in its cultural contributions.

The market-oriented reform in China in the last three decades reached deep into a wide array of social sectors, including education, health care, and media. In the movie sector, high-budget commercial films dominated, and movie-going gradually transformed into a costly consumer activity rather than, as it had been, an easy moment for leisure and enjoyment. The change started during the mid-1990s, when imported American movies dominated the Chinese film market, and domestic production saw a sharp decline (Zhao & Schiller, 2001, p. 143; also see Miller et al., 2006, pp. 320-321). The imported American movies brought about a commercial model of “high concept” movies, which emphasized “big investment, big production, big distribution, and big marketing” (Yin & Wang, 2007). During the 2000s, “high concept” movies prevailed in domestic productions. In 2005, while imported movies still owned nearly half of the box-office, high-budget domestic movies and co-productions dominated the remaining share and drove almost all low-budget movies, totaling 85 percent of all domestic movies, out of theatres. Meanwhile, domestic resources for film production and distribution were concentrated on a small number of elite directors and producers. Whereas Zhang Yimou and Chen Kaige routinely controlled hundreds of millions yuan or US dollars, 85 percent of Chinese movies in 2005 had their budgets well below 3 million yuan (US\$450,000), less than one hundredth to that of *Wuji* (Yin & Zhan, 2006).

For movie-goers in China, the dominance of “high concept” movies meant that they had increasingly fewer choices of films, were exposed to omnipresent promotion campaigns and not surprisingly, had to pay more for tickets. In big cities, one ticket for *Wuji* generally cost 80 yuan (US\$12), more than enough for two people to have a good dinner at an average

restaurant. But what indeed did they watch? “High concept” movies typically cost a fortune, recruited all-star production teams and employed aggressive marketing strategies. As for the film itself, it generally included thrilling special effects designed to impress eyes and ears. At the same time, however, the story was generally simple or familiar, if not banal, written to be comprehensible to as many people as possible rather than to echo complex or fresh social experiences. The outcomes were movies like Zhang Yimou’s *Hero* and Chen’s *Wuji*, impressive for the eye, but hollow for the mind. Box-office successes of these movies, in the sharp words of a cultural critic, relied on “extravagant and crazy” marketing and “the violence of advertising” to “kidnap” audiences into the theater (Zhu, 2006). It was in this context that criticisms of *Wuji* soon developed into criticisms of the movie industry -- *Mantou* only gave them a chance to voice their frustration and anger. In a way, Chen Kaige and his *Wuji* were actually scapegoats for the movie industry. However, there were also good reasons why they became the target. Chen was an established film director and had wide connections in Chinese movie industry through his family. *Wuji* received substantial support from CFGC, the state-owned industrial giant. It was a typical “high-concept” movie, with huge investments and powerful promotion campaigns. It was rich in special effects but the story was awkward. While these were common features shared by most high-concept movies produced by domestic industries, it was more or less coincidental that *Mantou* showed up as a nemesis. Chen could probably have won some sympathy if he had asked “why me?”

Here, video-sharing as a new form of popular communication played a key role. As mentioned above, to remain in the same medium is the most accessible and effective way to comment and

criticize another work (Straphis & McLeod, 2006), and it certainly contributed to *Mantou's* popularity and power. Meanwhile, online video-sharing only just began to gain popularity in early 2006. Broadband network access became widely adopted in 2005. It was during the first six months in 2005 that broadband (DSL, cable modem) users first amounted to over half of all Internet users in China (China Internet Network Information Center, 2005), but the growth was very fast. By the end of 2005, broadband users in China amounted to 64.3 million, or 57.9 percent of total Internet users, with an annual growth rate of 50.2 percent (China Internet Network Information Center, 2006a, p. 22). This number further increased to 77 million by the end of June 2006 (China Internet Network Information Center, 2006b, p. 25-26). At the same time, as a newly emerged media form, online video did not catch the attention of state regulatory agencies until the end of 2007, when the State Administration of Radio, Film and Television (SARFT) and the Ministry of Information Industry jointly issued "Regulation on Internet Video Services" (China Internet Network Information Center, 2010).

This was the technological and regulatory context when *Mantou* became widely circulated and watched online. The Chinese version of YouTube, Tudou.com, was still in its infancy in early 2006 ("Chinese Couch Potatoes," 2006). Video-sharing at the time was not a separate new media form, but embedded in forum-style communications. Many web forums allowed users to post audios or videos in their postings, thus putting video-sharing on a par with texts and audio. *Mantou* was circulated among different online communities whose interest did not focus solely on watching videos but on various social and popular issues. The "embeddedness" of video-sharing in online forums, a major type of online public space in China and the conduit for

massive mobilizations and social deliberations (Li, 2010; Zhao, 2008; Zhou, 2005), situated *Mantou* right in the center of information exchange and opinion formation in the cyberspace. *Mantou* as a video, rather than a written text, showed unique power connecting with Internet users' feelings and experiences regarding *Wuji* and the movie industry. The rapid distribution of *Mantou* among online communities quickly mobilized the online population into a massive protest against the developmental trend of the movie sector.

A widely circulated posting in online forums provided a succinct account of popular sentiment. The author said that she/he was firstly shocked by the massive repercussions caused by *Mantou*, but then realized that *Mantou* was only a trigger which touched off long-repressed frustration against Chinese movies that no longer connected to what people cared or knew. According to the author, Chinese movies in the 2000s exhibited a massive degradation. They no longer related to Chinese economics, politics and culture that concerned people, but focused on distant histories or fabricated stories about ghosts, monsters and the supernatural ("*tian shen gui guai*"). Except natural sceneries, nothing in those movies, the author stated, was real and relevant, and audiences had good reasons to feel fooled and frustrated. At the end of the posting, the author said: "People like us...just want to watch movies for fun and to relax, and have no time or interest to care about the fate of *Mantou*. But we have been holding back our frustrations for so long. I cannot tolerate it any more" (Yuanjuli Kanni, 2006).

Thus, a short video inadvertently led a social mobilization in protest against the transforming Chinese movie industry. *Mantou* became an icon, and the case of *Mantou* was no longer

between a young video-maker and an established film director but between the public and the industry. Following *Mantou*, cultural critics and media professionals also spoke up. In a tone very similar to the online posting mentioned above, a film director stated that “Chinese movies are now hundreds of thousands of kilometers away from real life” (X. Z. Zhang, 2006). *China Newsweek*, a fast-growing news magazine, organized a series of articles on *Mantou* and *Wuji*, which included several sharp criticisms of Chinese movie industry (see Bai, 2006; Ding, 2006; Zhu, 2006). The outbreak of criticisms was a sharp contrast to the omnipresence of lavish praises and the invisibility of negative comments for *Wuji* before *Mantou* appeared. As a matter of fact, *Wuji* had taken a very aggressive approach to criticisms. In one instance, when a newspaper published a critical comment on the film, it received a call from the production team asking for an apology (He, 2006). Had *Mantou* not been made and circulated on the Internet, would all these criticisms and frustrations have been voiced and communicated on such a scale?

\* \* \*

Network and digital technology played a significant role in the mobilization invoked by *Mantou*. Video-sharing as a new media form in early 2006, embedded in web-forum communications, easily slipped through the cracks of state regulation and corporate publicity campaigns and touched off an outburst of frustrations and anger. But of course, it was not technology but social conflicts and unrest in the transforming Chinese society that fueled the outbreak. Market-oriented reform starting in the late 1970s swept through a wide array of social sectors in China (Meisner, 1999). “Neoliberalism with Chinese characteristics” dramatically changed

Chinese society and resulted in wide-spread social unrest and conflicts (Harvey, 2005; Perry and Selden, 2003). The commercialization of the communication sector, while making headway in the market, was carried forward at the cost of the social and cultural functions of communications (Zhao, 2007). The Chinese state made remarkable endeavors to control communications, working to boost commercial media growth on the one hand, and to repress social unrest on the other (Zhao, 2005, 2008). When *Mantou* made a small crack in the control mechanism, it ushered in an eruption of frustrations and anger not limited to the movie or even to the cultural industries. Critical observers unhesitatingly related *Mantou* not only to film and media but also to larger social conflicts. A sociologist argued that people supported the video to express their frustration with the manipulative commercial culture, and “*Mantou* has actually become a way by which those without power talk to those in power” (Hou, 2006). A cultural critic concluded his article on *Mantou* by saying:

“Behind the lawsuit is the conflict between entertainment industrial moguls and Internet grassroots, which reflects the sharp conflict in Chinese society. No matter what the outcome (of the lawsuit) is, this cultural control can only further squeeze the (public) discursive space, exacerbate social polarization and intensify social hatred already in growth” (Zhu, 2006, p. 29).

It is in this sense that a study on a parody video is highly relevant for the understanding of dynamics, features, and limitations of online mobilizations as well as copyright control in digital communications in China. Firstly, eruptive expression of popular opinions and outrage was

typical in several cases of online mobilizations including the case of Sun Zhigang, in which a college graduate died from police brutality (Zhao, 2008, pp. 245-285). In the case of *Mantou*, the burst of popular revolt needed to be attributed to state censorship as well as corporate control. The former produced a long-term repression of voices from the disenfranchised and disadvantaged, who shared similar sentiments with a large portion of the online population because of overlap as well as family and social connections. The latter through publicity campaigns successfully shut off negative opinions in major media outlets and produced a fake celebratory atmosphere conducive for the market adventure of *Wuji*. *Mantou* inadvertently provided a channel for the release of otherwise repressed social antagonism. While the force of social mobilization was impressive, its limitations were also apparent. Sudden bursts of popular sentiment did not last long, and tended to die out after a period of time, especially after some form of compromise or appeasement was made from the socially advantaged. In the case of *Mantou*, Chen never sued at the court and silently dropped the issue, after which public discussion on the cultural industries and social polarization gradually disappeared. No further discussions and opinion exchange that might lead to more in-depth criticisms or action plans were visible. The status quo largely remained intact, although perhaps a new cycle of anger accumulation followed by eruption was underway.

Second, the case of *Mantou* demonstrates the “playfulness” of cultural resistance in Chinese cyberspace. Instead of straightforward criticism, *Mantou* was a funny parody that made the audience laugh. Nothing in the video seriously analyzed *Wuji* or the movie industry. The tone was light-hearted, fun-seeking, yet seldom did any audience miss its sarcasm and criticism. The

playfulness in *Mantou* was nothing strange to Chinese Internet users, who, faced with stringent state censorship, had got used to expressing themselves in a less-than-explicit manner.

Sarcastic metaphors, puns, anagrams and innuendoes were widely used online. The most well-known example was probably the use of “river crab” to refer to censorship and state control, which were carried out under the slogan of “building a harmonious society.” When “harmonious” and “harmony” are pronounced the same way as “river crab” in Chinese mandarin, and when “river crab” could also be used as a metaphor for arrogant bullies, “river crab” became a satirical icon in and beyond Chinese cyberspace (Under the Internet Police’s Radar, 2007). In the case of *Mantou*, Internet users also filled in new lyrics for a popular song and distributed audio clips online to support *Mantou* and to deride *Wuji* (Bai, 2006).

The “playfulness” of cultural resistance has both strengths and limits. The power of *Mantou*’s criticism came from incorporating movie clips instead of presenting a textual critique, and its popularity as an entertaining video was indispensable to reach a large audience. For people exhausted and frustrated from coping with the burdens of life and a repressive cultural environment, to laugh over a funny video that echoed their sentiments was not only refreshing and comforting, but also helped to build a sense of community with peers. Meanwhile, a playful tone in a parody like *Mantou* was also indispensable to dodge surveillance from both the state and market powers. Had *Mantou* been a serious critique of *Wuji*, it probably would either have published in a marginalized media outlet without much audience, or have been killed by the formidable publicity campaign by the movie company, which did manage quite successfully before *Mantou* appeared. Furthermore, if *Mantou* had explicit criticisms of the Chinese movie

industry, cultural policy, or social polarization, to which critical observers had so unhesitatingly related it, it would probably have invoked state censorship. The playfulness of *Mantou* thus became a much-needed pass at the checkpoint. Once passed, less-playful social and political agendas quickly jumped on board.

However, serving as a vehicle was probably as far as a playful *Mantou* could go. For one thing, to resort to parodies as a means of resistance was in itself a limit. A newspaper article argued that the popularity of parodies reflected people's distrust and resistance of "mainstream culture," as well as their feelings of powerlessness to intervene into cultural production (Song, 2006b). For another, to laugh and to post applauding comments in online forums was not enough to bring concrete social changes. Serious, widespread discussions and debates were indispensable to construct and to communicate new understandings of, or even solutions to, widely perceived problems. Yet *Mantou* as a vehicle ran out of fuel as soon as it was no longer a fresh entertaining experience. Critical comments and analyses, published at a time when *Mantou's* popularity quickly rose and media managers were willing to take some censorship risks in exchange for market share, were largely confined to entertainment sections, and without successive discussions and studies. State censorship certainly played a role. When the Chinese state had effectively sabotaged the electronic public space for serious deliberations (Li, 2010), cultural and social criticisms on board at the playful vehicle of *Mantou* did not have a next station. Entertainment stories had market cycles. And when *Mantou's* turn came, it left social and political agendas, which had hoped to catch a ride, in the middle of nowhere.

Discussing *Star Trek* fandom, Jenkins (1988) points out that the appropriation of mass culture texts is an important means of resistance “to build up support for such (meaningful social) change, to challenge the power of the cultural industry, to construct the common sense of a mass society, and to restore a much needed excitement to the struggle against subordination” (p. 104). Although Hu Ge probably could not be regarded as a “fan” of *Wuji*, Internet users’ use and interpretation of *Mantou* were also a form of “appropriation” through which the subordinated sought “to voice their frustrations and anger, and to share their new understanding with others” (Ibid., p. 104). While in the US in the 1980s, “Producers insist upon their (intellectual property) right to regulate what their text may mean and what types of pleasure they can produce,” in China in the 2000s Chen Kaige threatened to sue *Mantou* for copyright infringement and hired lawyers to send out cease-and-desist letters. Besides similarities across time and space, the hostility of Chinese copyright law toward parody works, as discussed above, put *Mantou* in a legal situation even worse than writings by *Star Trek* fans.

Considering the fact that Chen never really sued at the court, can we conclude that copyright control in the case of *Mantou* was less formidable and effective than it had first seemed? First, it must be noted that possible negative publicity is always the reason why most such lawsuits in the US never materialize (McLeod, 2007). Threats of intellectual property function more as a deterrent, rather than an actual prosecution in each and every case of alleged infringement. In the case of *Mantou*, copyright threats certainly engendered documented effects. Hu Ge, the producer of *Mantou*, explicitly stated that he would not take similar risks again (Yuan, 2006). At least one Internet company promptly removed *Mantou* from their web service after receiving

the cease-and-desist letter. For some Internet users, the case of *Mantou* directly related to their freedom of creation (Bai, 2006). Furthermore, the threat to *Mantou* took place in the context when “intervention into literary and artistic creation ‘by law’ has become an ugly fashion” in Chinese society (Zhu, 2006). Through the 2000s, literary works, critical news reports and plug-ins of free software in China faced accusations -- and convictions -- for libel, obscenity and copyright infringement; some of these prosecutions resulted in years of incarceration. Although *Mantou* was not really brought to a court, the “chilling effect” was difficult to ignore against the background of this “ugly fashion.”

It may be worthwhile to revisit Alford (1995) who maintains that there is a positive correlation between copyright and free speech in China, since they share a common enemy: the Chinese state. One of the major obstacles to IPR growth is the political culture in China that lays great emphasis on controlling and curbing the free flow of ideas. In his words, “A system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used” (p. 119). Copyright, being “a property interest in...creations that could be defended against the state” (Ibid., p. 18), fences off cultural control. However, as analyzed above, the hostility of Chinese copyright law toward “fair use” and parodies, as well as its repressive role in the case of *Mantou*, is at odds with Alford who made his arguments before media marketization in China sped up in the mid-1990s. At stake is the fundamental approach to conceptualize Chinese society, cultural production, and copyright.

The Chinese state in the last three decades embraced a capitalist agenda, under which corporate market power rose rapidly. In the communications sector, state-owned media corporations gradually transformed from propaganda organs into profit-seeking businesses, which worked to contain social unrest not only because of a Party mandate but also out of their own interest as capitalist enterprises (Zhao, 2008). Accordingly, tactics of cultural control transformed from coercive measures directly backed by state violence to a model of “privatization of control,” including market incentives to co-opt potential resistance as well as the outsourcing of control tasks to non-governmental agencies, e.g. Internet cafes (Zhou, 2010). It also included the employment of “legal” means, including intellectual property, to repress criticisms and contain social unrest. This was the context in which repression “by law” became “an ugly fashion” (Zhu, 2006), and copyright became “the censor’s tool” in contemporary China (Lessig, 2004, p. 186). If, in the context of the US, the capitalist class owns communication resources and employs intellectual property for cultural control (Bettig, 1996), the transformation of Chinese state and media in the last decades, which resulted in the dominance of capitalist agenda and interest in the cultural sector, have placed proprietary copyright control at the center of resistance and repression in Chinese cyberspace.

## **Conclusion: Between transforming laws and transforming practices: Dynamics, features and the future of copyright in China**

The role of copyright in the transformation of institutionalized media production and in the new technological environment did not contradict the fact that copyright enforcement in China, narrowly understood as crack-downs on “piracies” in the consumer market, remains very different from the West. However, media and communication industries in China grew at remarkable speed in spite of widespread unauthorized replication of copyright commodities including music and software products. This concluding chapter examines the features of industrial growth in Chinese communications sectors and the pursuits of copyright privileges by rights holders through both judicial and non-judicial means. It argues that market-oriented media growth and copyright development in China took place in a non-Western manner. This is an on-going process and it remains to be seen if (or how) the Chinese path of media growth and copyright development may converge with a theoretical Western liberal model. It is probably safe to predict, however, that the dynamics in Chinese media and copyright sectors will have significant impacts on the international stage. Copyright in China is not only important as a component of the global process of cultural commodification, but also as a shaping force that may affect cultural and industrial practices in other countries.

## Industrial growth under a “weak” copyright system

Market-oriented growth in China’s media and communication sectors during the last three decades has been nothing less than spectacular. An icon of Chinese media marketization, China Central Television’s (CCTV) advertising revenue increased by more than two thousand times in three decades (Huang, 2008). As discussed in Chapter Four, it took place largely in the absence of an effective copyright system, yet CCTV’s centralized power and its control over content and the network very well supported its advertising sales. Meanwhile, marketization in other media sectors also achieved astonishing growth. In the printing industry, out of previously Party papers grew lucrative businesses which unabashedly appealed to popular tastes and market demands even as they continued to promote and defend the dominance of the Party (Lee, He & Huang, 2006; Zhao, 2008). In the movie industry, *Wuji* and its like harvested staggering figures from the box-office and launched massive waves of promotion/propaganda campaigns sweeping through Chinese cities. The production of TV dramas prospered (Bai, 2008), targeting both domestic and international markets (Zhu, 2008). The Internet has had an explosive growth since its birth, and big commercial companies including Sina.com were public listed companies with billions in revenues. With over 20 million online gamers and the largest gaming population in the world, the video games industry generated 6.7 billion yuan in 2005 and continues to expand (Cao & Downing, 2008). In 2007, the Associate Director of the National Copyright Administration of China (NCAC) stated that the annual incomes from cultural industries and software industries in 2006 exceeded 370 billion yuan and 480 billion yuan, respectively (Cui, 2007). In 2010, a senior official of the NCAC stated that the output values of the software

industries and broadcasting and film industries had a 30% growth in 2009, reaching 950 billion yuan and 180 billion yuan, respectively. Composed mainly of publishing, animation, audiovisual and software industries, copyright industries in China contributed 6.5% of GDP and 6.8 % of employment in 2009, significantly higher than global average (Dou, 2010).

The remarkable growth of the cultural industries took place under a copyright system that was lambasted for its enforcement problems by the West. The International Intellectual Property Alliance (IIPA) is a private sector coalition of trade associations representing US copyright-based industries. Its member associations including the Business Software Alliance (BSA), the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA). Every year IIPA released a report on China's intellectual property practices in its Special 301 recommendations to the US Trade Representative (USTR) based on data provided by IIPA's member associations. Each and every one of these reports attacks China's copyright enforcement. For example, its 2011 Special 301 Report on Copyright Protection and Enforcement on China estimates that music piracies on the Internet alone deprived the entertainment industry of profiting opportunities that amounted to more than US\$ 2 billion (International Intellectual Property Alliance, 2011, p. 61). IIPA also published USTR decisions regarding trade losses due to copyright piracy in China in 2008 and 2009. According to IIPA's chart, trade losses in the business software sector due to piracy amounted to US\$ 3412.4 million in 2009, with a piracy rate of 79 percent. Trade losses in records and music amounted to US\$ 466.3 million in 2009, with a piracy rate of 90 percent (International Intellectual Property Alliance, 2010).

Meanwhile, however, strong criticisms regarding IIPA statistics arose from both in China and the US. In 2008, The Associate Director of State Intellectual Property Office (SIPO) stated that the piracy level for computer software in China was 41 percent in 2007, based on a study by a Chinese IT consulting company, Chinalabs. This was lower than 82 percent as published by BSA, which was duly included in IIPA's report in 2008. According to the SIPO, Western countries demonized software piracy in China ("SIPO official: Software piracy in China is demonized by foreign countries," 2008). A well-known IT critic in China argued that the BSA's statistics had major problems (Fang, 2004). A report by ChinaLabs on software piracy argued that BSA statistics suffered from three major flaws. First, BSA only calculated the piracy rates of its member companies' products, thus could not reflect the whole software market in China, which included many other transnational and domestic companies. Second, BSA used the piracy rate of personal computer software as the piracy rate of the whole industry. Yet personal computer software was only a small portion of the industry, which also included software services and system integration. Third, BSA's formula calculated the number of piracies, not the value of pirated products, thus overestimated the economic impacts of piracy ("Software piracy in China" Work Team, 2007). On the US side, at a hearing held by the U.S. International Trade Commission (USITC) in 2010, a Harvard business professor argued that transnational corporations' method to calculate businesses' loss due to piracy might exaggerate the damages, because "[T]he estimates of monetary damages released by many U.S. industries often assume that a pirated copyright of a product like software or a music CD blocks the sale of an authorized copy, when that may not be the case" (Gross, 2010).

In spite of disagreements on statistics, both foreign and domestic communication companies believed that the levels of “piracy” in the consumer market worked against business models prevalent in the West. Business analysts propose various ways to do business in China, including working with the government, enhancing control and monitoring in management and at workplace, offering local pricing and profiting from services rather than products (Blodget, 2005; Swike, Thompson & Vasquez, 2008). A Beijing-based lawyer working at a leading firm providing legal services to transnational media and telecommunications corporations strongly advised his clients to change business strategies. According to him, market practices in the West could not be transplanted because of different circumstances regarding intellectual property, but the Chinese market was nonetheless full of opportunities. The key to market success was to come up with new, creative business models (Interview with legal professional, January 12, 2009). As a matter of fact, in both computer software and the music industry, two industrial sectors most vulnerable to “piracies,” transnational and domestic businesses have developed new business strategies that worked reasonably well.

Microsoft entered China in 1992. During the first decade it tried to carry its business model from the US and Europe to the Chinese market. This strategy failed miserably because, according to an article in Fortune Magazine, everyone was using Windows but no one paid Microsoft. Fifteen years later, Bill Gates conceded that: "We were a naive American company." Microsoft realized that it had to re-design its market strategy to radically change its pricing, be more flexible regarding intellectual property and partner with the Chinese government. In 1998

Microsoft opened a research center in Beijing and hired some of the best software talent in China, people who later contributed key components to Microsoft's leading software products. Regarding intellectual property, Bill Gates publicly stated that "piracy" in China helped Microsoft rather than worked against it. Cheap, unauthorized copies of Microsoft software drove other manufacturers and open-source software out of the market, and in some cases made Microsoft software de facto standard applications. Therefore, when the Chinese government (lobbied by Microsoft) issued orders to require all manufacturers to pre-install operating systems on computers they made, Microsoft had a dramatic market growth because Microsoft Windows was the No. 1 choice for Chinese computer users who seldom had experience with other products. In 2007, Microsoft expected its sales in China to reach US\$ 700 million, up three fold from 2004 (Blakely, 2007; Kirkpatrick, 2007).

After eighteen years, Microsoft had mastered the skills to profit from the Chinese market. It worked hard to forge ties with Chinese government including hiring former governmental officials as Microsoft's senior managers, which partly contributed to President Hu Jintao's visit to Bill Gate's home in 2006. Having secured the support from the Chinese government, Microsoft set out to quench unauthorized copying and use of its products. In April 2010, a People's Court in Shanghai asked Shanghai-based Dazhong Insurance (*dazhong baoxian*) to pay Microsoft 2.17 million yuan in compensation for using 450 unauthorized Microsoft software products – more than 4,800 yuan (US\$700) for each copy, which was dramatically higher than average market pricing. Among a series of Microsoft's litigations all over China, the lawsuit against Dazhong Insurance was the first against a major state-owned corporation and resulted

in the highest compensation award. Chinese critics pointed out that Microsoft had developed a network that included law firms, sales agencies as well as local governmental organs to work together to track down companies that used unauthorized Microsoft products. Backed by a number of court cases including the case against Dazhong Insurance, Microsoft launched charges against a number of companies and forced them to pay compensation calculated largely on the basis of Microsoft's pricing. Fang Xingdong, a well-known IT critic in China, estimated that 80 percent of Microsoft's revenues in China came from these counter-piracy initiatives (Li, 2009; Xiao, 2010).

The music industry, according to the chairman and CEO of International Federation of the Phonographic Industry (IFPI), relies on effective copyright protection. According to him, copyright "underpins the music industry" and "is at the heart of our business model." However, copyright protection is badly inadequate in China where about 90 percent of all recordings are illegal. "No creative or knowledge-based industry can hope to survive in such an environment" (Kennedy, 2006). Nevertheless, the music industry in China still grows and prospers. While business models in the West rely on selling recordings in the market, Chinese companies choose to bundle music rights and artist management. In its dealings with artists, a company will control both the rights to publish and distribute music recordings and the rights to arrange live performances and to earn money as the manager. In the mobile music market, the dominant service provider, China Mobile, developed a business model to sell music as caller ring-back-tones. This service allows the caller to hear music instead of regular "ringing tones" when calling a mobile number. Instead of ring tones stored at user-end mobile devices, ring-

back-tones are controlled by the mobile service provider who charges a fee to subscribers. This centrally controlled distribution of music generates music revenues that are effectively controlled and monitored. It rendered “piracy” impossible and generated substantial revenues from recorded music (Montgomery, 2009).

The cases of Microsoft and China Mobile partly explain the incongruity between “weak” copyright enforcement in China and growth in media and information industries. They share features in common with the case of CCTV (Chapter Four) in that control mechanisms other than copyright worked to generate profit. For CCTV in the 1990s, centralized power and industrial dominance conferred on CCTV all-around control over its programming and rendered copyright ownership less significant. In the case of China Mobile, technology ensured that the access to ring-back-tone music had to go through a centralized hub in the network, which effectively constructed a mechanism to exclude unpaid access and to monitor transactions. The case of Microsoft was a little more complicated in that “piracy” paved the way to profits by nurturing a market before Microsoft partnered with the government. The Chinese state’s goal to promote intellectual property was then bonded with Microsoft’s interests: when the former ordered all computers sold in the country to have operating systems pre-installed, it in effect asked all computer manufacturers in China to purchase Microsoft products. In addition, backed by the People’s Court, Microsoft chased down business “pirate” users and generated significant revenues. Here, market successes were closely linked to the ability to exert centralized control, either by working with the government or making use of technology or market tying practices. Copyright was not at the core of this market growth.

Thus, contemporary China seems to present an alternative business model in communication sectors which is not (solely) based on copyright. China's media reform policies laid great emphasis on transforming existing state-owned enterprises so as to create a small number of market powers controlled by the party-state (Zhao, 2008). Market concentration and monopoly, rather than competition, are likely to be the dominating feature of the growing cultural and information industries in China. Meanwhile, however, centralized control and copyright control do not work against each other. Centralized control can work as an effective mechanism to monitor consumption and collect payment, while strengthened enforcement of copyright in the consumer market will provide new sources of revenues for industrial monopolies. Besides, increasing levels of copyright protection are unlikely to lead to the birth of new competitors to challenge existing market powers. The case of CCTV demonstrates how a monopolistic media corporation can reinforce its dominance in the market and control production resources as well as distribution networks through, not in spite of, copyright. The case of Microsoft shows how support from centralized political power could help it to fully exploit copyright proprietorship under circumstances of intellectual property in China. Monopolies do not fear copyright growth but welcome it.

In addition, enforcement of copyright, narrowly understood as the elimination of "pirate" consumer products and the prosecution of criminal activities, are taking on new looks in China in the 2000s. Copyright infringements were criminalized quickly and punished harshly (Liu, 2010). Intense media publicity of cases of prosecution worked to deter violations and to

showcase China's achievements in intellectual property. At the same time, copyright played important roles in different cultural sectors and injected new dynamics in the transformation and privatization of culture and entertainment.

### **Criminal prosecutions and media publicity**

One of the foci of US pressure on China regarding intellectual property is on criminal prosecutions. The President of IIPA insisted that the main priority of US entertainment industries in the Chinese market was to engender criminal prosecutions of copyright violators (Chartrand, 2004). In 2007, the US filed a complaint to the WTO regarding intellectual property in China, which treated criminal prosecution of copyright violations as the core issue. According to the US, the threshold for invoking penalties in China was too low, and the application of criminal procedures and penalties for "piracies" was too narrow (World Trade Organization, 2010). However, a study across eleven years from 1998 to 2008 showed "a consistent pattern of increasing criminalization of IP infringements and strengthening of criminal enforcement" in China. In 2008, the Criminal Enforcement Strength Index of China was actually higher than the US, which means that criminal punishments for IPR violations in China were actually stronger than in the US, at least quantitatively (Liu, 2010). Is China really punishing IPR violations more harshly than the US? What are the social and historical contexts in which this takes place, and how does it inform us of intellectual property enforcement in China?

Liu (2010) provides a detailed account of criminal enforcement of IPR in China. She argues that there was a steady pattern of rapid criminalization of IPR infringements throughout the last decade, both on the books and in action. While the Chinese Criminal Law only has general guidelines on the prosecution of IPR infringements, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) issued two Interpretations in 2004 and 2007, respectively, to detail definitions and scope of criminal activities and prosecutions. It is a commonplace practice in China for laws made by the NPC to be supplemented by regulations made by the State Council or by judicial interpretations from the SPC and SPP. These interpretations have binding force for all courts, thus in effect have the power of law. The Interpretation in 2004 defines key legal concepts and details the "thresholds" for criminal prosecutions. Under intense US pressure, the Interpretation in 2007 revised the 2004 Interpretation and lowered the prosecutable thresholds substantially. It also imposed harsher measures including limiting the application of probation in criminal verdicts. On a different occasion in 2005, the SPC and SPP also made it clear that replication and distribution through the Internet were also subject to criminal prosecutions.

The enforcement of the Law and the Interpretations were indeed harsh. In eleven years from 1998 to 2008, the number of criminal IPR case increased at an annual rate of 24%. A comparative study between China and the US shows that the enforcement of IPR in China was actually stronger. Based on statistics in 2008, the study first calculates the conviction ratio per capita by dividing the number of people convicted under IPR offenses by the total population. Then, using software piracy rates (published by BSA) as an index of IPR infringement rate, the

study divides conviction ratio per capita by software piracy rate to calculate the Criminal Enforcement Strength Index. The results are shocking. In 2008, there were 4.05 people convicted of IPR crimes per million people in China. With an 80 percent piracy rate, the Criminal Enforcement Strength Index is 5.06. The US in 2008 had 0.89 people convicted of IPR crimes per million people. With a piracy rate of 20%, the Criminal Enforcement Strength Index is 4.44, about 12 percent lower than China. In other words, this criminology study shows that an IPR criminal is more likely to be caught in China than in the US (Liu, 2010).

Table 2 China-US Major Criminal IPR Enforcement Indexes Comparison (2008)

	<i>Software Piracy Rate</i>	<i>Number of Persons Convicted</i>	<i>Ratio Per Capita (pmp)</i>	<i>Criminal Enforcement Strengthen (pmp)</i>	<i>Conviction Rate for Criminal IP Cases</i>	<i>Rate of Prison Sentencing (Year 2004)</i>
China	80%	538	4.05	5.06	99.96%	41.3%
<b>USA</b>	20%	270	0.89	4.44	84.40%	49.2%

Source: Liu, 2010, p. 149.

Perhaps surprised by her own findings, Liu (2010) cautions that the data on China are provided by the Chinese government, which does not specify the methods to collect and report information. If the Chinese government, which has always been suspected of manipulating statistics, does exaggerate the number of IPR criminal cases so as to mitigate foreign pressure, the real Criminal Enforcement Strength Index will be lower than calculated here. However, the

denominator in the calculation -- the software piracy rate -- is provided by BSA, whose methods are flawed and who has strong incentives to exaggerate their losses (Gross, 2010; "Software Piracy in China" Work Team, 2007). If the piracy rate of 80 percent is overstated, then the real Criminal Enforcement Strength Index of China will be even higher and present an even more stringent enforcement scenario. Furthermore, as Liu (2010) also notes, a large number of minor offenses in China are investigated and punished through administrative procedures and do not trigger criminal investigations, as would be the case in the US. If these offenses were also counted as criminal IPR cases, the numbers of criminal prosecutions and the Index would further increase.

Two copyright criminal cases that received heavy media publicity demonstrated the realities of the Chinese copyright system. On August 21, 2009, the *Financial Times* publicized "a landmark victory against Chinese piracy" when the Suzhou Intermediate People's Court jailed four people and imposed harsh fines for modifying and distributing Microsoft Windows XP over the Internet (Lau, 2009). Hong Lei, a software engineer with an associate degree, modified the Microsoft operating system, created his Tomato Garden (*fanqie huayuan*) version of Windows XP and made it available through his website. Tomato Garden soon became the most widely used (unauthorized) version of Windows XP in China. Hong was detained right before the Beijing Olympics and received his conviction one year later: three and a half years in jail and one million yuan in penalties. In a high-profile manner, Microsoft and BSA admitted that their complaint to the Ministry of Public Security led to Hong's detention and thanked the Chinese government (and the court) through the media right after the verdict. Microsoft also stated

that this case would serve as a warning to potential piracies of Window 7, its next generation operating system to be released two months after. This conviction sent a shock wave through Chinese software, computer and Internet industries. Hong Lei stated in an interview that he would never have distributed Tomato Garden had he known that it would lead him to jail. The CEO of a video-sharing website maintained that criminal prosecutions in this case would deter many Internet companies to risk challenging copyright proprietorship. A member of Chinese Engineering Academy published an article arguing that China should learn a lesson from the case by developing open-source software and domestic software industry (“Interview with author of Tomato Garden,” 2010; Lau, 2009; Niu, 2008, 2009a, 2009b; Ni, 2008; Yang, 2009).

In another widely publicized case, a university research staff/teacher was sentenced to three years in jail for creating and distributing a plug-in for a free IM (instant messaging) application for a Chinese company. Chen Shoufu, Director of the Computing Center of Beijing Institute of Technology, cultivated a plug-in for Tencent’s QQ, which was the most popular IM application in China. Known as *shanhuchong*, or coral QQ, Chen’s plug-in enhanced some of QQ’s functions and removed some others, e.g. advertising. Chen distributed his plug-in over the Internet both separately and bundled with QQ, which was distributed by Tencent for free. In 2007, Chen was detained for copyright infringement and was sentenced to three years in jail in 2008. Chen appealed but the appeals court maintained the verdict.

The conviction of Chen was very severe and triggered revolts among Internet users. Chen and Tencent had had extensive interactions before, including friendly co-operations to distribute

QQ as well as a litigation in a civil court in Beijing, which only partly supported Tencent's claims and awarded merely one hundred thousand yuan in compensation. Judges in Shenzhen, where Tencent was based, apparently favored Tencent more than their Beijing colleagues. A criminal court in Shenzhen jailed Chen three years and imposed a penalty of 1.2 million yuan. In their ruling they ignored Chen's attorney's arguments and evidences, as well as an *amicus* brief from well-known legal experts which argued that Chen's activities did not constitute a crime. Key issues in dispute included whether a plug-in was a copyright infringement, whether Chen's distribution of Tencent QQ constituted a criminal offense and whether revenues generated through *shanhuchong* were illegal, but the court did not address any of them and simply claimed that Chen had committed a crime. Tencent denied that it manipulated the prosecution from behind the scenes, but they apparently learned the verdict before it was announced. Supporters of Chen set up a website, [www.helfsoff.com.cn](http://www.helfsoff.com.cn), to protest against the conviction. Till today, the website is still running and has frequent new, flaming posts attacking Tencent. Nevertheless, Chen spent years in jail ("Creator of *shanhuchong* jailed for three years with 1.2 million in penalty," 2008; Meng, 2007; The Alleged First Trial Verdict of the case of *Shanhuchong* QQ, 2008).

In addition to quantitative criminology research (Liu, 2010), the cases of Tomato Garden and *shanghuchong* provide qualitative evidence of harsh criminal prosecutions of IPR infringements in China. The two cases demonstrate Chinese judicial organs' determination to side with copyright proprietors and to prosecute infringements. Meanwhile, intensive media publicity in both cases worked to disseminate warnings in the Chinese society. Microsoft and BSA hailed

the case of Tomato Garden as a milestone victory in the Chinese market. Tencent celebrated the protection of its intellectual property by feeding news stories to the media. Shenzhen's local TV even produced a program to applaud the conviction. The program's title, *The shanhuchong that flew into fire*, borrowed from the Chinese saying, the moth that flew into fire, and depicted Chen as a blind insect that chased self-destruction. Software products similar to Tomato Garden disappeared almost overnight after Hong Lei's detention. The author of *shanhuchong*, having spent years in jail, no longer works on software but at a group-shopping website, where groups of consumers band together to buy goods at wholesale prices. The power of deterrence in both cases was strong and far-reaching.

### **Power and profits of collective management**

Authors and composers worked hard to push for the making of the copyright law after the late 1970s (Li & Chang, 2007, pp. 143-166; Shen, 1998, pp. 29-30). Advocates of copyright argue that copyright protects the creations and works of talented individuals. However, dealing with issues of licensing and remuneration collection in some instances, e.g. broadcast music, can be overwhelmingly time-consuming and difficult for individual authors or artists. Collective management organizations address the problem by granting licenses and collecting remuneration on behalf of individuals and distributing revenues among member authors or artists. The first collective management organization in China, the Music Copyright Society of China (MCSC), was founded under the auspices of the NCAC in 1992. In 2004, the Regulation of Copyright Collective Management set forth basic principles for establishing collective

management organizations. It authorized the NCAC to administer collective management activities in all over the country and stipulated that only one collective management organization is allowed in each copyright sector. In other words, copyright collective societies must be national monopolistic organizations under the auspices of the NCAC. The making of the Regulation and the subsequent establishment of a number of copyright collective societies took place when the growth of media and entertainment industries created a large market for music and audio-visual products. One good example is the growth of karaoke services all over China and the copyright controversies that accompanied it.

Beginning in the late 1990s, karaoke bars became very popular in Chinese cities. Also known as KTV, a typical karaoke service in China has a number of private rooms with karaoke equipment and charges customers by the hours the rent the rooms. At the center of a karaoke room is always a big screen that shows karaoke videos, which are sometimes music videos produced by the record company. KTV services in China had been paying the MSCS music royalties for several years beginning the late 1990s. However, a round of litigations targeting the copyright of karaoke videos (instead of music) swept through China after 2003. In 2004, International Federation of the Phonographic Industry (IFPI) retained law firms and sent attorney letters to twelve thousand karaoke businesses all over China. The standard letter stated that a given karaoke bar had infringed IFPI's member companies' copyright by using their music videos, demanded compensation and threatened to sue. Some karaoke bars were later sued in the court, lost the case, and were ordered to pay high compensation. This massive wave of legal action again sent a shock wave through the industry (Lei, 2006; Shao, 2004; Sun & Chen, 2006).

At the end of 2005, the NCAC approved the establishment of China Audio-Video Copyright Association (CAVCA), which immediately began to work on karaoke video licenses. The management fee of collective licensing was clearly the major motivation, in what became a big turf-fight. Prefaced by the NCAC's warning against illegal, de facto collective management activities by some copyright agencies, the CAVCA soon engaged in a head-on confrontation with the Ministry of Culture. As the regulator of the cultural and entertainment market, the MOC asked its affiliate, Cultural Market Developmental Center, to monitor the use of music and music videos in karaoke bars and to "solve" the copyright problem by collecting royalties. NCAC/CAVCA fought back and stated that collective societies under the NCAC were the only authorized organization to issue copyright licenses and collect payments. The media quickly caught the undertone in the tug-of-war and pointed out that both governmental organs were eyeing the management fee – it was estimated that karaoke copyright payments would amount to about ten billion yuan each year in the whole industry (if all duly paid), which translated into roughly two billion in revenue for the managing corporation (Liu & Wang, 2006). The eventual resolution was to have NCAC affiliated copyright societies, in this case the MSCS and CAVCA, work together to collect copyright payments for both music and music videos. MOC as the regulator of karaoke businesses would then receive eight percent of the total gross revenue inclusive of management expenses and charges. In 2010, the CAVCA passed the plan to distribute royalty payments from karaoke bars, which quantitatively detailed the stakes in collective management. The total revenue to be distributed in 2010 amounted to 120 million yuan. The MOC received eight percent, roughly 10 million yuan. Management fees and

expenses for CAVCA and its affiliate amounted as high as fifty percent of the remains, or 55 million yuan, much higher than twenty percent as previously promised by CAVCA (Zhu, 2010).

CAVCA's approach to collect copyright payments from entertainment businesses did not work as efficiently as planned, which gave a good lesson for another collective agency, the China Film Copyright Association (CFCA). CAVCA set up offices all over China and negotiated with local karaoke bars. If it did not work, they filed complaints to local governments or sued in court. After more than 160 complaints and 800 lawsuits all over the country from 2007 to late 2009, CAVCA only managed to issue 3,000 licenses and collected 170 million yuan from music and music video royalties combined. The numbers of obliged karaoke bars were only one fourth of those contacted by IFPI in 2004, and the payments collected were far less than the figures estimated by the media. To make things worse, setting up offices and launching lawsuits cost tremendous time and money. Founded in 2009, CFCA took a different approach. It aimed at Internet cafes and long-distance bus services that showed movies to customers. Instead of establishing branches and launching lawsuits, CFCA planned to hire local people "with connections (*you renmai guanxi*)" to collect payments and to pay them commissions. It triggered an outburst of criticism and skepticism from the media and online. A widely circulated posting on the Internet questioned the use of *guanxi* (connections) to claim a legal right, asking: "Is the fee going to be collected by 'law' or by '*guanxi*'...Does it rely on 'law' and 'order,' or on 'fists' and 'power'?...Who are these people 'with connections' anyway? Powerful local officials, or thugs and gangsters" (Yang, 2010)?

The rise of copyright collective management in China was a recent phenomenon still unfolding, but it has shown some disturbing trends. The establishment of copyright societies in China was initiated top-down and was stipulated by law to be monopolistic. Backed by state organs and without effective bottom-up mechanisms to restrain them, they had strong tendencies to grow into profit-seeking corporations that parasitized established interests and used copyright privileges to pursue profits for their own ends. CAVCA pocketed fifty percent of all copyright royalties collected as management fees, which was an astonishing high percentage by any standard. As CAVCA acknowledged, the rule of thumb in other countries was to charge at most twenty percent. Thus, tariffs levied from karaoke businesses in the name of copyright did not make individual composers and authors wealthy but passed a remarkable share of market profits to an industrial monopoly created out of thin air. CFCA pushed the line further by planning to hire people “with connections” to collect payments. The development was so recent that it remained to be seen how it would work out. If CFCA works with local governmental organs that have “real” power to control local businesses, e.g. industrial and commercial bureaus that issue or revoke business licenses, the collection of fees under the name of copyright will become a de facto tax. If CFCA relies on local officials’ personal influence and power, then it will probably feed into networks of corruption. If thugs and gangsters are involved, as some have worried, then the copyright law will become a new revenue source for organized crime. Probably the only thing can be sure at this point is that, in either case, individual artists will not be the major beneficiaries. Although CFCA had promised to control the management fee – leaving it at under twenty percent, there was no real mechanism to make them keep their promise. CAVCA had made the same promise before, yet this did not prevent

them from pocketing half of the payments collected. In addition, neither CAVCA nor CFCA had a clear plan to monitor the usage of copyrighted works, which was indispensable if royalties thus collected were to be distributed to individual artists. Indeed, composers complained strongly against MSCS regarding the distribution of copyright payments. Some composers received only meager payments without details or breakdowns, and some others simply received nothing, while their works were widely used (Huai, 2011; Liu, 2011).

### **Copyright as social relationship**

Legal studies tend to view copyright in China in two overlapping phases: legislation and execution. This was exactly the US's approach to IPR on the international stage: the US first pressured a foreign country to make or revise its laws and then pressured on enforcement. The 1989 MOU stipulated the scope and content of the yet-to-be-born Copyright Law, and the three MOUs that followed gradually shifted the focus to enforcement. Scholarly publications followed suit. In the mid-1990s Alford (1995) did a comprehensive analysis on the texts of China's Copyright Law, Patent Law and Trademark Law. In the 2000s, after China's IPR laws had all met with "international" standards prescribed in conventions including the Berne Convention, the Universal Copyright Convention and the Trade-Related Aspects of Intellectual Property Rights (TRIPS), Mertha (2005) and Dimitrov (2009) extensively examined the problems of enforcement. Again, this is not to blame individual researchers but to point to the uncritical trend in academia and the publishing industry. Though interesting and sometimes useful, an uncritical legal

approach misses the mutual constitutive relationship and the social dynamics *between* law and practice.

When “law” is the frame of reference, contestations and disagreements can result in new laws made or old laws revised; social injustice can always be interpreted as either a bad law being in place or a good law not being enforced properly. As for copyright in China, when all legal codes are in accordance with “international” norms, the problem must be with enforcement and the research focus needs to be on state organs that enforce the laws. This is the rationale behind the shifting focus on China’s bureaucratic structure and the “quality” of IPR enforcement (Dimitrov, 2009; Mertha, 2005). A different, social approach treats law as one manifestation of transforming social relationships and is concerned with the dynamics of social conflict and control. Law is not necessarily the key marker in social life but one of many forms of embodiment of power configurations. Law as a subject of research is not only a set of rules and their implementation but also a constantly changing process in which different social forces and interests strive to utilize specific state organs to intervene and to adjust social relationships. There is nothing like an unchanging, inviolable law, according to which people’s activities and behaviors are regulated. Law is an expression of social relationship. It can only be understood in the context of social transformations and, in the case of copyright, in the context of cultural and industrial practices.

This is the basis on which my dissertation reviews the history of copyright in China, as an idea, a set of legal codes and an industrial practice. Copyright law did not crystalize only from abstract

philosophical ideas. The idea and practice that treated literary works as privately controlled and tradable products existed in China long before the Western concept of copyright was imported in the nineteenth century. It was during China's involuntary encounter with Western capitalism and Chinese elites' effort to learn from the West that copyright slowly rose in significance. It became an industrial practice before the law was made. It enriched big businesses and people with power and prestige. It paid deference to social hierarchies, whether constructed from dynastic legacies, capitalist market growth or top-down political maneuvers. Copyright in today's China developed in the context of dramatically changing social structure and drew on practices and ideas from a century-long history. The market reform did not start in isolation from the pre-reform Chinese society. The marketization in the cultural sector and intellectuals' rise in social status were not natural occurrences or inherently righteous. Rather, they manifested attempts to reverse social changes in preceding decades with market-oriented agendas based on new social hierarchal orders. This is the starting point to critically analyze copyright and communication in today's China.

A Western liberal model of copyright could not possibly be born out of Chinese society and global political economy in the last three decades. In this model, copyright goes hand-in-hand with individual political and social freedom and local stakeholders are the ultimate driving force for copyright development (Alford, 1995). Copyright does not only provide incentives to creation but also contributes to democracy by supporting individuals with resources independent from either the state or corporate powers (Netanel, 1996). However, copyright growth in China's market reform is part of a state-led developmental project. Not only was it

initiated top-down, but it also relied on Party propaganda machines and strategies to mobilize popular support. Chinese private businesses are neither major beneficiaries nor the most ardent advocates of copyright in China. Western countries have been making all-out efforts to mold the Chinese market for the benefit of transnational corporations. In some instances, only by resisting foreign pressure could the Chinese government help domestic industries (Montgomery, 2009). Domestic market giants transformed from Party media dominated cultural and media industries as monopolistic copyright owners (in the making) that exploited individual talents, who had to transfer control over their works to the new market powers. The further copyright in China grows on its current path, the further it deviates from a liberal democratic model.

Copyright in China is not only about law and punishment. It is also about bias and balancing of conflicting interests in court cases, market negotiations and labor relations. The case of CCTV (Chapter Four) demonstrated how imbalance of power between an industrial monopoly and individual workers and artists could lead to unbalanced copyright control over media products. In the lawsuit regarding CCTV's logo, the skewed interpretation of the law did not only reflect the bias of that particular court or even of the judicial system. It demonstrated how the Chinese copyright system, contested in different arenas including the legislative, the judiciary, the market and the workplace, slanted towards established interests. The bias of copyright showed even more strongly in the case of *shanhuchong* (coral QQ), when the court brazenly ignored key issues in dispute and hastily sent the defendant to jail. Instead of seeing it as a distortion of an abstract, fair law, it makes more sense to treat it as a typical instance of copyright in practice in

different social arenas. Indeed, the implication of a copyright case can only be understood in a broader context. For example, the two comedy artists' victory in court vis-a-vis CCTV/CITVC was in effect neither a victory for them nor for individual artists, after which they were shut off from the national television network and their peers were forced to sign template copyright transfers with the industrial giant (Chapter Four). Copyright as de-contextualized occurrences in judicial occasions does not make more sense than a game on the chessboard. It has to be contextualized in a network of constantly transforming social relationships.

Moreover, copyright in China is more about who pursues copyright privileges, through what means and with what outcomes, and less about the content of the law. In the US context, big businesses negotiated and divided up the cultural and informational market by means of copyright law (Litman, 2001). Issues of high stakes were generally contested before the law was made. However, copyright law in contemporary China was largely a state-led initiative with significant impact from the West. One of the consequences of a top-down imposed legal system was its "incompatibility" with existing industrial practices. This was the context in which even state-owned leading media like CCTV had significant problems adjusting production and management to cope with copyright. The significant gap between the law and practice gave rise to highly visible conflicts over issues of high stakes *after* the law was made. It led to a somewhat funny situation in which stakeholders might discover, all of a sudden, that the Copyright Law had put them in unexpected yet substantial advantageous or disadvantageous positions. This was how a retired employee found out he could sue CCTV for the corporate logo and caught the media giant by surprise. This was also how copyright collective organizations

like CAVCA and CFCA triggered such repercussions in the industry – it was an intrusion of an “outsider” into entertainment industries to siphon market earnings and to change the way profits were divided up among different parties, which took shape through years of in-fighting and negotiation.

It is in this sense that the notion of “law enforcement” is seriously flawed for a critical understanding of copyright in China. The term “enforcement” implicates a scenario in which a few asocial outlaws tracked down and duly punished by the noble and just law. Yet in the Chinese scenario, not only underground CD factories but also leading state media corporations like CCTV had their production and management seriously at odds with the Copyright Law. The implementation of the law was a major site of social conflicts and hosted no less, if not more, battles than the making of the law. The notion of “enforcement” cannot reflect this widespread copyright incompatibility in cultural and media industries and the structural collisions that took place *between* the law and industrial practices. The features and dynamics of copyright and communication in China must be observed from the actual functioning of copyright in media and cultural practices, rather than from de-linked processes of legislation and enforcement.

Copyright in China has been undergoing rapid growth and transformation. Still an unfolding process, it has shown three defining features in the media and communication sectors. First, copyright in China has proved to have a pro-business bias. As discussed in Chapter Four, the copyrightization of labor relations in media institutions took place when media workers were non-unionized and unable to challenge institutionalized powers as unorganized individuals.

Copyright reforms in state media corporations were (and probably will continue to be) corporate initiatives to concentrate copyright ownership at the cost of workers' control over outputs of their labor. Second, copyright law and practices had a distinct bias toward proprietary privileges and were repressive of cultural and expressive freedom. The case of an online video in Chapter Five demonstrates how the code of copyright in China shows strong hostility towards "fair use." Together with the cases of *shanhuchong* (coral QQ), discussed in this chapter, market powers have proved their determination and power to wield "legal" weapons of copyright to quench criticisms or technological innovations at odds with their market interests. Third, the realization of copyright interests has shown strong tendencies to adhere to existing power structures and to work with established interests. CCTV's copyright reform helped a dominating propaganda organ to transform into a monopolistic copyright owner. China Mobile's ring-back-tone business was based on centralized communication control and industrial dominance. CFCA planned to hire and to pay local people with (legal or illegal) power and connections to collect royalty payments. None of these features provides incentives to individual talents, promotes market competition, contributes to free speech or gives structural support for independent expression, which are all merits and hopes that have been loaded onto the notion of copyright.

### **Culture: China's new strategic industry?**

State policy in the late 2000s pushed for the marketization of cultural and media sectors more vigorously than ever. In 2006, the Party's Central Committee and the State Council jointly

issued the first long-term national plan to develop the cultural sector, “National Cultural Development Plan Outline during the Eleventh Five-Year Plan,” which laid significant emphasis on developing cultural industries and markets as well as protecting intellectual property. In September 2009, the State Council promulgated The Plan to Promote Cultural Industries (*wenhua chanye zhenxing guihua*). It aims to “fully utilize the important function of cultural industries in restructuring industries, enhancing domestic demands, increasing employment and facilitating development,” and addresses the “urgent need to cope with global financial crisis and to develop and reform the cultural sector.” According to the *People’s Daily*, the Party’s mouthpiece paper, the Plan marked the rise of cultural industries into one of the nation’s strategic industrial sectors. These industrial sectors, also including steel, automobile and textile industries, were to undertake the task to lift China out of the global crisis (“An important measure to promote the development of the cultural industries,” 2009).

The new initiative unhesitatingly and thoroughly treated culture as a site of economic exploitation. The Minister of Culture was fluent in using economic terms to discuss cultural development. According to him, the implementation of the Plan would have “great impacts on the transformation of economic growth path and the adjustment of economic structure.” The benefits of the cultural industries included less pressure on the environment, high added value and independence from economic fluctuations. The making of the Plan aimed at developing cultural and media industries as the new growth edge so as to prevent an economic downturn (Yan, Zhang & Guo, 2009). A key measure in the Plan was to transform cause-oriented cultural enterprises (*wenhua shiye danwei*) into profit-seeking enterprises (*qiye*). In the Chinese

language, this was a one-character change from *shiye* to *qiye*. Literally, it meant that “culture” remained to be the Party’s cause (*ye*), though with new profit-oriented goals (*qi*). The Plan marked a thorough, market-oriented turn and treated culture as an industrial undertaking (*qi*). It included five measures in support of cultural enterprises, including measures on capital and funding, tax, finance and investment, all of which were market incentives. Meanwhile, however, the transformation of state cultural institutions showed continuity in state policy: “culture” still remained a cause (*ye*), to be used to feed productions to the people instead of facilitating bottom-up participation and creativity. The term “cultural subsistence allowance” (*wenhua dibao*), coined by the Minister of Culture (see Huang, 2006; Jiang, 2006), was reflective of this policy change as well as continuity. “Cultural subsistence allowance” aimed to provide free or low-cost access to cultural facilities to the low-income population. It justified the dominance of profit motives in the cultural sector by providing a “safety net” for the economically disadvantaged, which served to appease the disgruntled rather than to challenge the inequality resulted from the market. On the other hand, it reinforced the notion that culture was a product institutionally produced for consumption. The demarcation between cultural production and consumption/usage was indispensable for both marketized media and propaganda media.

A distinct feature of the Plan was to cultivate a large cultural market dominated by a small number of state-owned “backbone” corporations. It emphasized the market-oriented transformation of state-owned media corporations, a policy choice that ran through the media reform. The Plan called for “concentration of cultural resources to leading corporations” and

encouraged acquisitions and mergers so as to create “backbone” corporations (“An important measure to promote the development of the cultural industries,” 2009). According to high-ranking officials, this served to strengthen the control and influence of state cultural capital and to “make China’s aircraft-carriers (in the cultural industries).” The ultimate goal was to create a “Chinese national team” of cultural enterprises in order to increase China’s “cultural competitiveness (*wenhua jingzhengli*)” and “cultural soft power” on the international stage (Yan, Zhang & Guo, 2009). While the reform and restructuring of the cultural sectors had clear and ambitious global agendas, they also demonstrated a passion for monopolistic corporate power as well as an indifference toward media labor and social and political functions of culture and communications.

Under the new initiative, copyright is likely to make significant growth on its current path. An official in the Policy and Regulation Department of the Ministry of Culture argued that intellectual property was at the core of the development of the cultural industries. In his words, “our cultural systems owned rich cultural resources, which we must transform into industrial advantages” (Zhang, 2010, p. 26). It is foreseeable that leading media corporations in China will work more vigorously to translate their political, economic and social influences and power into copyrighted properties in ways similar to CCTV’s copyright reform. Once transformed into large-scale intellectual property owners, they will be in an even better position not only “to exact monopoly rents from consumers but also to siphon surpluses from the wage earners and independent contractors whose collective labors produced these commodities” (Schiller, 2007, p. 30). Given the scope and force of copyright control, the intellectual property monopoly by a

small number of state-owned media companies will further deprive the public of not only free access to knowledge and information but also the resources and means of cultural production and creation. Of course, this is not an attempt to foretell a bleak future for an on-going and vehemently-contested historical process. On the contrary, to identify the features of copyright and media growth is a first step for any meaningful intervention into the marketization of cultural and communication sectors in today's China. In merely three decades, "culture" in China swayed from being "revolutionary" to being "strategic" and "industrial." The complexity and implications of such dramatic transformations open up a vast area for social and academic inquiries, to which this dissertation strives to contribute.

## Notes

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<sup>1</sup> General Secretary of the Party in 1979 was a top-ranking position, but not yet the head of the Party as it later became.

<sup>2</sup> During the 1990s, intellectuals as a distinct social group showed signs of disintegration. On the one hand, sharp disagreements emerged between different understanding and interpretations of Chinese society (Wang, 2003), and intellectuals split up in a way not unlike the historical precedent after the May Fourth movement (Xu, 2004). On the other hand, the professionalization of scholarship took place in accordance with social stratification, and the intellectuals of 1980s were gradually transformed into experts, scholars and professionals (Wang, 2003, p. 143). Heated debates between intellectuals in 1990s and after reflected their increasingly visible division along class lines.

<sup>3</sup> I thank professor Yuezhi Zhao at Simon Fraser University, Canada, for this point.

<sup>4</sup> Full text of the Summary is available at

[http://www.sipo.gov.cn/sipo2008/yw/2008/200806/t20080610\\_406106.html](http://www.sipo.gov.cn/sipo2008/yw/2008/200806/t20080610_406106.html).

<sup>5</sup> Famous translator in late Qing China. His translation works included *Uncle Tom's Cabin* and *David Copperfield*.

<sup>6</sup> Some believe that Mao received over RMB 100 million in gaochou, which is an astoundingly huge number, considering the economy and the purchasing power of RMB at that time. But some others point out that supporting sources are not credible. See <http://blog.chinesenewsnet.com/?p=11675>, accessed December 7, 2007.

<sup>7</sup> Li (2006) apparently does not like the situation he identifies and implicates that had this not been the case, copyright in China would have been more pro-freedom and less instrumental. However, copyright is not an abstract idea but was born and transformed in specific historical contexts. There is nothing like an “inherent nature” of copyright. It helps to focus on what has actually happened, rather than to contrast concrete history with imagined, ideal circumstances.

<sup>8</sup> In one instance, in an article on China's intellectual property policy by the Associate Head of the Supreme People's Court (SPC)'s Intellectual Property Branch, US sources were cited more often than Chinese sources. Published in China Intellectual Property Yearbook 2007, the article cited Chinese publications thirteen times and US publications seventeen times (In addition, it had one citation from a Polish publication and seven others whose “national” identity could not be identified) (Kong, 2008).

<sup>9</sup> Bogch's zeal in Chinese IPR development was unusual. It remained unclear if his personal experience and background played a role – he was born in Hungary and began his career as an attorney in Budapest. He worked at the US Copyright Office and became a US citizen before working at WIPO.

<sup>10</sup> Starting from 2004, several CCTV's digital channels of entertainment and sports programming began to charge subscription fees. However, most CCTV channels remain “free,” especially news channels.

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<sup>11</sup> Some information and facts in this chapter are collected through interviews conducted during a field trip to China at the end of 2008 and early 2009. Interviewees included people working at various media, governmental agencies and private companies as well as law firms. As promised in written consents, they are kept anonymous and only their general job function and employment status at CCTV are disclosed. The author's five years of experience working on copyright at China Central Television also contributes data. Although most of the author's knowledge have been verified, confirmed and supplemented by interviews and documentary research, in rare cases the author is the only source of information due to the non-public nature of internal corporate management as well as the lack of research on the subject. Weighing the risk of trespassing academic norms and the benefit of informing readers of important events and contexts, the author works to present truthful facts and information to the best of his ability. Indeed, it would be a worse violation of academic goals and principles to hold back some findings simply because there lack multiple sources on a non-public, badly under-researched subject. In these cases, the validity of information rests with the author's knowledge and conscience.

<sup>12</sup> China Radio International is China's state-owned radio corporation that broadcast all over the world in 61 languages.

<sup>13</sup> The fact that a festival of Han Chinese, one ethnic group in China, was treated as a festival for all people with Chinese citizenships, regardless of ethnic identities, at CW is an important yet badly under-researched topic. This will have to be the focus of another research project.

<sup>14</sup> The Chinese court system is composed by four levels, the Supreme People's Court, the High People's Court, the Intermediate People's Court, and the Basic People's Court. The Intermediate People's Court handles important local cases in the first instance and hears appeal cases from the Basic People's Court, which handles all cases except those that meet certain criteria and must be handled by higher courts. The People's Court generally has multiple branches, which handle civil cases, criminal cases, administrative cases (lawsuits against administrative organs), etc., respectively. Beijing has two Intermediate Courts with different jurisdictions. The case of Chen and Zhu was heard by the Intermediate Court because its importance and influence met certain criteria. It was handled by the branch for intellectual property.

<sup>15</sup> This was important because the copyright of a "work for hire" rests with the employee, according to the Chinese Copyright Law.

<sup>16</sup> CCTV started an employment reform of temporary workers in the mid-2000s. It asked all temporary workers to set up employment relationship with a company that provided staff leasing services. The said company, affiliated with CCTV, then "leased" its employees to CCTV to work at various posts. Started as a pilot plan by the end of 2003, this reform measure became a formal policy in 2009 (Interview with CCTV administrative staff, January 12, 2009). It was too recent a progress that its implications remained to be observed and evaluated.

<sup>17</sup> In some cases, a "temporary" worker might become a well-known anchorperson or a producer with de facto control over significant production resources. But these were more the exceptions than the norms.

<sup>18</sup> In a case-law system (e.g. the US), court rulings have binding force for lower courts. The Chinese legal system is largely a statutory-law system, in which a court makes decisions by its

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interpretation of legal codes rather than by referring to verdicts of other courts. Nevertheless, a verdict by an intermediate or higher court has de facto binding force for lower courts in the jurisdiction, because lower courts tend to avoid giving a verdict that will likely be reversed by the appeals court.

<sup>19</sup> It was said that in the 1990s, advertisers chased the Advertising Department, yet in the 2000s head of the Advertising Department had to court major advertisers, including driving to the airport to pick them up (Interview with CCTV administrative staff, January 13, 2009).

<sup>20</sup> This is from the author's knowledge gained from his working experience.

<sup>21</sup> Mantou is a commonplace food popular in northern part of China. Sometimes translated as "steamed bun," mantou is made from steaming fermented dough.

<sup>22</sup> See <http://www.chinafilm.com/showinfo.ASP?infoautoID=341>, accessed Dec 11, 2006.

<sup>23</sup> Sina.com, 13 March, 2006, URL (consulted July 2006): <http://ent.sina.com.cn/m/c/2006-03-13/10001013900.html>.

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## Abbreviations

BSA	Business Software Alliance
CAVCA	China Audio-Video Copyright Association
CCOIC	China Chamber of International Commerce
CCPIT	China Council for the Promotion of International Trade
CCTV	China Central Television
CFCA	China Film Copyright Association
CFGC	China Film Group Corporation
CW	<i>Chunjie Lianhuan Wanhui</i> , or <i>Chun Wan</i> , in English translation, Spring Festival Happy Gathering
GAPP	General Administration of Press and Publication
IFPI	International Federation of the Phonographic Industry
IIPA	International Intellectual Property Alliance
IPR	intellectual property rights
MCSC	Music Copyright Society of China
MOC	Ministry of Culture
NCAC	National Copyright Administration of China
NPC	National People's Congress
SIPO	State Intellectual Property Office
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate

TRIPS Trade-Related Aspects of Intellectual Property Rights

USITC U.S. International Trade Commission

USTR U.S. Trade Representative

WIPO World Intellectual Property Organization

WTO World Trade Organization