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# The Sly Rabbit and the Three C's: China, Copyright and Calligraphy

Marc H. Greenberg



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# **The Sly Rabbit and the Three C's: China, Copyright and Calligraphy**

**By Marc H. Greenberg\***

## **Abstract**

This article posits that among the many different methods being used to try to increase enforcement of Western style IP laws in China, that ultimately one of the most effective methods may be to support and aide the slow but steady shift in Chinese culture, away from a collective society view, and towards an individual ownership view – not reasons not based purely on economics, but also as a benefit from a cultural and social perspective – with broader support for the concept of individual rights and freedoms on a variety of fronts, and not just the IP arena. In this context also, I note in passing that the movement in China to embrace many of the attributes of Western culture is a mixed blessing, as media coverage of the rise in obesity and lung cancer in China is an example of a byproduct of some of the less salutary aspects of Western culture. <sup>1</sup>

The merit of this hypothesis is shown in this article by the discussion of the specific example of calligraphy arts, and the more general example of modern art creation and marketing in China. The teaching and marketing of modern art, and of modern calligraphy as an art form, provides a demonstration of my hypothesis. Calligraphy symbols in China are, in essence, pictograms that draw their inspiration from things found in nature – trees, rocks, animals, elements, etc. For most of the history of calligraphy as an art form in China, this source history supported the view that calligraphy symbols could not, and should not, be

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\* Marc H. Greenberg is a Professor of Law and the Co-Director of the Intellectual Property Law Program and IP Law Center of Golden Gate University School of Law. Professor Greenberg acknowledges and thanks Professor Peter Yu of Drake University School of Law, and Professors William Gallagher and Helen Hartnell of Golden Gate University School of Law for their insight and assistance in the development of this article. A work in progress version of this article was presented at the 2008 IP Scholars Conference at Stanford University and at the 2008 Works in Progress IP Conference at Tulane University, wherein other colleagues offered valuable commentary as well. The invaluable efforts of research assistants Katia Bloom and Frankie Yeung is also acknowledged. This article is dedicated to his wife, Kim Munson, whose work on Chinese art history was the genesis of this work.

<sup>1</sup> Agence France Presse, *Quarter of Chinese Adults are Overweight: U.S. Study*, 7/8/2008, reprinted in Yahoo! News, last viewed at [http://news.yahoo.com/s/afp/20080708/hl\\_afp/chinaushealthobesityresearch&printer=1;\\_ylt](http://news.yahoo.com/s/afp/20080708/hl_afp/chinaushealthobesityresearch&printer=1;_ylt).

protected by copyright – just as in patent law, you cannot obtain a patent on items found in nature.

However, modern calligraphy art, uses the symbols of traditional calligraphy only as a jumping-off point – the modern works contain interpretations of these classic symbols that are virtually unrecognizable, and are imbued deeply with the artist’s own vision and perspective – they often bear no visible resemblance to their source symbols at all. Since these symbols, under a Western view, would, by virtue of their age and utilitarian function, be deemed to be in the public domain, the new calligraphy artists would face no derivative rights challenges, and would be entitled to claim sole ownership of these works.

The first section of this Article looks at modern art in China. Two key trends emerge, each of which has different impact on the recognition and enforcement of copyright law in China. The first trend is the copy art industry – the use of assembly line techniques to produce cheap, popular artworks, often copies of traditional and contemporary art, including popular works of European and American artists. The second trend is the unexpected recognition of a burgeoning contemporary art scene in China, and how its leading artists have become “rock stars” in their country and beyond, with their work bringing multi-million dollar sales and allowing them to enjoy newfound individual wealth and status, contrary to longstanding tradition for Chinese artists.

The second section looks at the history of copyright, first in a summary fashion as to Western European and U.S. law, and in more detail as to China. Copyright law in China is traced from its Imperial age origins, followed by a consideration of how copyright has been implemented during modern times in both the communist nation of the People’s Republic of China on the mainland, and the Republic of China (ROC) on the island of Taiwan.

The third section of this Article discusses why, despite efforts by both the Chinese government, and Western governmental entities, the attempt to import Western-style copyright enforcement mechanisms have been largely unsuccessful to date. This section explores the need for approaches other than those rooted in the law, suggesting that changes in social norms and the migration of China into a “socialist market economy” may hold the answer to the problem of developing a cultural

shift in favor of the kind of private ownership approach that best supports a vigorous copyright protection system.

The final section explores how Chinese Calligraphy, a classic and highly traditional art form in China, which eschewed the concept of individual ownership, has, through the operation of these three approaches, in law, economics and normative social expressions, evolved into a very different contemporary form of artistic expression, marked by individual expression and ownership, and offers this evolution as a basis for suggesting that as this and other forms of fine art evolve in China, they present an opportunity to convert those artists into the kind of stakeholders, to borrow the concept articulated by Professors Peter Yu and William P. Alford in many of their published works, which may provide the best opportunity to create an environment more conducive to successful enforcement of copyright protection for members of the Chinese creative community.

## **Introduction**

There is a classic Chinese proverb which reads: *Jiao tu san ku* – “A sly rabbit will have three openings to its den.” The meaning has been interpreted to be that “to succeed one must have several alternatives”. Applicable to many circumstances, this proverb is particularly apt in describing the approach that the United States and the European Union (referred to variously herein collectively as the “West”, or “Western”) needs to take in attempting to develop an effective means for enforcing copyright rights in both Taiwan and the Peoples Republic of China.

As is discussed in greater detail in Section 3 of this Article, the West has, for at least the past forty years, attempted to foster a stronger enforcement environment regarding copyright law in the PRC and the ROC via external pressure, primarily in the area of international treaties and trade agreements. While these efforts contributed, along with significant internal economic factors which played an even greater role, to the adoption of Western style copyright law in both the PRC and ROC, this adoption was not followed in any significant degree by a strong enforcement regimen. Both countries remain the source of vast quantities of pirated goods, primarily in the sound recording, motion picture, computer games

and software industries. To a lesser, but by no means insignificant degree, this laxity in enforcement has also affected the market for fine art in, and from, China.

Like the sly rabbit, we need to develop new and alternative approaches to the issue of copyright enforcement in China. This is not to say that the approaches used to date have not had some impact – without these laws on the books we would lack the basic structure necessary to begin the needed process – a cultural and political change of view that supports private ownership of intellectual property rights, and the means to enforce those rights. But laws alone do not effect cultural change – one need look no farther than the music downloading history in the United States for support for this view. Cultural change also presents numerous challenges, particularly where the goal of the change is to effect legal reforms. In part, the difficulty of effecting cultural change stems from the reality that culture itself is an enormously complex concept, and within any nation, culture is an ever-changing attribute. The mutability of culture makes it particularly difficult to serve as an engine of legal reforms, since those reforms are generally intended to function in a far more static environment than the cultural one.

So it is that we conclude that to effect the kind of cultural change that will, like the sly rabbit, give defenders of copyright rights more than one approach to successful implementation of an accepted copyright enforcement regime, care must be taken to tailor approaches that incorporate normative change, economic incentives, and a use of the rule of law that is respectful of the cultural tradition that eschews law as a basis for governance. It is the goal of this Article to articulate some of the issues facing us in meeting this challenge, and to offer at least one example where internal changes in one area of art – calligraphy – may offer us an opportunity to develop one such successful new approach.

## **I. Modern Art in China – From Rock Stars to Art Factories**

The death of Mao in 1976, and the concurrent termination of the widely reviled Cultural Revolution, began to allow a return of limited rights for authors and creators of intellectual property works. In the art world in China, this has manifested itself principally in two directions – the rise of high profile artists whose work is sought after by local and international collectors and museums, and

the growth of factory art “manufactured” in mass quantities and sold at trade fairs like the Canton Art Fair.<sup>2</sup>

Artists like Chen Yifei, Zhao Wuji and Wu Guanzhong create contemporary art that sell for hundreds of thousands, and even millions of dollars.<sup>3</sup> However, the biggest market in the U.S. for “original” Chinese oil paintings is for the mass market products, many of which find their way into condominiums in Florida, second homes nationwide, and in hotels and restaurants.<sup>4</sup> In most instances, these mass produced paintings are done in a factory assembly line style, with hundreds of painters specializing in trees, skies, or flowers, for example.<sup>5</sup> Despite the mechanical nature of these works, which are often copies of famous paintings, both new and old, Chinese exporters claim that since each copy is done by hand, and is therefore slightly different than the original and the other copies, these works do not violate copyright – a view vigorously disputed by artists and trade groups in the United States.<sup>6</sup> This argument failed to convince a federal judge in Wisconsin who authorized the seizure, by federal marshals, of dozens of paintings displayed in the Gold Coast Gallery in Lake Geneva, Wisconsin, based on a finding that the works directly, and almost literally, were infringing copies of the paintings of wine and wine bottles created by American painter Thomas Arvid.<sup>7</sup>

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<sup>2</sup> Keith Bradsher, “Own Original Chinese Copies of Real Western Art!” The New York Times, Jul 15, 2005 at pg. A.1

<sup>3</sup> Id.

<sup>4</sup> Bradsher profiles 26 year old artist Zhang Libing, who estimates that he has painted up to 20,000 copies of van Gogh’s works. He tells the story of a wholesaler in Manchester, England, who went to the Canton Art Fair and placed an order for six 40-foot shipping containers filled with paintings to be deliver to ports in Europe and the United States. Id. Retailers like Pier 1 Imports and Bed, Bath & Beyond are also major customers for this artwork. Id.

<sup>5</sup> Id. Bradsher notes that bulk purchase imports of Chinese paintings nearly tripled from 1996 to 2004, with bulk shipments in 2004 reaching \$30.5 million.

<sup>6</sup> Id. Robert Panzer, then executive director of the Visual Artists and Galleries Association, notes that paintings produced before the 20<sup>th</sup> century are in the public domain and may be freely copied, but that modern works still under copyright protection may not be copied. Id.

<sup>7</sup> Keith Bradsher, *Paintings Seized*, The New York Times, Oct. 1, 2005, pg. B.10. In an interesting twist, the copy artist industry has given rise to at least one photographer using it as a basis for creating an artistic series of photographs of the copy artist’s best work. Hong Kong based photographer Michael Wolf, in 2007, created a series of photos exploring the world of these painters, entitled *Copy Art*. He photographed the painters in alleyways in China, displaying their remarkably faithful copies of works by Warhol, Richter, Lichtenstein and other leading Western artists. The series was exhibited at the Robert Koch Gallery in San Francisco in 2007, which the Gallery described as “[a] development that distinctly reflects the rise of a new global economy and the trend of mass production. The series uncovers the odd and subtle interplay between capitalism and the Chinese tradition of developing artistic skill by copying the works of master artists.” Last viewed at [www.kochgallery.com/exhibitions/pr\\_MWO07.html](http://www.kochgallery.com/exhibitions/pr_MWO07.html).

After years of lackluster sales of traditional calligraphy and historical artworks from Imperial China, the post-Mao growth in contemporary art has been embraced by the Western world with unparalleled enthusiasm, as evidenced by a skyrocketing sales and media coverage.<sup>8</sup>

An example of the impact these new artists have on the Chinese art world is found in the work of Zhang Xiaogang, whom Barbara Pollack, in a December 2007 *Vanity Fair* article on the new Chinese art scene, calls an “unlikely rock star figure”. In the 1990’s his work was banned by the Chinese government as being unfit for public display, and was only sold outside of China. Now his work hangs in state-approved galleries, and he has become one of China’s highest earning artists - his individual paintings fetch prices between \$500,000 and \$3 million dollars.<sup>9</sup> An individual artist earning this kind of fees was unheard of until only recently in China. Now, in the words of one commentator:

“That has all changed. These days, China’s leading avant-garde artists have morphed into multimillionaires who show up at exhibitions wearing Gucci and Ferragamo. Wang Guangyi, best-known for his Great Criticism series of Cultural Revolution-style paintings emblazoned with the names of popular Western brands, like Coke, Swatch and Gucci, drives a Jaguar and owns a 10,000-square foot luxury villa on the outskirts of Beijing.”<sup>10</sup>

In one of his 2006 New York Times articles covering the contemporary art scene in China, David Barboza writes about Xu Beihong, “one of China’s best-known early-20<sup>th</sup>-century painters”, whose painting “Slave and Lion” sold at Christie’s for \$7 million, a record price for any Chinese painting.<sup>11</sup> A Zhang Xiaogang painting entitled “Tiananmen Square” depicting a view of the infamous square devoid of

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<sup>8</sup> See, e.g. Barbara Pollack, *The Chinese Art Explosion*, ARTNews, September 2008, at pg. 118; David Barboza, *Chinese Art Is as Hot in the East as It Is in the West*, nytimes.com, November 29, 2006, last viewed at <http://www.nytimes.com/2006/11/29/arts/design.29pric.html>; David Barboza, *Chinese art market booms, prompting fears of a bubble*, International Herald Tribune, January 4, 2007, last viewed at <http://www.iht.com/bin/print.php?id+4097207>; Xinhua, *Yearender: Up-and-down year for China art market, credibility on the line*, People’s Daily Online, 12/13/2006, last viewed at [http://english.people.com.cn/200612/13/print20061213\\_332091.html](http://english.people.com.cn/200612/13/print20061213_332091.html)

<sup>9</sup> Barbara Pollack, *Art’s New Superpower*, *Vanity Fair* (Dec. 2007) 318, 320.

<sup>10</sup> David Barboza, *Chinese art market booms, prompting fears of a bubble*, International Herald Tribune, January 4, 2007, last viewed at <http://www.iht.com/bin/print.php?id+4097207>

<sup>11</sup> David Barboza, *Chinese Art Is as Hot in the East as It Is in the West*, nytimes.com, November 29, 2006, last viewed at <http://www.nytimes.com/2006/11/29/arts/design.29pric.html>

life, but marked by delicate red lines that hint at the 1989 massacre, sold for over 2.3 million dollars in the same Christie's auction.<sup>12</sup>

Pollack concludes her article by noting:

“Young Chinese artists are free to think as selfishly as anyone who wields a paintbrush in Brooklyn or on the Lower East Side. It seems the Chinese government has managed to defuse the explosive potential of contemporary art simply by allowing it to flourish.”<sup>13</sup>

The current economic explosion of building activity in China has been accompanied by the creation, for the first time in its history, of many new museums in outlying communities far from the major urban areas of Shanghai and Beijing.<sup>14</sup> There are now more museums, than there are original works of the great masters of Chinese art. The cultural attitude that views replication of these works by pupils as an innocent activity, now supports instances where the works hanging in the museum, although copies rather than originals of these masters, are not identified as copies.

Holland Cotter, writing for the New York Times, summarized this issue:

“Even less acceptable from a Western viewpoint is the casual approach some Chinese museums take toward exhibiting copies of artworks in place of originals. Fragile works that cannot survive gallery exposure may be represented by photographs. And when a well-known piece of art is unavailable, it may be considered preferable to display a copy – perhaps not acknowledged as such – rather than disappoint visitors.”<sup>15</sup>

As Chinese art has become increasingly popular to Western collectors and museums, the first instances of problems with the conflicting cultural viewpoints regarding imitation/forgery have come to the fore. In 2004, Frederick Warne Ltd., a London-based division of Penguin Books, brought a copyright infringement

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<sup>12</sup> Id. Similarly, Barboza reports of a sale the previous week at the Beijing Poly Auction, of a huge panoramic painting by Beijing artist Liu Xiaodong, titled “Newly Displaced Population”. The work sold for more than 2.7 million dollars.

<sup>13</sup> Barbara Pollack, *Art's New Superpower*, Vanity Fair (Dec. 2007), *supra* at 330.

<sup>14</sup> Holland Cotter, *China's Legacy: Let a Million Museums Bloom*, nytimes.com, July 4, 2008, last viewed at [http://www.nytimes.com/2008/07/04/arts/design/04\\_museums.html](http://www.nytimes.com/2008/07/04/arts/design/04_museums.html).

<sup>15</sup> Id.



claim against the China Social Sciences Press for their unauthorized republication in Chinese of Beatrix Potter's "Tale of Peter Rabbit". The suit, acknowledging that the text was in the public domain, claimed rights to protected illustrations and the author's name. The Beijing No. 1 Intermediate People's Court ruled that the Chinese publisher had improperly reproduced the drawings, and upheld a government order to confiscate 20,000 copies of the Chinese-language version of the book.<sup>16</sup>

In an unusual case, in 2002 the family of a Chinese artist was successful in a copyright action brought against the Museum of Chinese Revolution. Considering that the Museum is a state institution, it took unusual bravery for the heirs of artist Dong Xiwen to bring this suit.<sup>17</sup> Dong had painted a work entitled "The Founding Ceremony" in 1949 to commemorate the founding ceremony of the People's Republic of China. The work was immediately collected by the Museum in 1953, shortly after its completion. In 1999, to mark the fiftieth anniversary of the founding of the republic, the Museum authorized a Shanghai company to issue and sell goldleaf copies of the painting, without obtaining any right to do so from the Dong family.<sup>18</sup> Adding insult to injury, the Shanghai publisher claimed to have exclusive licensing rights from the Museum, and threatened copyright infringement action against any who copied their print.<sup>19</sup>

After two years of trial, the Beijing No. 2 Intermediate People's Court found against the Museum, ordering it to make a public apology to Dong Xiwen's widow and to pay the family 260,000 Yuan (equal to U.S. \$31,000 at that time) for monetary compensation.<sup>20</sup> Hou Yimin, a renowned artist and professor with the Central Academy of Fine Art in China commented on the ruling:

"It honors the artist's labor and copyright and is popular among us artists... We artists used to care more about our contributions to society and so long as our paintings make an impact on society and get recognized, it is

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<sup>16</sup> Brian Sisario, Compiler, *Arts, Briefly*; The New York Times, Dec. 27, 2004, pg. E.2

<sup>17</sup> Zha Xin, *Feature: lawsuit to honor artist's copyright*, publication date unknown; last viewed in December 2004, at <http://www.chinaiprlaw.com/english/letters/leter13.htm>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*

fine...We didn't care so much about who used it and for what purpose. Now we should change this concept of ours."<sup>21</sup>

These new trends in support of individual ownership and entrepreneurship in art are a huge departure to art and the role of copyright law in protecting original art in China. To understand how we have arrived at this point, it is worthwhile to consider the evolution of copyright law, both in the West, and in greater detail, in China's complex and long history.

## II. Copyright Law in the West and in China

### a. Western Copyright Law: Common Approaches in Europe and the United States

There can be no question that the first copyright laws in the European tradition, such as Britain's Statute of Anne<sup>22</sup>, had as their principal concern the economic well-being of book publishers. While some commentators note an additional purpose of copyright laws was to provide the monarchy or government an opportunity to control content and to suppress heretical or anti-government views<sup>23</sup>, what remains inescapably true is that copyright, in its nascent state, had little to do with protecting the rights of the authors of the works involved. Indeed, the first 140 years of copyright protection in the West is marked by is notable for its limited scope – principally only the right to make copies was protected.

This began to change in 1852, when the first steps towards what is referred to as the "proprietaryization" of author's rights manifested itself by the decision of some European nations to add translations of works to the scope of copyright.<sup>24</sup> By the

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<sup>21</sup> Id. at 3. Money was not at the heart of the Dong family claim. Plaintiff Dong Yisha, daughter of the artist, said: "We are not zealous about the money at all. We wanted to make it clear that the painting was the result of my father's hard work and we just asked for respect for his work." Id.

<sup>22</sup> An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, c. 19 (1709)(Eng).

<sup>23</sup> This view is discussed in Peter K. Yu, *Three Questions That Will Make You Rethink the U.S.- China Intellectual Property Debate*, 7 J. Marshall Rev. Intell. Prop. L. 412 (2008) at 429-430. Prof. Yu refers readers interested in a more extensive discussion of this viewpoint to AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1899); CYPRIAN BLAGDEN, THE STATIONERS COMPANY: A HISTORY, 1403-1959 (1960); and LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 28-77 (1968).

<sup>24</sup> I am indebted to Professor Maurizio Borghi for this insight, which was part of the discussion of his work in progress, entitled *Copyright Beyond the Right to Copy; Translations, Adaptations and Creative Reworking in 19<sup>th</sup> Century Law*, presented at the 8<sup>th</sup> Annual Intellectual Property Scholars Conference, August 7-8, 2008, at Stanford University.

time the Berne Convention was revised in 1908, translations as a protected element of copyright law were codified and added to the Convention<sup>25</sup>. While this right was not explicitly enumerated in the U.S. Copyright Law of 1909, it is implicitly granted via the right “to prepare derivative works based upon the copyrighted work” found in Section 106’s list of exclusive rights in copyrighted works.<sup>26</sup>

The relative harmony between the E.U. and the U.S. during the first two hundred years of copyright law in the West would begin to crack in this first decade of the twentieth century, as the revisions to the Berne Convention, and the adoption of the Copyright Law of 1909 in the U.S., revealed significant differences in approach.

### **b. Western Copyright Law Divergences – Formalities and Moral Rights**

There is a strong policy in Berne favoring a prohibition against formalities being required as a condition precedent to the grant of copyright protection.<sup>27</sup>

However, under the Copyright Act of 1909, a very strict set of formal procedures were adopted, and authors violating those procedures suffered the loss of all protection. For example, rights holders were entitled, upon compliance with a formal registration process, to copyright protection for an initial period of 28 years.

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<sup>25</sup> Id. *See generally*, Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971), (hereinafter “Berne” or “Berne Convention”), at Article 2, section 3.

<sup>26</sup> 17 U.S.C. § 106(2). The right to protection afforded to derivative works has always been a controversial element of modern copyright law. Critics of this expansion correctly note that most, if not all, artistic expression borrows heavily from the past, and that efforts to limit that practice may be deployed by owners seeking only to protect their own interest, even at the expense of the creative process of their successors. Creators rebut this claim by noting that without derivative rights protection, they are subject to wholesale appropriation of their artistic expression, which can be taken with impunity by merely changing enough of the expression to avoid liability for direct copying. This doctrine did not, as is discussed *infra*, gain acceptance in other parts of the world, and in particular was generally rejected throughout Asia.

<sup>27</sup> Berne art. 5(2) provides “The enjoyment and exercise of these rights shall not be subject to any formality;...”. Various commentators have noted that the definition of “formalities” prohibited by Berne is fluid and expansive:

“Formalities are any conditions or measures – independent from those that related to the creation of the work ...or the fixation thereof...without the fulfillment of which the work is not protected or loses protection. Registration, deposit of the original or a copy, and the indication of a notice are the most typical examples”. Report at 60, citing Mihaly Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, ¶ BC-5.7 at 41;

“[F]ormalities are “everything which must be complied with in order to ensure that the rights of the author with regard to his work may come into existence”, Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, 222 (1987)”. Report at 60, fns 151-152.

A right of renewal for an additional 28 years was available, once again upon completion of a formal registration process. This system has been characterized as an “opt-in” system since it required affirmative steps by the owner of the rights in order to secure the benefits of copyright protection. The opt-in nature of the system was criticized over time, because the renewal requirement, and the requirement for strict compliance with an array of formalities, resulted in the loss of protection for many otherwise deserving creators and their heirs.

A further divergence from Berne which marked the 1909 Act was the requirement that notice of copyright, ©, be placed on all published copies of a work. While there existed cure provisions for inadvertent failures to place the notice on a work, if the failure was intentional, the work was deemed dedicated to the public domain, and the author lost any right to control its use.

These formalities led, over time, to a considerable number of authors and their heirs losing their rights to works due to a failure to comply with one or more of these formalities. Common reasons for loss of rights included failures to affix notice on the works and allowing them to be published for many years without notice (thereby precluding the ability to effect a cure for the error), and failure to renew the work after the first 28 year term expired. Authors voiced these concerns to Congress and sought redress.

### **c. Western Copyright Law: The Prodigal Child Returns: The U.S. Movement To Harmony With Berne**

The 1976 Copyright Act attempted to address those concerns by eliminating most of the formalities, and by substituting an automatic protection scheme for the life of the author plus fifty years, thereby eliminating the need for renewal as well.<sup>28</sup> Since protection of the law was afforded to authors and other creators as soon as a work was fixed in a tangible form, the 1976 Act has been characterized as creating an “opt-out” system of protection. A rights holder would have to affirmatively disavow claim to some, or all, of the rights afforded under the law, in order to allow third parties unrestricted rights to use the work.

The extension of the term to life plus 70 was accomplished by Congress’ passage of the Sonny Bono Copyright Term Extension Act of 1998 (this extension is generally referred to as the “CTEA”).

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<sup>28</sup> Pub. L. No. 94-553, 90 Stat. 2541 (1976), known as the Copyright Act of 1976, which paradoxically went into effect January 1, 1978.

One of the other principal motivations behind this revision of U.S. Copyright law was to bring the United States into harmony with the Berne Convention.<sup>29</sup> There is a strong policy in Berne favoring a prohibition against formalities being required as a condition precedent to the grant of copyright protection.<sup>30</sup> By becoming a signatory to Berne in 1988 the U.S. committed itself to retain the formality-free approach to copyright embodied in the 1976 Act, and to eschew a return to the formalities that were a hallmark of the 1909 Act.

#### **d. Copyright Law in China**

##### **1. Copyright in Imperial China**

Legal, political and economic scholarship and popular media offerings are replete with condemnations of China, its people and its government, as perpetrators of mass copyright infringement.<sup>31</sup> Most of these books and articles also suggest that the U.S. Government, acting through the U.S. Trade Representative (U.S.T.R.) , and through the World Trade Organization (WTO), should apply external pressure to China to bring it into compliance with the Western-style of enforcement processes. Other commentators, with whom I join, suggest that this is an approach

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<sup>29</sup> Berne Convention, *supra*. The U.S. accession to Berne is reflected in the Berne Convention Implementation Act, Publ.L. No. 100-568, 102 Stat. 2853 (1988).

<sup>30</sup> Berne art. 5(2) provides “The enjoyment and exercise of these rights shall not be subject to any formality;...”. Various commentators have noted that the definition of “formalities” prohibited by Berne is fluid and expansive:

“Formalities are any conditions or measures – independent from those that related to the creation of the work ...or the fixation thereof...without the fulfillment of which the work is not protected or loses protection. Registration, deposit of the original or a copy, and the indication of a notice are the most typical examples”. Report at 60, citing Mihaly Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, ¶ BC-5.7 at 41;

“[f]ormalities are “everything which must be complied with in order to ensure that the rights of the author with regard to his work may come into existence”, Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, 222 (1987)”. Report at 60, fns 151-152.

<sup>31</sup> See, e.g., Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (2005, Cornell University Press) at 118-163; Pat Choate, *Hot Property: The Stealing of Ideas in an Age of Globalization – Ch. 6 – China Rising*, at 169-192 (2005, Alfred Knoph); Bruce Stokes, *The United States Should Force China to Reduce Intellectual Property Theft*, published as Viewpoint #5 in Chapter 2, *How Strong is China’s Economy*, of the *Opposing Viewpoints Series – China* (2006, Thomson Gale, publishers) at 89-95.

that has not succeeded in the past, and on its own, is unlikely to succeed in the future.<sup>32</sup>

Professor Alford, in his seminal work, *To Steal a Book is an Elegant Offense*<sup>33</sup> traces the history of intellectual property protection back to Imperial China, from its first dynasty, the Qin (221-206 B.C.) through its last dynasty, the Qing (A.D. 1644-1911).

Prof. Alford posits four broad propositions regarding the development of intellectual property law in Chinese history. He begins by asserting that imperial China did not develop a “sustained indigenous counterpart to intellectual property law, in significant measure because of the character of Chinese political culture”.<sup>34</sup> Secondly, he notes that initial attempts by the West to introduce our style of intellectual property law at the turn of the (20<sup>th</sup>) century were unsuccessful because that approach was not relevant in Chinese society – and the West’s assumption that it could simply, through foreign pressure, compel widespread adoption and adherence to such laws, was in error<sup>35</sup>.

His third proposition is that current attempts to establish and enforce IP laws, both in Taiwan and particularly in the PRC, have been “deeply flawed in their failure to address the difficulties of reconciling legal values, institutions and forms generated in the West with the legacy of China’s past, and the constraints imposed by its present circumstances”.<sup>36</sup> Lastly, Alford notes that despite all our efforts, we continue to fail to achieve our goals re: our IP concerns because we continue to labor under fundamental misconceptions about the nature of legal development in China.<sup>37</sup>

Professor Yu also focuses his attention on the history of the development of law and legal systems in China as a means of understanding why copyright doctrine has struggled for acceptance there. He suggests that one reason the Western

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<sup>32</sup> See, generally, William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995, Stanford University Press) (hereinafter “To Steal a Book”); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, (hereinafter “Pirates II”) 55 *American University Law Rev.* 4:901 (2006).

<sup>33</sup>, William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995, Stanford University Press)

<sup>34</sup> *Id.*, at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

legalistic approach fails is that it evokes both a classic cultural difference in approach between East and West, and more interestingly, is also reminiscent “[o]f the millennia-old debate between the Confucianists and the Legalists in China. In this debate, the Confucianists questioned whether laws were needed or expedient.”

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Essentially, the Confucian approach is that people should be governed by moral force and ritual, rather than by law. The result of such an approach, Yu writes, is that “In a Confucian society, people learn to adjust their views and demands to accommodate other people’s needs and desires, to avoid confrontation and conflict, and to preserve harmony. Litigation, therefore, is unnecessary.”<sup>39</sup> Yu goes on to note: “The legalists, by contrast, believed it was impossible to teach people to be good. Laws and punishment (*fa*), therefore, were needed to maintain public order by instructing people what and what not to do. Although Legalism was embraced in a very short period of time in the Qin dynasty (227-221 B.C.) it never dominated the Chinese society until very recently.”<sup>40</sup> From this analysis, Prof. Yu concludes: “Thus to many Chinese, laws should be used only as a last resort”<sup>41</sup>.

Confucianism as a driving force in Chinese cultural, religious and political life has a long and deep history. It was during the reign of Emperor Wu of the Former (Western) Han (140-87) B.C., that Confucianism was officially recognized as the object of study for those who hoped for official careers. He ordered the Legalists and others, but not Confucianists, to be ejected from the Government.<sup>42</sup> A second attempt, during the reign of T’ang Hsuan-tsung (712-755 A.D.), to substitute Taoism in place of Confucianism as the ranking “ism”, also failed..<sup>43</sup>

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<sup>38</sup> Yu, *Pirates II*, at 970-71.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Prof. Yu cites, in support of this view, Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA Pac. Basin L.J. 1, 32 n. 144 (1996) (explaining that Confucianism “saw laws as an instrument of last resort necessary to punish those who could not follow the normative ideal of social harmony arising from the many social relationships within society.”)

<sup>42</sup> Brandauer/Huang, *Imperial Rulership and Cultural Change in Traditional China*, Ch. 1, Jack L. Dull, *Determining Orthodoxy: Imperial Roles*, (1994, University of Washington Press), at 3-5.

<sup>43</sup> *Id.* at 4. Dull characterizes the role of the Imperial Government in establishing an orthodoxy in Chinese society as “lackluster”. *Id.* at 13.

Professor Alford notes the China's Imperial state was organized around the model of an extended family, in which family heads, village elders and guild leaders provided authority in their localities.<sup>44</sup> Moral suasion, and the desire to honor one's parents and elders, is thus a far more significant driver for conduct than a system of laws. This was the argument which diminished the role of the Legalists in Chinese society – why do we need laws, when all we need to do instead is follow the leadership of our parents and wise elders?

An understanding of Confucianism, and how it compares with Christianity, the dominant religious order in the West, provides a necessary degree of context with which to understand why a Western style of copyright has not gained a foothold in modern China to date. In *Confucianism & Christianity: A Comparative Study*<sup>45</sup>, author Julia Ching describes Confucian society thusly:

The Confucian society also has its rulers, laws and statutes. But it is more than a society. It is also a community of personal relationships. It is joined together, not by religious belief – although such is also present – but by the acceptance of a common culture, a culture which esteems the person above the law, and human relationships above the state. Culture is the life of the Confucian community. In traditional China, when the Confucian state allegedly embraced the then known world, Confucian culture was also regarded as *human* culture – that which distinguished the civilized from the barbarian.<sup>46</sup>

Ching later summarizes the critiques of the moral persuasion base of Confucianism as follows:

I have discussed the critiques of Confucianism voiced by ancients and moderns, Chinese and Westerners. In examining them, one finds both concurrences and contradictions. Mohists and Legalist decry government by moral persuasion as a form of weakness, not strength; Mohists and Taoists rejoin in attacking an exaggerated, unnatural ritual observance; Taoists and Legalists express a sense of bemused scorn of the Confucian focus on ethics

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<sup>44</sup> Alford, *To Steal a Book*, supra at 8-9.

<sup>45</sup> Julia Ching, *Confucianism & Christianity: A Comparative Study*(1977, Kodansha Int'l).

<sup>46</sup> Id. at 101.



and virtues. Some of these arguments have been reiterated by modern critics, who exalt a government of laws above that of men, and insist upon the separation of ideology and cult from the state. But, until very recently, the moderns have described Confucius himself variously--for praise or blame--as a traditionalist, a reformist or a political revolutionary.<sup>47</sup>

In describing the role Confucianism has played in China's past, Ching notes that it has served as a moderate view:

In the Chinese past, Confucianism has usually appeared as a school of moderation between certain extremes – retreat from society as advocated by Taoism and Buddhism, and complete immersion in the social and political order according to the tenets of Mohism or Legalism. Indeed, the Chinese opted for Confucianism on account of its moderation.<sup>48</sup>

These differing views of Confucianism led, according to Ching, Western and Eastern critics like Russell, Dewey, Ch'en Tu-hsiu, Hu Shih, and Lu Hsun and others, to argue that the social vestiges of Confucianism remained an obstacle to intellectual freedom and social transformation.<sup>49</sup> This criticism was, to a degree, prescient, since Confucianism served as a gateway for the Chinese form of Communism, which was to become the dominant political and cultural system in 20<sup>th</sup> century China.

Another author has characterized Confucianism as being:

“[c]oncerned primarily with the moral development of individuals and the accepted modes of behavior in a civilized state. It stresses government by education, persuasion, and moral example. According to Confucianism, a formula legal system serves only to make people litigious and self-interested. Morality leads to social order, and group order is more important than individualistic desires. These ideas have created a hostile attitude toward the use of law to protect individual rights.”<sup>50</sup>

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<sup>47</sup> Id. at 58.

<sup>48</sup> Id. at 61.

<sup>49</sup> Id. at 59

<sup>50</sup> June Cohen Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 Law & Policy in INT'l Bus. 1185 (1996) at 1201, citing Derk Bodde & Clarence Morris, *Law in Imperial China* (1973) at

Another factor which Western analysts must consider is that the impetus for protecting works with copyright styled laws in China was not the need to protect the interests of either artists or publishers. Instead, Professor Alford notes, historically, that the Imperial family's focus on control, via registration, of published works was motivated not by a desire to secure property style rights to authors, but rather by the need of the state to control the content of published works, to make sure that works did not challenge the social order or improperly reveal "the inner workings of government, politics and military affairs".<sup>51</sup> A further reason for granting protection to certain works was to ensure that the designs embodied in those works, if used by the Imperial family, would not be available for use by common people.

Continuing this analysis, Prof. Alford notes that the pre-publication review by the state was "part of a larger framework for controlling the dissemination of ideas, rather than as the building blocks of a system of intellectual property rights, whether for printers, booksellers, authors, or anyone else."<sup>52</sup>

## 2. Copyright in Communist China

The political revolution in China came to its conclusion when the Chinese Communist Party came to power in 1949.<sup>53</sup> To the extent that the preceding political powers, the Northern Warlord and Kuomintang governments had attempted to develop copyright laws during their regimes, those efforts were repudiated, and in their place, the newly created People's Republic of China (PRC) enacted Article 17 of the Resolution on the Improvement and Development of Publishing Work, which became known as The 1950 Publishing Resolution.<sup>54</sup> Although the Resolution provided a formula that allowed authors to recover significant sums from infringing publishers in privity of contract with authors, it didn't address third party infringers, and in general, lacked enforceability powers.<sup>55</sup>

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27, n 120 at 50; Albert Hung-Yee Chen, *An Introduction to the Legal System of the People's Republic of China* (1992) at 8-9.

<sup>51</sup> Alford, *To Steal a Book*, *supra*, at 14.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China* (21 Tex. Int'l L.J. 259 (1986)), at 261.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* An effort to bolster the enforceability of the 1950 Resolutions was made by passage of the 1952 Regulations on the Editorial Structure and Work system of State-Run Publishing Houses. Although moderately more successful than the 1950 Resolutions, it was still plagued by a lack of control over the actions of third parties.

By 1958, however, the launch by Mao Zedong and his adherents of an Anti-Rightist Movement, and the Great Leap Forward, both movements intended to hasten the adoption of a version of state socialism for China, ended the payment of high royalties under the 1950 and 1952 Acts, culminating in the total elimination of all royalty payments to individuals via the Great Proletarian Cultural Revolution of 1966.<sup>56</sup>

The anti-intellectualism of the Cultural Revolution led, during its ten year reign, to the imprisonment, torture and death of many academics, writers and other intellectuals. National policy mandated the reduction of intellectuals' privileges and rights – and copyright protection in any real form ceased to exist.<sup>57</sup>

The death of Mao in 1976, and the concurrent termination of the widely reviled Cultural Revolution, began to allow a return of limited rights for authors and creators of intellectual property works. The flow through of political and cultural thought from Confucianism to Communism carried with it a consistent antipathy to the individual ownership which is a key component of copyright in Western law. Professor Alford notes that although Marxism and Confucianism stem from very “different ideological foundations, [N]onetheless, because each school of thought in its own way saw intellectual creation as fundamentally a product of the larger society from which it emerged, neither elaborated a strong rationale for treating it as establishing private ownership interests.”<sup>58</sup>

While Professor Alford is probably correct when he notes that Marxism and Confucianism start from different ideological foundations, it is nonetheless true that there are many similarities, both cultural and political, to be found in these doctrines. One such similarity is the disdain for the rule of law. In his seminal work *The Manifesto of the Communist Party*<sup>59</sup>, Marx and co-author Friedrich Engels, savagely attack the wealthy and powerful, characterized as the “bourgeois” class, and decry the poverty and reduced circumstances of the proletariat, which

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Id. at 262.

<sup>56</sup> Id. at 263. Professor Alford notes that during the Cultural Revolution, all theater was banned except for a few “revolutionary operas, and virtually all writers’ work, and those of other intellectuals, was disrupted. Alford, *To Steal a Book*, *supra*, at 63-65.

<sup>57</sup> Id at 263-64.

<sup>58</sup> Alford, *To Steal a Book*, *supra* at 3-4.

<sup>59</sup> Karl Marx & Friedrich Engels, *The Manifesto of the Communist Party* (1848).

they conceptualize as comprised of the working class, the middle class, and the upper-middle (petit bourgeois) class:

“In the condition of the proletariat, those of old society at large are already virtually swamped. The proletarian is without property; his relation to his wife and children has no longer anything in common with the bourgeois family relations; modern industry labor, modern subjection to capital, the same in England as in France, in America as in Germany, has stripped him of every trace of national character. Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.”<sup>60</sup>

June Lazar’s description of Chinese Communism under Mao reflects the influence Marx had on Mao’s philosophy, and is reflective of how both doctrines echoed Confucianist thought:

“Early socialism as practiced under Mao’s leadership viewed law as a tool for oppression of a class of people<sup>61</sup> ... Chinese society is geared toward eliminating private property and equalizing the differences among all people, whereas the acceptance of a primarily economic purpose behind intellectual property protection has led modern U.S. courts to expand 1206 authors’ rights at the expense of society. Such an expansion of individual interest is incompatible with the Chinese practice of putting societal interests before those of individuals.”<sup>62</sup>

### **III. Anatomy of a Failed Planting: The Effort to Graft Western-Style Copyright Protection onto Chinese Society**

#### **a. Adding an Economic Incentive to the Legal Enforcement Approach Proves Insufficient**

Faced with the challenge of reconciling the principles of Confucianism and Marxism, battered by the popular rejection, in China, of the highly destructive Cultural Revolution, China embarked on the process of creating a national copyright law that would also appease the concerns of both rights holders within

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<sup>60</sup> Id. at 2.

<sup>61</sup> Lazar, *Protecting Ideas and Ideals*, *supra* n.29, at 1205, citing Laszlo Ladany, *Law and Legality in China: The Testament of a China Watcher* (1992) at 62.

<sup>62</sup> Id. at 1205-06, citing Alfred C. Yen, *Restoring the Natural Law, Copyright as Labor and Possession*, 51 Ohio State L.J. 517, 541 (1990).

the country, and the clamor of other nations that China's lack of copyright law was allowing the country to become a nation of pirates, stealing intellectual property throughout the world.<sup>63</sup>

The solution, for the Chinese Government, was the creation and adoption of the Copyright Law of 1990, the first extensive national law of copyright enacted in Chinese history.<sup>64</sup> The law, patterned after the copyright terms of the Berne Convention and of U.S. Copyright law, had all the right notes, but its music was, for Chinese society, discordant and quickly rejected. Writing five years after its adoption, June Lazar summarizes its failed impact:

“The copyright law China adopted in 1990, after twelve years of preparation and drafting, was heavily influenced by pressure from the United States and Japan....However, the law's attempt to balance the Marxist aims of Chinese society with the economic goals of the United States dissatisfied the Western business community.... While the scope of China's copyright law is narrower than the United States would prefer, the real issue in the last five years has been the enforcement of the law. U.S. frustration with Chinese enforcement led the USTR to place China on the Priority Foreign Country list again in 1994. The Chinese were angry with the U.S. because they felt that China had worked very hard to build a copyright system and that the U.S. was not allowing it enough time to produce results. Li Changxu, Chief Director of the China United Intellectual Property Protection Center, analogized the situation to building a house: “You can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time.”<sup>65</sup>

Director Changxu's wishes notwithstanding, the international community was not willing to be patient in the face of the continued piracy and unauthorized copying of copyrighted works that marked Chinese society following adoption of the 1990

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<sup>63</sup> Professor Alford writes that in Taiwan ROC, with a government that rejected the mainland's embrace of state socialism, copyright infringement became a rampant problem in the 1970's. Alford, *To Steal a Book*, *supra* at 98. He concludes; “As a consequence, in 1982, *Newsweek* labeled Taiwan the counterfeiting capital of the world, and the *New York Times* soon thereafter described it as being “to counterfeiting what Miami is to drug trafficking.” Id.

<sup>64</sup> The adoption of this Copyright law posed serious challenges for the Chinese government in attempting to reconcile the Confucianist and Marxist/Communist doctrines to what is essentially a private property regime, Prof. Alford quotes Jiang Ping, head of the Committee on Legal Affairs of the Standing Committee of the National People's Congress (NPC), who characterized the efforts to adopt a new copyright law as taking “a road as tortuous as that of Chinese intellectuals” (presumably referring to the forced marches imposed on intellectuals during the Cultural Revolution, many of whom were forced to walk from the city into the country, there to engage in forced manual labor). Alford, *To Steal a Book*, *supra* at 76.

<sup>65</sup> Lazar, *Protecting Ideas and Ideals*, *supra* n.29, at 1288-90, citing Kim Newby, *The Effectiveness of Special 301 in Creating Long-Term Copyright Protection for U.S. Companies Overseas*, 21 *Syracuse J. Int'l & Com* 29, 44 (1995).

Copyright law. Professor Yu describes the problems affecting enforcement of the 1990 copyright law:

Old habits and customs, however, die hard. The view of most Chinese that published works belonged to, and were for the benefit and unrestricted use, of the people, led to China being characterized, in the early 1990's as "home to the world's largest gang of CD [compact disc] pirates", some of whom, the *Wall Street Journal* suggested, were affiliated with "the very governmental authorities who should be policing them".<sup>66</sup>

In 1994 and 1995, The United States, seeking to protect American companies that claimed to be losing profits in China due to intellectual property piracy, initiated an investigation under "Special 301" (19 U.S.C.A. § 2242) and threatened to impose a one-hundred percent duty on Chinese imports, as a means of recovering the estimated losses suffered by U.S. companies from this IP piracy. Acting quickly to avoid an all-out trade war, China and the U.S. negotiated and signed an Agreement Regarding Intellectual Property Rights, followed shortly thereafter in 1996 by another agreement that included a Report on Chinese Enforcement Actions, and an Annex on IP Rights Enforcement and Market Access Accord.<sup>67</sup>

External dissatisfaction with the enforcement of the 1990 Copyright laws was matched by internal concerns as well. Professors Xiaoqing Feng & Frank Xianfeng Juang, in their article *International Standards and Local Elements: New Developments of Copyright Law in China*,<sup>68</sup> described the transformation of their society as follows:

"[S]ignificant social and economic changes have taken place in China since the enactment of the 1990 Copyright Law. The fundamental economic structure of the country has been further transformed from a central planning system ("command economy") into a socialist market economy."<sup>69</sup>

Professor Yu also describes this shift in economic models. Commenting on the development of what is called a "socialist market economy", Yu notes the

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<sup>66</sup> Alford, *To Steal a Book*, *supra*, at 91. Prof. Alford notes that the problems of copyright piracy also plagued the Republic of China in Taiwan. He notes that ROC's own Minister of Economic Affairs realized, in the mid-1990's, that greater protection of IP is needed for Taiwan's own research and development activities. *Id.* at 108.

<sup>67</sup> Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 *Fordham Intell. Prop. Media & Ent. L.J.* 63, 74 (1997).

<sup>68</sup> 49 *Copyright Society of the U.S.A.*, (2002) at 917.

<sup>69</sup> *Id.*

change in China's Patent Law - which now allows employees the right to obtain a patent on works created while they are employed, provided that there is no contract transferring ownership to their employer (this is, of course, a reverse image and contrary to the presumption of employer ownership found in the U.S. "work for hire" doctrine, in which the presumption is that ownership vests in the employer unless there is a contract reserving ownership to the employee). Yu explains the context in which this change arose as follows:

"This revision reflects the many economic changes in China in the past decade. While state owned enterprises dominated the Chinese economy a decade ago, the number of private enterprises has greatly increased, and a large number of employees of state-owned enterprises are now rushing to enter the private sector."<sup>70</sup>

China's movement to a socialist market economy is consistent with the economic and political analysis that detailed the failure of Marxism as a political doctrine. As early as 1959, it was apparent that the Marxist experiment in the Soviet Union was not going to yield the falling away of the state in a victory for the proletariat. In his Introduction to the 1959 edition of Marx's seminal work, *Das Kapital*, Serge L. Levitsky wrote:

Marx could not conceive of a state in terms other than as the power of one class organized for the exploitation of other classes. He would have found the modern "capitalist" state, which sets goals and intervenes to protect the interests of the "proletariat," utterly unbelievable.

Nor did Marx foresee that the middle class, far from being reduced to the status of the proletariat by the operation of the laws of capitalist competition, would actually enjoy a remarkable consolidation of its position and broadening of its bases.<sup>71</sup>

It is in this transition to a different economic model, one which, at least in some part (primarily economic rather than political) recognizes the rights of individuals

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<sup>70</sup> Yu, *Pirates II*, *supra*, at 915.

<sup>71</sup> Karl Marx, Friedrich Engels, Serge L. Levitsky *Das Kapital: A Critique of Political Economy* (1867)

to ownership of private property, that the seeds of a more effective enforcement of copyright infringement may be found.

Thus it was that in 2001, the Chinese Government enacted a wide ranging and significant reform of its Copyright law, in recognition of the changes it was undergoing in its society.

The Chinese Copyright Law, as amended in 2001,<sup>72</sup> added new provisions intended to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (generally known as the TRIPS Agreement)<sup>73</sup>. These new terms expanded the subject matter of copyright to include databases, architectural works and other related works. Public performance rights and rental rights for software and audiovisual rights were also added. Statutory damages were increased to a maximum penalty of RMB 500,000 (about \$60,000)<sup>74</sup>. Additional terms allow enforcement agencies to confiscate income from infringing parties, and to destroy the tools and manufacturing equipment used to create infringing works.<sup>75</sup>

While many commentators have asserted that these changes in the Chinese Copyright law were motivated solely or primarily for the purpose of showing the West that China was serious about complying with TRIPS as part of the nation's participation in the World Trade Organization (WTO), other China scholars dispute this notion, and suggest that adherence to it is likely to lead to misunderstandings regarding China's desire to adopt enforceable copyright laws. Prof. Yu is one such critic. In his *Pirates II* article, he confronts and rejects this notion:

“Such a statement would ignore the important changes in the socialist market economy, the internal dynamics of the intellectual property lawmaking process, and contributions of the local stakeholders in the legal

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<sup>72</sup> Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept 7, 1990, amended Oct 27, 2001, effective Nov. 1, 2001 (P.R.C.), [http://www.sipo.gov.cn/sipo\\_English/flfg/xfgflfg/t20020416\\_34754.htm](http://www.sipo.gov.cn/sipo_English/flfg/xfgflfg/t20020416_34754.htm).

<sup>73</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm). The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994.

<sup>74</sup> Chinese Copyright Law, *supra* n. 51, at Articles 3(4), 10, 14, and 48, respectively. The increase in maximum statutory damages to RMB 500,000 (\$60,000) is just over a third of the maximum statutory penalty in U.S. Copyright Law, which is \$150,000, per 17 U.S.C.504 (c)(2), <http://www.copyright.gov/title17/92chap5.html#504>.

<sup>75</sup> *Id.* at Articles 47 and 51.



reforms. More problematic, by creating a misimpression that external pressure was the key to improved intellectual property protection in the country, the claim would misguide the development of future U.S.-China intellectual property policies.”<sup>76</sup>

While most critics of China’s intellectual property law felt that the 2001 amendments addressed many of their criticisms, the concern over lax enforcement of these laws remained unabated. Yu cites the *2005 National Trade Estimate Report on Foreign Trade Barriers* on the question of laws versus their enforcement, as follows:

“[w]hile China has made significant progress in its efforts to make its framework of laws, regulations and implementing rules WTO-consistent, serious problems remain, particularly with China’s enforcement of intellectual property rights”.<sup>77</sup>

In his *Pirates II* article, Professor Yu addresses the problems of enforcement of copyright rights, and IP rights in general in China, following the adoption of the 2001 amendments to the Chinese Copyright Law. He notes that the political climate in the United States, fueled by exporters’ complaints, led the U.S. to seek assistance from the WTO to enforce IP rights in China:

“Because intellectual property-based goods were considered key exports that helped reduce the deficit, the first Bush and Clinton administrations sought to induce China to strengthen intellectual property protection by threatening the country with economic sanctions, trade wars, non-renewal of most-favored nation status, and opposition to entry into the World Trade Organization (“WTO”).<sup>78</sup>

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<sup>76</sup> Yu, *Pirates II*, *supra* at 914.

<sup>77</sup> Id. at 935, citing Office of the USTR, 2005 National Trade Estimate Report on Foreign Trade Barriers 95 (2005), at 95, last seen at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_NTE\\_Report/asset\\_upload\\_file469\\_7460.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file469_7460.pdf).

<sup>78</sup> Yu, *Pirates II*, *supra*, at 903.

Professor Yu points out, however, that the filing of a WTO complaint may be a risky proposition for U.S. companies, as the filing of a weak complaint that ultimately fails may have far-reaching negative consequences for the filing parties and their government.<sup>79</sup> Rather than pursue that risky course, he suggests different approaches to enforcement:

“(1) educate the local people; (2) create local stakeholders; (3) strengthen laws and enforcement mechanisms; and (4) develop legitimate alternatives”<sup>80</sup>

Professor Yu suggests that one way to develop a social consciousness that is supportive of the enforcement of IP law in China is to develop, through education and other means, local stakeholders who will become invested in the benefits they would derive from enforcement:

“Commentators often ignore the impact of local conditions (*guo qing*) on the Chinese intellectual property system. This Part (of Professor Yu’s article), therefore, focuses on these conditions, in particular the Chinese leaders’ changing attitude toward the rule of law, the emergence of private property rights and local stakeholders, the increasing concerns about ambiguities over relationships in state-owned enterprises, and the government’s push for modernization. By highlighting the local developments, this Part demonstrates the importance of domestic factors in intellectual property lawmaking and suggests that the development of local stakeholders may hold the key to improving intellectual property protection in the country”<sup>81</sup>

I agree with Professor Yu on this point. It raises, in turn, a more immediate and practical question – in the area of fine arts, who are the local stakeholders, how are they to be developed, and how can their development progress in a direction that will lead them to join in the effort to strengthen IP protection in China?

The answer may be that the individual contemporary artists in China, who are reaping the benefits of the right of private ownership of their works, may have

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<sup>79</sup> Id. at 943-945. Prof. Yu points out that the U.S. failed in a 1998 effort to use the WTO process to open the Japanese market for American Films. Id at 944, n. 211, and that the filing of such complaints strains bilateral relationships between the two countries. Id. at n. 213.

<sup>80</sup> Id. at 946, citing Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, at 428-37.

<sup>81</sup> Yu, *Pirates II*, at 908.

become, or are becoming, sufficiently motivated by those benefits to become the kind of local stakeholders who will advocate for more effective enforcement of copyright laws in China.

**b. The Third Approach Needed: The Development of a New Social Norm Supporting Private Ownership**

Professor Yu notes that the need to educate local people in China regarding copyright law is great, since cultural differences may make even what appear to be simple concepts, like prohibitions on unauthorized use by third parties, the subject of misunderstandings. He cites an example from an article by Pat Chew about the way cultural differences can affect the interpretation of contract language:

“The contract may prohibit employees of the Chinese joint-venture partner from disclosing the American partner’s proprietary information to “third parties.” The Chinese, however, may define a “third party” differently than American business practices. In China’s collectivist, socialist, relationship-oriented society, the notion of outsider status may be quite narrow. For instance, cultural traditions would likely indicate that family members, “extended family” members, close friends, party members, and state-affiliated companies and their representatives are not outsiders, and hence would not be considered as “third parties”.<sup>82</sup>

Professor Alford concurs with the concern that cultural misconceptions can have a negative impact on efforts to development acceptance of IP enforcement regimes. He notes that these misconceptions begin by our use of IP definitions that are based on Western cultural settings and that even if we all use the same terminology, that doesn’t guarantee that those terms will carry the same meaning in each setting. He makes the very important point that discussions about cultural differences must also recognize that cultures are constantly evolving - he notes

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<sup>82</sup> Id. at 957, Citing Pat K. Chew, *The Rule of Law: China’s Skepticism and the Rule of People*, 20 Ohio St. J. On Disp. Resol. 43, 47-48 (2005)

“Moreover, we must remain mindful that at no time is any society’s culture monolithic, given class, gender, ethnic, regional and other differences”.<sup>83</sup>

Developing a successful enforcement system for copyright law in China remains a moving target, one which is complicated by the long history of normative antipathy toward ownership of private property. The challenge then, is to see to what degree the normative standards in Chinese society can be altered, to view the protection of individual property, including intellectual property, can become a dominant value in that society.

There is a vast body of social psychology research and scholarship that essentially says that “[m]ost people obey the law most of the time because they think it is the right thing to do. In other words, social norms play a large role in securing compliance with the law.”<sup>84</sup> And while their impact on law is undisputed, there is no consensus on how to explain the origin of these norms.<sup>85</sup>

One thing that is clear however is that the intersection of digital technology, with its ease of copying and distribution, and the desire of copyright owners to protect

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<sup>83</sup> Alford, *To Steal a Book*, *supra* at 6.

<sup>84</sup> Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 Berkeley Technology Law Journal 2:651 (Spring 2006), at 655 (hereinafter *Fear and Norms*). As noted, the literature on the impact of social norms on compliance with the law is vast. A representative sampling includes: Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. Rev. 453, 458-64 (1997); Lon L. Fuller, *Human Interaction and the Law*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 211, 234 (Kenneth I. Winston ed., 1981); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 400-07 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996); Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607, 619 (2000); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ERIC POSNER, LAW AND SOCIAL NORMS (2000), Mark Lemley, *The Law and Economics of Internet Norms*, 73 Chi.-Kent L. Rev. 1257 (1998).

<sup>85</sup> See, e.g., Richard McAdams and Eric B. Rasmussen, *Norms in Law and Economics*, in The Handbook of Law and Economics (A. Mitchell Polinsky & Steven Shavell, eds.) 2006, offering explanations for the origin of social norms from the fields of biology, philosophy, religion and culture. In considering this list and applying it to social norms in China, the role of a virtually homogenous tribal ethnicity should also be considered – although there are 56 different ethnic groups in China, the Han group makes up 91.6% of the population, a percentage found rarely in other industrialized major countries in the world. See, e.g. Edward Wong, *Clashes in China Shed Light on Ethnic Divide*, The New York Times, (July 8, 2009), last seen at <http://www.nytimes.com/2009/07/07/world/asia/08china.html>; Travel China Guide.com, *Chinese Ethnic Groups*, last seen at <http://www.travelchinaguide.com/intro/nationality> (7/9/2009).

their interests, has led to a widening gap between normative behavior and the willingness on the part of consumers to accept and enforce copyright protections.<sup>86</sup>

The trick, therefore, is to develop a way to begin to change normative behavior in Chinese society so that acceptance of the principal of private ownership of intellectual property becomes the norm. From that acceptance one can build a concurrent norm that enforcement of copyright ownership is a necessary part of that principal. As Mark Shultz notes, change of this nature is not easily accomplished:

“The difficulty, of course, is that changing social norms is, in reality, a very complex challenge. Building norms is not like build a house. Hard work, strong desire, and resources are not enough. Norms likely arise from a variety of sources, including religion, philosophy, culture, education and biology. There likely is no universal or easy way to establish a social norm.”<sup>87</sup>

So why should a society engage in this kind of social engineering, when we retain the ability to enforce copyright through the power of the punitive measures of the law, which include both financial penalties and incarceration. Mark Shultz offers a cogent explanation:

“A strategy based on scaring people into complying with copyright law by ratcheting up enforcement and penalties will quickly surpass the point of diminishing returns. Some enforcement is helpful and necessary, because laws do derive a deterrent effect merely from existing and from being credibly enforced.

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For some people, this notice (of infringement penalties) alone is enough to change behavior, either because they are unwilling to tolerate any risk of sanctions at all or because illegality represents a symbolic threshold they are unwilling to cross. Nevertheless, increasing penalties or enforcement may

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<sup>86</sup> See, e.g., Peter K. Yu, *The Copyright Divide*, 25 *Cardozo L. Rev.* 331 (2003); Laurence B. Solum, *the Future of Copyright Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 83 *Tex. L.Rev.* 1137, 1148 (2005)

<sup>87</sup> Schultz, *Fear and Norms*, *supra* note 83, at 667-68.

not appear to have the direct effect of increased compliance that some lawmakers and music industry advocates seem to assume. Many studies find very little or no deterrent effect at all from increasing the level of enforcement or penalties.”<sup>88</sup>

Given the historic antipathy both to the use of law to enforce social behavior in China, and Confucianism’s active discouragement of individual ownership and control, the likelihood of a successful enforcement of copyright law through the legal system alone, regardless of the severity of penalty, is unlikely to succeed.

Thus we come to the conclusion that while “[l]aws can contribute to the formation and change of community norms and individuals’ moral reasoning; laws cannot themselves compel community acceptance”.<sup>89</sup> Effecting change in normative behavior becomes a necessary element in developing an environment supportive of copyright protection.

Mark Schultz’s *Fear and Norms* article examines why the jamband community of fans behaves differently from the mainstream of pop music fans.<sup>90</sup> While a significant subset of mainstream fans willfully engage in illegal downloads, which are often justified by rants against profiteering major music labels, jamband fans accept, observe and even help with enforcement of the copyright rights of the bands. He attributes this atypical conduct to the human behavioral trait of “reciprocity”, which he argues “encourages the formation of social norms that support compliance with law.”<sup>91</sup>

Reciprocity implies some form of exchange. In the jamband context, the bands allow their live performances to be taped, often setting aside space in the

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<sup>88</sup> Id. at 651, citing COMM TO REVIEW RESEARCH ON POLICE POLICY AND PRACTICES, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 294-95 (Wesley G. Skogan & Kathleen Frydl eds., 2004); Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501,(1993).

<sup>89</sup> Robinson & Darly, *Utility of Desert*, *supra* note 83, at 473.

<sup>90</sup> Schultz, *Fear and Norms*, *supra*, at 653. Jambands, according to Schultz, are pop music groups which often play “jams”, long, and often meandering, improvisations interspersed between the melodies of their songs, and are bands who, with a set of guidelines, allow fans to record their live shows and to distribute copies of those recordings to other fans of the band. The prototypical jamband was the Grateful Dead, and its successor band, sans the late Jerry Garcia, which is a band now known simply as The Dead. Successors to the Grateful Dead’s jamband legacy include Phish, the String Cheese Incident, and the Dave Mathews Band. Id. at 668-674.

<sup>91</sup> Id. at 668.

performance venue for the “tapers”.<sup>92</sup> The bands also allow, encourage and facilitate the creation of a fan community, who actively engage in the distribution and trading of these tapes, as well as participate in an online community that reviews and discusses the band’s shows and the tapes of them.<sup>93</sup>

In exchange for this generous support (generous indeed, since the bands receive no income from the creation and distribution of these tapes), the jambands present guidelines they ask their fans to follow: fans are asked not to copy or distribute any of the band’s commercial releases (generally studio created works, although these can sometimes include live shows – in which case the band restricts taping at those shows); fans are asked not to commercially profit from their distribution and copying of the live shows they have recorded; and fans are asked to respect the copyright ownership of the writers, performers and publishers in the music.<sup>94</sup>

Shultz documents the effectiveness of this fan community’s efforts to adhere to these guidelines:

“Fans pay attention to the rules set by jambands and work diligently to comply. As a result, a culture of voluntary compliance with intellectual property rules pervades the jamband community. Fans carefully track information about bands’ rules, communicate with the bands to clarify them, and publicize them to one another. In addition, jamband fans enforce bands’ rules through: (1) informal sanctions such as shaming and banishment; (2) specific rules and policies of fan organizations such as etree; (3) monitoring and reporting illegal activities to band management and attorneys; and (4) software code in file-sharing programs that allow only permitted trading.”<sup>95</sup>

Adherence to social norms appears motivated by a variety of factors. Sometimes adherents do so out of self-interest, such as economic benefits or social status<sup>96</sup> In

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<sup>92</sup> Id. at 680-81.

<sup>93</sup> Id. at 679.

<sup>94</sup> Id. at 680-681, citing the Grateful Dead’s statement on taping and distribution, the Grateful Dead MP3 Statement, [http://www.archive.org/audio/etree-band-details.php?band\\_id=3](http://www.archive.org/audio/etree-band-details.php?band_id=3).

<sup>95</sup> Id. at 681-82. Etree is a volunteer community, comprised of websites and email lists, that attempts to help tapers and traders to be in compliance with the taping guidelines of bands that allow live performance taping. See, e.g. <http://wiki.etree.org>.

<sup>96</sup> Shultz, *Fear and Norms*, *supra* at 691

other instances, a sense of fairness, and a desire to be seen as cooperative, provides the incentive for compliance.<sup>97</sup>

It is important to note that reciprocity theory dictates that people respond in kind, regardless of the nature of the value involved – so kindness is met with kindness in return, value provided is responded to with like value (think of holiday gift-giving among friends as an example), cooperation yields cooperation in return.<sup>98</sup>

Scholars note that for cooperative behavior and reciprocity to flourish as social norms, people must have a sense that the majority of the society is similarly cooperating, and that the results of their cooperation are equitable. If there is a significant enough number of people who free-ride and take the benefits without reciprocating, the whole structure begins to collapse as people’s aversion to inequity kicks in, and people will withhold cooperation.<sup>99</sup> Schultz and others scholars refer to this conduct as “conditional cooperation”.<sup>100</sup>

With these principles in mind, the question posed is how does reciprocity theory apply to the development of a pro-copyright protection social norm in China? Is the jamband fan community a model with broader, if not universal, applicability, or is it limited to those few musical groups who have live performance taping to offer their fans? Is it limited only to music, or does it have a broader applicability in the arts? And lastly in this string of rhetorical questions, is the limited, finite number of fans of jambands a factor? Can you build a large enough community of dedicated fans to effect a change in social norms in a 2+ billion population?

As an art and entertainment format, popular music groups, who tour regularly and perform live before large audiences of fans, offer a very different level of fan

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<sup>97</sup> Id. at 692. Shultz cites Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition and Cooperation*, 114 Q.J. Of Econ, 817, 818 (1999), and quotes from the author’s discussion of the sometimes conflicting behavior that supports normative behavior: “Some pieces of evidence suggest that many people are driven by fairness considerations, other pieces indicate that virtually all people behave as if completely selfish, and still other types of evidence suggest that cooperation motives are crucial.” Id. See, also Eric Posner, *LAW AND SOCIAL NORMS* (2000).

<sup>98</sup> Id. at 699, citing Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. of ECON. PERSP. 159, 159-160 (2000). Perhaps one of the best examples of how reciprocity seems hard-wired into human conduct is the behavior of infants and small children when you hand them a toy or piece of food, and they want to hand it back to you.

<sup>99</sup> Id. at 705.

<sup>100</sup> Id. at 710, citing as the source for these terms the article by Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 142 (2000).



interaction than all other art and entertainment models. Actors in motion pictures do not perform live for their fans, as a general rule. Similarly, actors in television programs, although they are seen in more homes than movie actors, have very few forums in which they appear live for their fans.

Similarly, fine artists tend to only appear at the openings of shows of their works, either at galleries (generally for new work) or at museums (generally for retrospective shows of past works). Writers do promotional appearances at bookstores for signings of new works, and on television and the book fair circuit to promote new works. However, all of these other events differ from music groups appearances because the former are not actual performances of the works, whereas the music groups are actually performing for the live audience. In many jamband cases, the live performances are the principal venue for appreciation of the band's artistry, with sound recordings being a secondary form of work for the band – the Grateful Dead being a perfect example of this.

The coin of the realm for jambands, and what they primarily have to offer their fans, is the permission to record the live performances of the band, and secondarily, permission to trade those recordings and in the process, to create a community of fans who can interact with each other via trading and discussing the live recordings. As noted, the first element of these offerings, permission to tape live performances, is a kind of offering that artists in other media formats cannot provide. It follows that to the extent this is a core element of the reciprocity menu offered by jambands, the applicability of reciprocity theory to other arts and entertainment formats is limited.

The second item on this menu is more intriguing, however, and may represent a means by which reciprocity theory may be a basis for normative change, and may be of assistance in creating a social norm that supports copyright enforcement. The creation of a community of fans, by artists offering to share more of their daily lives and creative process, in exchange for which the artists can set guidelines for fan behavior, which can include helping the artist to protect their ownership rights, is an example of reciprocal behavior which may influence and shape the creation of helpful social norms.

The ever changing role of technology in our digital age may play a significant role in the creation of this fan community. Artists are increasingly using Twitter, Facebook and other social networking programs to make themselves and their lives more accessible to their fans. In the sci-fi and fantasy entertainment communities, the reach of these programs are enhanced by mega-conventions like ComicCon<sup>101</sup>, where thousands of fans can see, meet and greet actors, artists, and directors in person, and can then spread the word about those celebrities newest works via countless websites, blogs, and Twitter messages.

The digital revolution is in full bloom in China. Although there have been much publicized efforts made by the Chinese government to control or limit the content available online to Chinese web surfers, those efforts have met with very limited success. Moreover, there would appear to be little to object to about the creation of fansites and similar sites that would help build artist-fan communities in China.

Thus it seems that while the jamband analogy may not be applicable to the development of pro-copyright social norms in China, the concept of creating a fan community is one that will translate well into Chinese society, and can serve as yet another entrance to that sly rabbit's den.

In this next section, we see how the evolution of one of China's most traditional art forms, calligraphy, offers an example of how economic benefits, and a rejection of the social norms of the past regarding the value of individual artistic expression, coupled with legal protections, can serve as a basis for creating a new attitude towards copyright protection in the country.

#### **IV. Fertile Ground for a Multi-Level Approach: The Art of Calligraphy and Calligraphy Education in China**

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<sup>101</sup> ComicCon is one of the world's largest conventions of pop culture. Held every July in San Diego, California, the convention attracts over 160,000 participants, and has become a significant factor in generating consumer attention to upcoming films, television shows, books and other media in the fantasy, sci-fi, manga and related animation media. By generating positive buzz among attendees about soon-to-be-released products, media companies hope to create a built-in fan and purchaser base for those products. Reciprocity as a basis for social norms is present at ComicCon, via its rules for fans attending events where they are shown advance clips for upcoming movies. The rules require that no one use a video or audiotaping device to capture these clips. Fans are told explicitly that the studios are willing to show the clips if the fans agree not to tape them and/or upload them to the Internet. By and large, despite thousands in attendance at these events, the rules are adhered to.

Calligraphy is one of the oldest forms of writing known to civilization. In its earliest form, it employed what are called pictograms, symbols painted with a brush, to indicate and communicate ideas.<sup>102</sup> The earliest form of these pictograms is called *oracle-bone* script, or *jiaguwen*, which were developed between the 13<sup>th</sup> and 11<sup>th</sup> century b.c. These pictograms, over the course of thousands of years, evolved from their root expression into more symbolic script. For example, the oracle bone script for the concept of a mountain looks like a capital W with lines down its sides and bottom, so that it ultimately looks like a three-pronged crown. By the time calligraphy has gone through its seven iterations in Chinese history to reach Cursive script, the pictogram has become a few lines that bear very little relationship to the original form. Other concepts have seen little change, such as the pictogram for Sun.<sup>103</sup> Because these pictograms depicted elements that occurred in nature, it was the view of Chinese calligraphers that copyright protection could not attach to calligraphy, since no one should exclude others from using these elements of their common heritage.

The third oldest form of Chinese calligraphy is known as *seal* script, or *zhuan shu*, which is so named because it was the style of script used on identity seals. The oldest version of this form, called large seal script, was found primarily on stone inscriptions from the fifth through the third century b.c.<sup>104</sup> A later version, small seal script, was adopted by Emperor Qin Shi Huangdi, and was declared by him to henceforth be the standard script for all of China.<sup>105</sup> Emperor Qin standardized calligraphy symbols as a means of uniting the country (a largely successful effort, since despite numerous different dialects, written Chinese is the same throughout the vast country). Creating the symbols was a difficult task, and required much practice and skill, which included learning the precise sequence of strokes needed to create each of the thousands of characters that made up the language.<sup>106</sup>

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<sup>102</sup> Gordon S. Barrass, *THE ART OF CALLIGRAPHY IN MODERN CHINA*, (Univ. of Calif. Press, 2002) (hereinafter *ART OF CALLIGRAPHY*) at 16-17.

<sup>103</sup> *Id.* at 18-19, reproducing an illustration by Huang Miaozi depicting various concepts in seven different styles of calligraphy over the ages, and reprinting *A Brief History of Chinese Calligraphy*, by Shen C.Y. Fu, former senior curator of Chinese Art, Freer Gallery of Art, Washington, D.C.

<sup>104</sup> *Id.* at 19.

<sup>105</sup> Anne Farrer, *Calligraphy and Painting for Official Life*, chapter 2, *THE BRITISH MUSEUM BOOK OF CHINESE ART* (Jessica Rawson, ed., British Museum Press 1992) at 90. Farrer points out that Emperor Qin used this standardizing of written language as a means of unifying the “highly diverse feudal states” which preceded the Qin dynasty. *Id.*

<sup>106</sup> *Id.* at 91; Barrass, *ART OF CALLIGRAPHY*, *supra* at 19

It is difficult, coming from a Western perspective, to appreciate the significance of calligraphy in Chinese culture. As Gordon Barrass notes, one of the reasons calligraphy is so revered in China is that there is no “culture of political oratory” in China, as opposed to the West.<sup>107</sup> Chinese politicians and rulers all expressed their power in written form, rather than political oratory. And finally, not having a tradition of a language based in pictures, rather than an alphabet, Western scholars find the idea that language can also be art to be a foreign concept. For the Chinese, however, this dual role calligraphy serves is fertile ground for artistic expression.

By the beginning of the first century a.d., there were at least five different versions of script a calligrapher could choose in which to express ideas as well as communicate information. This was a factor in the development of calligraphy as an art form.<sup>108</sup> Another factor was that although the language used was standardized, and the symbols within each form (ie: oracle bone, seal script, or clerical script<sup>109</sup>) were also standardized, there was a broad range of artistic expression available through variations in brush size, brush style, calligraphy paper, type of inkstick and inkstone, and ink effect, which can produce differences in brushstroke.<sup>110</sup>

During the Cultural Revolution, Mao developed a simpler, less formal, structure for calligraphy, to make writing more accessible to the peasant classes.<sup>111</sup> By the time the Cultural Revolution ended with his death, so few members of the intelligentsia and former bureaucratic classes were left that a return to the more detailed and formal style of calligraphy was impossible for mass usage, and the simplified version is what remains in use. This change was part of what set the stage for the prospect of new forms of calligraphy, which would begin to diverge from the formal and rigid style that fostered schools of copiers, and would ultimately give rise to a modern school of calligraphy, which was based on individual expression.

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<sup>107</sup> Id. at 17.

<sup>108</sup> Id.

<sup>109</sup> Id. at 19. Clerical script was developed during the Han Dynasty (206 B.C. – AD 220), which followed the Qin Dynasty. This form of writing was used for official documents and public monuments. It was a simplified version of small seal script. Id.

<sup>110</sup> Id. at 24.

<sup>111</sup> Id. at 105. Gordon Barrass refers to Mao the calligrapher as “The Revolutionary Classicist”. Mao, he notes, had to develop his calligraphy style first as a poor student, and then as a revolutionary, while engaged in military operations. As such, he did not have access to a wide array of papers, ink and inkstones, and brushes. His simple style was developed, it seems, out of necessity. Id. at 106.

Gordon Barass summarized the impact Mao had on the development of modern calligraphy in China:

“The main message that many young calligraphers have drawn from Mao’s style is that they, too, can be a law unto themselves and do not need to follow the ‘rules’ of calligraphy. This would not be a bad influence, had they Mao’s poetic inspiration and consummate skill with the brush.”<sup>112</sup>

Gu Gan, one of the founders of this new school of contemporary calligraphy, drew inspiration from another key development for Chinese artists in the post-Mao era – the exposure to Western modernist art and artists, such as Picasso.<sup>113</sup> This exposure, which occurred in the late 1950’s- early 1960’s, fueled the development of modern calligraphy. In an odd sense, it seems that Western influence may indeed be what may lead to a greater acceptance of Western style IP regimes, only not the influence of our law, so much as the influence of our artistic culture – which is deeply rooted in the work of the individual, rather than works for the benefit of the state. Although deeply grounded in the traditional styles of calligraphy, Gu Gan has taken those styles and combined them with his extensive knowledge of Western abstract art, to create bold, highly individualistic works of contemporary calligraphy which have brought him great recognition and fame, both in China and in the West.<sup>114</sup>

Modern calligraphy bore little resemblance to the traditional forms, and was instead, as articulated by artist and theorist Zhang Qiang, about “self-openness”, or “calligraphic openness”. The artists creating these works are challenging official definitions of art, and are claiming individual ownership of their work. As their works move beyond China’s borders, they bring, through the interest shown in their work by collectors, curators and dealers, recognition and fame to China – values prized and desired by the government.<sup>115</sup>

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<sup>112</sup> Id. at 117.

<sup>113</sup> Id. at 53-54, 182-193. Professor Zhang Ding, President of the Central Academy of Design in China, met Picasso in Paris in 1956. Picasso remarked, during their meeting, that if he had been born in China, he would have been a calligrapher, not a painter. Id.

<sup>114</sup> Id at 192. Gu Gan created a trilogy of works, entitled *The Age of Red and Gold*, which represent a radical departure from traditional calligraphy, and which were widely imitated throughout China. He is viewed as one of the leading figures in China’s Modernist art movement. Id.

<sup>115</sup> Id at 256-263. Qiang’s work is viewed as going beyond Modernism towards Avant Garde, and is marked by a style he created called “Traceology” in which he works with a female partner creating a new way to

Noted art critic and Columbia University Philosophy Professor Arthur C. Danto, in his book of essays, *Beyond the Brillo Box: The Visual Arts in Post-Historical Perspective*, discusses, in an essay in the book entitled *Shapes of Artistic Pasts, East and West*, how the essence of the Modernism movement in art is the rejection of history.<sup>116</sup> Danto tells the story that when Braque and Picasso were co-inventing Cubism, they stopped going to museums, so that they would not be influenced by art movements of the past. Braque was so torn by his desire to avoid those past influences, but at the same time be up to date on new material found in museums, that according to Danto:

“There is a story about Braque driving with his wife through Italy, stopping in front of a museum, and saying “Marcelle, you go in and look around and tell me what’s good in there”. He was anxious not to spoil his eye with old painting (Francoise Gilot tells us) and nothing could more eloquently express the attitude toward the past that is proper to the modernist narrative.”<sup>117</sup>

It is precisely this rejection of history by the new wave of artists in Chinese calligraphy, in this case the history of Confucian doctrine which eschewed individual expression and ownership, which if supported and encouraged, may create in these new artists the kind of local stakeholders who will see the value of implementing a regime of strong copyright protection, and in so doing, achieve internally the goal sought by the West.

## **Conclusion**

Any effort to chart a prospective course for social change among an entire society is fraught with difficulties, chief among them the impossibility of discussing culture, and cultural change, in broad general terms, since in most cases it is in the details that change is affected and those details are virtually impossible to predict in advance. Add to that the challenge of discussing cultural change in a culture

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collaboratively create calligraphic artworks. He notes that the very fact that he is allowed to perform and exhibit this kind of cutting edge work demonstrates how much attitudes in China have changed in the last decade. Id. at 262.

<sup>116</sup> Arthur C. Danto, *BEYOND THE BRILLO BOX: THE VISUAL ARTS IN POST-HISTORICAL PERSPECTIVE* (Univ. of Calif. Press, 1992), including *Shades of Artistic Pasts, East and West*, which was first presented at the Sixth East-West Philosophers’ Conference held in Honolulu, Hawaii in August 1989; and published in *CULTURE AND MODERNITY: THE AUTHORITY OF THE PAST* (Eliot Deutsch, ed. Honolulu: University of Hawaii Press, 1991).

<sup>117</sup> Id. at 128.

that the author is not born into, and the difficulties are magnified. However, scholars have long embarked on such discussions, and it is hoped that in this article I have been able to explain and illustrate that attempts to create an environment supportive of copyright enforcement and protection in China are more likely to succeed if they take into account the nuanced approaches necessary to nurture such an environment. Like the sly rabbit, we need multiple approaches to achieve this goal, approaches anchored in law, economics and the creation of social norms.

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