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Available at: https://works.bepress.com/tianxiang-he/2/
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China is famous for its strict censorship system regarding cultural goods. China is not, of course, the only country which advocates censorship, but its uniqueness lies in the political purposes that its censorship system serves. This article explores China’s censorship system in the cultural sector in detail. It examines the ex ante and ex post censorship system in three major areas – publications, traditional broadcasting channels and online publishing – as well as the interplay between related legislations, regulations and national enforcement campaigns. This article explains how China uses these legal instruments and utilizes enforcement campaigns to strategically live up to its international obligations and serve the political needs of content control and market domination, rather than merely the outward purposes of these regulatory instruments and campaigns such as copyright protection.

Keywords: cultural products, censorship, China, copyright, WTO Case DS362/363, enforcement campaign

1 INTRODUCTION

Today, foreign copyright owners face two major problems in the Chinese market when they wish to conduct business there: massive copyright infringement and market access. In other words, once a copyrighted work has been publicly uploaded online, the volume of possible infringement appears infinite. Furthermore, market access is also a major problem with respect to transnational licensing, since China has its own political considerations regarding its cultural market. However, a degree of causal relationship exists between these two problems. According to a UK-wide survey conducted by Ofcom, almost 50 per cent of interviewees claimed their reason for downloading unauthorized copies was because it was the fastest and most convenient way to obtain said material,¹ and that partly explains why people infringe others’ copyright online today. In China, the problem is not speed of access, but freedom to access. The government has set certain limitations regarding the importation of foreign works. These conditions have limited the ability of Chinese consumers to access the foreign titles they desire, whereas online piracy offers people a way to access things they are not allowed to have. That is one of the major reasons why Chinese people

* The author wishes to thank Professor Anselm Kamperman Sanders of Maastricht University Faculty of Law for his invaluable assistance and insights in the preparation of this paper.

tend to acquire unauthorized copies of foreign titles instead of purchasing legitimate products. With regard to Chinese productions, their domestic situation is slightly better; indeed they arguably enjoy much better protection in China, albeit they nevertheless face massive online infringement as well. It appears that the very censorship mechanism that works so well for foreign copyright owners is so strict that it strangles any inappropriate local creation at birth.

It is clear from the above that besides general copyright legislation, cultural products in China are heavily regulated by a set of censorial rules as well. China has also regularly employed enforcement campaigns to address ‘problems that regular enforcement strategies have failed to address adequately’, since in the digital era many traditional regulatory measures are frequently challenged. Most existing studies on campaigns have focused on their direct effects on crime control, yet little attention has been paid to their indirect effects, such as on the right of free speech. This article examines how the Chinese government harnesses enforcement campaigns as an auxiliary instrument to its copyright legislation and censorship system in regulating cultural products.

In doing this it sheds light on how the Chinese government regulates its cultural sector and the political rationale behind this behaviour. It argues that copyright owners in the Chinese market should take into account China’s censorship system and the political considerations behind it, rather than merely following its copyright laws. It reveals the differences between a one-party state and western countries in regulating the cultural market, and how China’s cultural policies influence its protection of copyright. It also demonstrates how these policies and campaigns have been designed so that the Chinese government can cleverly evade potential international disputes.

Therefore, it is necessary to examine what exactly the cultural censorship system is and how it functions in China. For this purpose, sections 2 and 3 of this article comprehensively explore China’s ex ante and ex post censorship system in three major areas: publications, traditional broadcasting channels and online streaming. Section 2 concerns officially released legislation and regulations issued by different governmental agencies, which, despite the problem of legal hierarchy, are having an effect upon the cultural market. Section 3 discusses the application of ex post censorship requirements that China’s legislation and regulations entail. Section 4 outlines China’s import quotas and cultural enforcement campaigns, and the policy considerations behind them. The article concludes by scrutinizing the avowed goals and real effects of China’s regulatory net of copyright and censorship regulations over its cultural sector.

2 EX ANTE CENSORSHIP SYSTEM OF CHINA IN CULTURAL SECTORS

China is renowned for its rigid censorship system. Generally speaking, in terms of content distribution activities, the Chinese censorship mechanism functions in two

directions: *ex ante* and *ex post*. *Ex ante* censorship concerns the official publication and distribution channels. Copyrighted cultural goods such as books and audio-visual products all have to undergo a strict review process, and those titles that fail the censorship test, no matter whether they be foreign or local, are banned from the Chinese market.

### 2.1 Publications

China has a long history of censoring books and other publications. Although other countries around the world have had periods of such censorship in their history,\(^5\) in modern times, the censorship of publications in China is quite unique.

Publishing businesses in China include newspapers, periodicals, books, audio-visual products and electronic publications.\(^6\) A recent study has indicated that China’s publishing industry is still heavily state monopolized, and that it is run differently from publishing businesses in free markets.\(^7\) It is evident that state-owned publishing houses have exclusive rights in publishing, along with other monopoly resources. This situation means that only by illegal means or by cooperation with state-owned publishers can private publishers enter the publishing business.\(^8\)

For foreign publishers, their ability to do business in the Chinese publishing sector was extremely limited before 2011. Post 2011 – the year in which the decision of the WTO case DS363 took effect and the Chinese government was forced to take action\(^9\) – they are now able to compete in the publishing market to a degree. In the DS363 case, the Panel and the Appellate Body found that the related provisions and measures China had were inconsistent with its WTO obligation. As a result, the US entertainment industry should have ‘a full chance to compete’ in China ‘under agreed WTO rules’.\(^10\) A number of changes in laws have been made in support of that assertion.

Firstly, according to the new rules, electronic publications, as requested by the US in the DS362 case, are now an option for foreign companies in China. Article 39 of the 2011 Regulations on the Administration of Publications stipulates that: ‘The State allows the establishment of Sino-foreign equity joint venture companies, Sino-foreign contractual joint venture companies and wholly foreign owned companies that engage in the distribution of books, newspapers, periodicals and electronic publications’.\(^11\) Before 2011, foreign investors were only allowed to conduct business in relation to ‘the distribution of books, newspapers and periodicals’.\(^12\) However, the ‘specific measures and their implementation procedures’, which determined how foreign investors

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8. Ibid.
could engage in the abovementioned business in practice, were subject to ‘further discussion’ by the ‘publication administration department of the State Council jointly with the competent foreign trade and economic cooperation department of the State Council’.\footnote{Ibid.} After the 2011 revision of the Regulations on the Administration of Publications, ‘electronic publications’ were added, and the paragraph relating to the ‘specific measures and their implementation procedures’ was deleted. Moreover, three related supplementary documents were published after 2011 as well.\footnote{Measures for the Administration on Subscribers’ Subscription for Imported Publications, 2011; Provisions on the Administration of Publications Market, 2011; Measures for the Administration of Import of Audio and Video Recordings, 2011.}

Secondly, the right to import publications is no longer limited to ‘wholly State owned’ enterprises, which was required by the 2001 Regulations on the Administration of Publications.\footnote{Regulations on the Administration of Publications, 2001, art 42(2).} That requirement is abolished in the 2011 revision.\footnote{Ibid.} Furthermore, the special requirement on the ‘importation of newspapers or periodicals’ set by Article 41 of the 2001 Regulations on the Administration of Publications\footnote{Ibid art 41.} was also removed from its 2011 version.\footnote{Ibid art 41.}

Thirdly, since audio-visual products are considered as publications in China, several legislative documents were amended in order to match the major revisions. For example, in some regulations, the word ‘designated’ which had appeared in the previous versions was changed to ‘approved’.\footnote{See Regulations on the Administration of Audio and Video Products, 2011, art 27, compare with its 2001 version; Measures for the Administration of Import of Audio and Video Recordings, 2011, arts 7–8, compare with its 2002 version.}

It appears from the above points that the Chinese market is now opening its arms to foreign works and many foreign import entities might appear in China in the near future. However, this may not be the case if we consider the bureaucratic procedures which must be gone through before an import unit can be established and foreign titles successfully introduced into the Chinese market. Even if we assume foreign companies can now easily establish an import unit in China, there are still many restrictions on the content. According to Articles 25 and 26 of the 2011 Regulations on the Administration of Publications, the publisher is responsible for censoring works of domestic literature in accordance with a long list of sensitive topics.

As to imported goods, the same regulation provides very detailed restrictive provisions in Articles 45–8 of the 2011 Regulations on the Administration of Publications. According to Article 45, the prohibited content listed in Articles 25 and 26 also applies to foreign works, and it further indicates the responsibilities of the ‘import unit’, and the specific procedures regarding submitting foreign works for state censorship.\footnote{Regulations on the Administration of Publications, 2011, art 45.} Article 46 further delineates the consequences if the imported product is deemed inappropriate.\footnote{Ibid art 46.} Article 47 prescribes that only those with ‘publication import units established in accordance with the laws’ are eligible to import foreign publications.\footnote{Ibid art 47.} Article 48 sets specific restrictions on the exhibition of foreign publications.\footnote{Ibid art 48.}

13. Ibid.
16. Ibid.
17. Ibid art 41.
21. Ibid art 46.
22. Ibid art 47.
Apart from these responsibilities that publishing entities in China must undertake, if the scheduled publications involve ‘key selected titles’ which concern national security or social stability, then the entities must submit their annual publishing plan for scrutiny as well.\(^{24}\) Moreover, scheduled publications concerning the abovementioned ‘key selected titles’ cannot be published if they have not been submitted for inspection beforehand.\(^{25}\) In fact, according to one former employee of the Encyclopedia of China Publishing House – a state-owned publisher in China – many of their publishing projects are stuck in the administrative stage of record submission and are thus unavoidably delayed.\(^{26}\) And, in the worst case scenario, publishers and their staff might receive administrative, even criminal, sanctions if they have failed to censor inappropriate content and consequently published it.\(^{27}\) Further, the publisher could be shut down if it fails to undertake its filing responsibility.\(^{28}\) From this single legislative document, we can see how restricted the publishing sector is in China. In terms of imported foreign works, similar censorship requirements have been reiterated in many associated regulations as well. For instance, with respect to the importation of foreign audio-visual works, although the entitlement to import such titles is no longer limited to government-controlled entities, the importer still faces rigid content censorship.\(^{29}\)

2.2 Traditional broadcasting channels

In terms of traditional broadcasting channels, local censorship is just as strict. Generally speaking, the traditional way for the public to gain access to audio-visual works is through broadcasting channels, such as movie theatres and television stations. These are all highly restricted and, in addition, government-controlled areas. Accordingly, these channels face strict management and content restrictions.

In terms of market entry, the right to broadcast one’s work through traditional channels is controlled by the state-owned television stations. According to Article 10 of the Regulations on Broadcasting and Television Administration, only certain levels of ‘departments of broadcasting and television administration of people’s governments’ can establish radio and television stations.\(^{30}\) That requirement was later reiterated in Articles 4–7 of the Measures for the Administration of Examination and Approval of Radio Stations and Television Stations in 2004,\(^{31}\) and seemingly no exception can be made to this.\(^{32}\) Once a broadcasting institution is established, a licence for a broadcasting station and television station will be issued to the successful applicant. Furthermore, according to Article 5 of the Administrative Measures for the Business

\(^{24}\) Ibid art 20; a similar provision can be found in the online environment as well, see Provisions on the Administration of Online Publishing Services, 2016, art 26.
\(^{26}\) Interviewed and documented by the author on 1 October 2014.
\(^{28}\) Ibid art 61.
\(^{29}\) Regulations on the Administration of Audio and Video Products, 2001, arts 3 and 28; Measures for the Administration of Import of Audio and Video Recordings, 2011, arts 5–6 and 13–19.
\(^{30}\) Regulations on Broadcasting and Television Administration, 1997, art 10.
of Transmission of Radio and TV Programmes, in order to engage in the business of transmitting ‘radio and TV programmes by cables’, the broadcasting institution must acquire ‘a Permit for the Business of Transmission of Radio and TV Programmes’. It should be noted that only those state-owned institutions, or those institutions and groups ‘established upon approval of the State Administration of Radio Film and Television (SARFT)’ are entitled to apply for the abovementioned permit, and that institutions involving foreign capital are prohibited from engaging in the business of transmitting radio and television programmes.

Not only is the privilege of content broadcasting in the hands of state-owned institutions, but the production and distribution of radio and television programmes are heavily state controlled as well. According to Article 5 of the Radio and Television Programme Production Business Management Regulations, although private parties can participate in the production of radio and television programmes, the involvement of foreign capital is highly restricted in this field. Furthermore, in order to produce television programmes, every production entity must first obtain a ‘Radio and Television Programme Production Business Permit’ from the administrative radio and television organ of the government. As for television drama productions, an additional ‘Television Drama Production Permit’ is needed. In addition, news about contemporary politics and similar topical and current affairs programmes can only be broadcast by state-controlled radio and television organs, so other privately run businesses cannot produce such products, even when a Radio and Television Programme Production Business Permit has been obtained. The broadcasting of productions produced by entities without a Radio and Television Programme Production Business Permit is prohibited. In terms of the new Video on Demand (VOD) service through radio and television systems, Article 7 of the Measures for the Administration of Radio and TV Video Broadcasting by Order clearly indicates that only approved radio and television stations can apply for a Permit for the Business of Video Broadcasting by Order.

In terms of movie production and theatre display channels, the level of state control is even stricter. First, According to Article 9 of the Regulations on the Administration of Movies, in order to establish a ‘film production entity’, the application for establishment shall be examined and consented to by the administrative department for film under the people’s government of the province, autonomous region or municipality directly under the Central Government where the applicant is located before being submitted to the administrative department for radio, film and television under the State Council for examination and approval.

34. Ibid art 6.
35. Ibid art 7.
37. Ibid art 4.
38. Ibid art 12.
40. Ibid art 25.
After approval, the qualified entities can thus gain a Licence for Producing Movies. Entities other than film production companies can also participate in film production, but they have to ask for approval from the administrative department for radio, film and television under the State Council, and obtain from that body a one-off Licence for Producing Movies. Foreign practitioners cannot participate in film production independently but have to cooperate with a film production entity, under the approval of the same department mentioned above. Furthermore, they have to obtain a different one-off licence, entitled the License for Producing Films through Chinese-foreign Cooperation, and have to face a series of procedural restrictions. Second, the distribution and projection of movies are subject to licences issued by the administrative department for movies under the Chinese government. Only after obtaining the Licence for Operating the Distribution of Movies and the License for Operating the Projection of Movies can entities engage in such business in China. As can be seen, the movie business and the theatre channel are firmly controlled by the Chinese government.

In light of the influence of the DS363 case on the movie sector, no major revision to the related legislative documents has yet been released, which means no changes have been made regarding the entities that are eligible to import films for public screening. However, if we take the movie quota set by the Chinese government into consideration, whether a foreign entity can import foreign films for screening is not the only issue. Therefore, it is understandable why the US chose to make China extend its annual film import quota from 20 to 34 in 2012 instead of forcing China to lift its limitations on import entities. This is because making the cake larger is a more urgent mission for foreign film companies, especially since they have already found that co-production is a much faster way of turning their products into money in China.

As to the content of the above-discussed articles, what can be produced or accepted seems to be another tricky question in China. In light of the ex ante censorship, Japanese anime products in China serve as a good example: Japanese anime is renowned for its undiscriminating nature, normally containing sexual and violent elements. For instance, in an online interview, Ma Kai, director of the programme ‘Comic World’ on the Children’s Channel of China Central Television (CCTV), revealed that imported animation works on their channel were subject to multiple levels of censorship, for the purpose of filtering out works deemed inappropriate for children. According to

43. Ibid art 10.
44. Ibid art 16.
45. Ibid art 18.
46. Ibid art 19.
47. Ibid arts 20–23.
48. Ibid art 37.
49. Ibid arts 37–8.
50. See infra section 4.1.
52. Ibid.
the Foreign Television Programme Import and Broadcast Management Regulations, areas such as sensitive political content, obscenity and violent content are included on the censorship lists too.\textsuperscript{55} In terms of local television productions, according to regulations such as the Television Drama Content Management Regulations, the censorship requirement is almost the same.\textsuperscript{56} Works that fail to pass the censorship examination are unable to obtain a Television Drama Distribution Permit or Television Cartoon Distribution Permit, and any production without these permits cannot be distributed, broadcasted, imported or exported.\textsuperscript{57} Taking movie production in China as another example, no productions can be distributed, projected, imported or exported without the Licence for Public Projection of Movies first having been obtained.\textsuperscript{58} In order to obtain that licence, all movies in China must be examined in accordance with a long list of censorship criteria,\textsuperscript{59} and those failing to pass the examination ‘shall not be distributed, projected, imported or exported’ in China.\textsuperscript{60}

In terms of content censorship in the television and movie screening sectors, China is certainly not alone: although Japan has a relatively close relationship with the US, as both countries have a strong partnership and share interests in multilateral cooperation, cultural products in the US market have also faced strict censorship. However, the purpose there is to filter violence and sexual content and to adapt Japanese works to the local language environment.\textsuperscript{61} Some believe that these harsh editing criteria may even encroach on the moral rights and integrity of the Japanese copyright holders and that US censorship requirements have in fact triggered some infringing activities from media fans.\textsuperscript{62} However, notwithstanding, the situation in the US is different from that in China, where most of the censorship rules focus on political considerations.\textsuperscript{63} By contrast, speaking of Japanese anime, the main motivation in the US is the desire to treat them as if they were only for the consumption of children.\textsuperscript{64}

\subsection*{2.3 Online publishing}

Online publishing is a new distribution conduit for copyrighted content that has only emerged recently in China. With the rapid development of broadband Internet services

\textsuperscript{55} See Foreign Television Programme Import and Broadcast Management Regulations, 2004, art 15.
\textsuperscript{57} Ibid art 15.
\textsuperscript{58} Regulations on the Administration of Movies, 2001, art 42.
\textsuperscript{59} Ibid art 25.
\textsuperscript{60} Ibid art 24.
since the late 1990s, it has been estimated that more than 90 per cent of Chinese Internet users (270 million) have broadband Internet access, and the State Council of China even estimated that by 2015 the Internet speed for cities would be as fast as 20 megabits per second, while rural Internet speeds would be around four megabits per second. For example, according to the 2014 Statistical Report on Internet Development in China, as issued by the China Internet Network Information Center (CNNIC), about 428 million Internet users in China had used online video services by the end of December 2013. There is evidently a huge market for online streaming services.

However, the once less controlled online publishing sector is now facing increased restrictions. Under the Administration Procedures of Internet Information Services, interested parties, according to their type (commercial or non-commercial), must obtain an Internet Information Services Value-added Telecommunications Service Operating Permit or carry out record filing procedures, in order to conduct Internet information services. The telecommunication administration authorities at different levels are in charge of issuing said permit and inspecting the record filing procedures. Further, all cooperation plans involving foreign capital are under government supervision, while the service providers are responsible for censoring a list of unwanted information. Failure to censor such information on their websites can lead to criminal sanctions.

In terms of eligibility, online service providers in China must obtain an Online Publishing Service Licence if they provide online publishing services in general. Specifically, in order to conduct audio-visual online streaming services, private Internet service providers must also obtain another permit, which is called the Permit for Spreading Audio-visual Programmes via Information Network (hereinafter Audio-visual Service Licence). In stark contrast, state-owned radio and television stations only have to follow record-filing procedures. Furthermore, it is stipulated that...
‘Chinese-foreign equity joint ventures, Chinese-foreign cooperative joint ventures and foreign-funded entities’ are not eligible to provide online publishing services, and only the ‘wholly State owned or State controlled work unit’ can apply for an Audio-visual Service Licence, which means no businesses involving foreign capital can enter the online publishing sector.

Interestingly, the Ministry of Culture of China revised many legislative documents in 2011 in response to the WTO DS363 case. The Interim Provisions on the Administration of Internet Culture, which covers ‘Internet cultural products and activities’, is one of them. The concept of ‘Internet cultural products’ in Article 2 of its 2011 version is broadly set. Its Article 3 provides that ‘Internet cultural activities’ covers all types of online businesses which are related to copyrighted works. Moreover, the requirements preventing foreign investors from establishing an ‘Internet cultural business unit’ and preventing foreign invested Internet information service providers from engaging in ‘Internet cultural activities’, as had appeared in the previous version and related documents, were modified. According to the Notice of the Ministry of Culture on the Implementation of the Newly Amended ‘Interim Rules on the Management of Internet Culture’, foreign invested Internet information service providers are still not eligible to participate in all Internet cultural activities ‘at the moment’ except for in the ‘music’ business. The 2006 Network Music Opinion is still valid in general, as the government had indicated that if there is ‘any discrepancy’ between the 2006 Network Music Opinion and the 2011 Internet Culture Implementation Notice, ‘the latter shall prevail’. Therefore, the requirement of the 2006 Network Music Opinion that ‘no foreign investors could set up an Internet cultural business unit’ remains valid but with an exception: foreign invested Internet information service providers can now engage in Internet cultural activities related to music. However, they still have to apply for a Network Cultural Business Permit from the culture administrative department in order to conduct business. Furthermore, it is required that only the unit with the Network Cultural Business Permit can import Internet cultural products, which is a new addition compared with its 2003 version. However, since foreign invested Internet information service providers are unable to participate in most ‘Internet cultural activities’ except currently for music, they cannot be assured of obtaining

80. Ibid art 8(1); Regulations on the Administration of Private Network and Directional Transmission of Audio-visual Programme Services, 2016, art 6(1).
82. Ibid art 2.
83. Ibid art 3.
85. Several Opinions of the Ministry of Culture on the Development and Management of Network Music, 2006, art 8: ‘The establishment of the foreign capital invested Internet Cultural business unit is prohibited’ [hereinafter the 2006 Network Music Opinion].
87. Ibid art 14.
89. Ibid art 15.
the said permit if their businesses involve other cultural products than merely musical products, since that permit is designated for successful applicants who want to establish a commercial Internet cultural entity. Therefore, it is possible for foreign copyright conglomerates to establish music-related ‘Internet cultural business units’, and they could then start to engage in Internet cultural activities thereafter. As to other cultural products, the door is currently closed to foreign capital.

Furthermore, according to Article 9 of the Administrative Provisions on Internet Audio-visual Programme Service, and Article 11 of the Regulations on Administration of Internet News Information Services, to offer services similar to those offered by radio and television stations and audio-visual news services about current events and political affairs, private Internet service providers must also acquire the aforementioned Permit for TV Business, along with the Internet News Information Service Licence. Moreover, to produce and offer programmes involving the hosting, interviewing and reporting of news requires the previously discussed Radio and Television Programme Production Business Permit and the Internet News Information Service Licence. And those who wish to offer ‘micro’ movie or drama production streaming services have to obtain the Radio and Television Programme Production Business Permit as well. These terms indicate that politically sensitive programmes are highly restricted in this area, an observation which can be further confirmed by Article 17 of the same regulations.

Those audio-visual service providers who are certified are subject to many obligations regarding content censorship as well. Many of these filters, such as ‘content endangering social virtue’, or ‘damaging good ethnic cultural traditions’, are vague enough that considerable content could inevitably be included if they were applied rigorously. Therefore, in practice, many service providers in the traditional distribution channels tend to exercise self-censorship before putting their content on air, regardless of whether they are local or foreign. That situation also applies to online streaming service providers. However, previous industry practice has shown that there existed at least one loophole in introducing foreign titles for online streaming purposes. Since the Chinese government had not been treating online streaming in the same way as it had traditional broadcasting channels, such as television stations and theatres, online video platforms in China had been able to exploit policy loopholes to broadcast far more foreign works than would be allowed on traditional broadcasting channels. However,
doing so was actually still violating the law. According to the existing legislation, no foreign audio-visual works can be introduced without going through the formal censorship procedure and obtaining the corresponding licence.

In spite of the levels of bureaucracy, in practice many foreign titles have managed to enter the Chinese market without being censored by the government. Take, for example, the show *My Love from the Star*, which Iqiyi, one of the official online streaming platform partners of the South Korean show, simulcast together with SBS, its South Korean copyright holder in China. It would be practically impossible for that kind of live broadcast to happen were video streaming platforms first to submit the show to the government’s lengthy approval process. Actually, it has been reported that most foreign television shows are not censored and edited at all before being streamed. It is believed that the loophole exists because the Chinese government has tried to avoid stifling its own promising high-tech industry. In other words, it is more a result of lax enforcement and policy considerations.

Recently the Chinese government has noticed the loophole and tried to use policy instruments instead of the law to regulate the market. The State Administration of Press, Publication, Radio, Film and Television of the People’s Republic of China (SAPPRFT, formally known as SARFT) issued a new notice in 2014 to restate the regulations relating to online foreign audio-visual programme management. According to SAPPRFT’s reiteration, no foreign audio-visual works can be streamed online without the broadcaster having obtained the Licence for Public Projection of Movies or Television Drama Distribution Permit. It mentioned that only those audio-visual platforms which had acquired the Audio-visual Service Licence are entitled to introduce foreign audio-visual programmes for the purpose of online streaming. Only after having obtained a Television Drama Distribution Licence (Special Use for Online Broadcasting) through examination and verification by a provincial-level or higher administrative press, publications, radio, film and television department, are audio-visual platforms allowed to broadcast foreign audio-visual titles on their sites. The notice also indicated that any such foreign audio-visual titles should be ‘healthy and positive’ and have a proper licence from the copyright holder. Nevertheless, it also indicated that

104. B Feng and S Wang, supra (n 99).
106. The State Council merged SARFT and the State General Administration of Press and Publication (GAPP) to form SAPPRFT in 2013.
108. Ibid.
109. Ibid.
any Chinese audio-visual platforms concerned should register all foreign titles they had acquired with the relevant administrative body before 31 March 2015. Any foreign television dramas that had not been registered could not be distributed online after 1 April 2015. Apparently, obtaining the said licence for a foreign audio-visual work requires the product to pass through the government censorship process. Moreover, unlike common practice in countries such as the US and South Korea, which could respond to the audience’s feedback on the previous episode, China’s requirement of submitting the complete production for censorship before it can be broadcast means that, with respect to the original broadcasting date, Chinese audiences have to wait for at least several months to watch their favourite foreign audio-visual works. An industry insider raised his concern that SAPPRFT’s decision may result in the return of commercial piracy and unauthorized online distribution, which have been restrained by the online simultaneous broadcasting service.

3 THE EX POST CENSORSHIP SYSTEM OF CHINA IN CULTURAL SECTORS

When it comes to the ex post censorship of the cultural sector in China, the focus is on information and works in circulation, both online and offline. For example, since many dissidents in China utilize the Internet to express their political opinions, and many other issues such as pornography and terrorism are taking the form of cultural products, the Chinese government has invested heavily in policing the Internet. As to the officially published cultural works concerning this research, in some rare cases, if the authorities find a published work or its author ‘inappropriate’, or believe it may cause unnecessary problems, they can ban the underlying work, and recall all marketed items at any time. Therefore, it is not hard to understand why the Chinese government has long been cautious about cultural goods, especially the importation of foreign cultural goods, and their online distribution.

3.1 Publications

Besides these ex ante publication censorship requirements that can be easily found in official documents, the ex post censorship mechanism in this sector is just as crucial but subtler. In addition to the cases of the books of Shuo Wang and Weihui Zhou, a more recent case exemplifies this latent censorship: because of their sympathetic

110. Ibid.
115. Ibid.
views on Hong Kong’s Occupy Central sit-ins and Taiwan’s ‘sunflower’ student movement in late 2014, a banning order was issued ‘orally’, according to one source in a state-owned publisher, against the books of many famous authors, including the Tang Prize recipient and Chinese American historian Yu Ying-shih. Their books have thus been banned and removed from the Chinese market. Many independent publishers have confirmed this unofficial order as well. In Yu’s case, we can see that it is not only the content that is the target of publication censorship in China, but the political attitude or sensitivities of the author are also considered.

3.2 Traditional broadcasting channels

The criteria of the ex post censorship system in the field of public broadcasting channels are relatively similar to those in the publishing sector. According to the related regulations, the broadcasting of certain television programmes, and the distribution and projection of certain movies can be stopped by the administrative department for radio, movie and television under the State Council at any moment because of ‘particular circumstances’. However, what these ‘particular circumstances’ are is comparatively unclear, and that has created space for the authorities to operate. For example, SAPPRFT issued an official notice in late September 2014, asking local television stations to remove those audio-visual productions featuring actors that had been arrested for drug and prostitution reasons. After Jinping Xi, the President of China, pointed out in a meeting on arts and literature that ‘creative works should be patriotic and moral’, the SAPPRFT and China Television Arts Committee soon organized a symposium to study his talk, and explicitly indicated that no persons with a criminal record or who had been involved in a scandal could be allowed in future productions. Therefore, it is notable that, although these officially released productions have no doubt already been ‘sanitized’ (therefore the contents themselves are theoretically ‘safe’), the participants of a work could be the ‘particular circumstance’ that can cause fatal damage to the commercial life of these products as well. Another famous example is the ‘cleavage ban’ imposed on the television series The Saga of Wu Meiniang, in which the production had already been passed for censorship and been broadcast but was soon pulled after

117. Ibid.
118. Regulations on Broadcasting and Television Administration, 1997, art 43.
119. Regulations on the Administration of Movies, 2001, art 42.
controversy over the actresses’ revealed cleavage. The show reappeared several
days after it had been pulled but now with ridiculously cropped scenes comprising
head and shoulder shots of the actresses. Commentators questioned whether
revealing cleavage can really be considered pornographic. However, in China,
this is a question with no clear answer.

3.3 Online publishing

As to the \textit{ex post} censorship of online publishing, it is also clear that, according to the
existing legislation, the investors in and managers of online content providers are
responsible for the content within, and the controlling bodies and the providers
themselves must deal with any inappropriate content immediately once found. This
means that, as a last resort, the authorities can then use those vague criteria to
pull any officially launched works. The reason why the government has chosen to
pull popular US television shows such as \textit{The Big Bang} from its official online streaming
provider remains unknown, even to the CEO of the officially licensed provider
SOHU. And SAPPRFT – the department that issued the take-down order – has
refused to give a clear answer. Recent reports have shown that the controlling
bodies that are in charge of the online streaming business, such as SAPPRFT and
the Ministry of Industry and Information Technology, have built an ‘information pool’. The controlling bodies of the government will upload unsuitable titles to this pool, and online streaming service providers, as observers, will know what to remove immediately. For example, several episodes of the famous American television series \textit{The Blacklist} that had been officially introduced to China by many video platforms were removed by a ‘pool’ order after their debut. Furthermore, due to the absence of a rating system, many officially introduced Japanese anime works have recently been

\begin{itemize}
\item \text{123. S Wee, ‘Sexy China TV Drama Busted, Returns to Air More Sedate’ [2015] Reuters <http://www.reuters.com/article/2015/01/03/china-television-idUSL3N0UI04P20150103> accessed 4 August 2016.}
\item \text{125. S Wee, supra (n 123).}
\item \text{126. Provisions on the Administration of Online Publishing Services, 2016, art 33; Regulations on the Administration of Private Network and Directional Transmission of Audio-visual Programme Services, 2016, art 19; Administrative Provisions on Internet Audio-visual Programme Service, 2008, art 18.}
\item \text{127. Ibid.}
\item \text{131. Wang, supra (n 102).}
\item \text{132. Ibid.}
\end{itemize}
pulled from video platforms by order of the Ministry of Culture, which has stated that these works contain pornographic and violent elements which are unsuitable for children.133

These requirements have also compelled Chinese video platforms to ‘self-censor’ their licensed content, which is understandable since online channels are much more complicated and harder to control than traditional ones, so the government has to rely on the service providers doing part of their job. A related SAPPRFT notice has ordered service providers to hire qualified staff to undertake their censoring work,134 and stipulated that they should follow a list of more detailed standards in doing so.135 However, this is evidently a major burden for online publishers such as online streaming service providers, some of whom have reportedly had to hire hundreds of employees to self-censor their content.136 Nevertheless, because of the vagueness of the ex post censorship standards and the administrative punishments and economic damage that a take-down can cause, online publishers such as video platforms are more inclined to introduce pure entertainment rather than politically sensitive content.

4 IMPORT QUOTAS AND ENFORCEMENT CAMPAIGNS

Besides its ex ante and ex post censorship regulations, the Chinese government also uses other policy instruments, such as import quotas and enforcement campaigns, to regulate its cultural market.

4.1 Import quotas

Importation quotas limit the appearance of foreign cultural works in the Chinese market from a different angle. For publishers of tangible copyrighted goods, such as books and audio-visual publications, the number that can be imported is not limited. However, the direct importation of foreign publications, as we have seen in the discussion above, is strictly controlled by the state.137 For example, with respect to imported titles, not only the establishment of an importation unit, but also the content of these titles falls under the Chinese government’s strict state control. Although the requirement that the import unit must be a ‘wholly State owned enterprise’ was deleted in 2011, the importation units themselves are still responsible for the content they import, and they must ensure that the content of the imported works is inoffensive, as ‘[t]he publication administration department of the people’s government at or above the province level may directly carry out the content examination of the imported publications’.138 However, in cases where the importation units are unsure

135. Ibid art 2.
136. Wang, supra (n 102).
137. See infra section 2.1.
about their judgement on imported titles, they can voluntarily submit them to ‘the publication administration department of the people’s government at or above the province level’ for content censorship.\textsuperscript{139} And, last but not least, ‘[t]he publication administration department of the State Council may prohibit the importation of particular publications’.\textsuperscript{140} Indirect imports, such as adaptations of foreign works by local production companies, are considered local productions and, thus, must undergo the same procedures as direct publications. It is notable that tangible audio-visual products are considered as publications under the existing legislation,\textsuperscript{141} which means foreign audio-visual products, such as television dramas and movies, can enter the Chinese market without a quota limit in the form of tangible goods such as DVD and Blu-ray discs, but they will nevertheless be strictly censored as well.

As we have seen, the Chinese government operates a strict censorship system but it has other implicit restrictions, in terms of audio-visual products, which have been frequently discussed elsewhere.\textsuperscript{142} Unlike import quotas in other fields, China’s movie import quota is more explicitly delineated. China’s quota system has long restricted the import of foreign movies. For example, between 1994 and 2001, the importation quota for Hollywood revenue-sharing films was a mere ten; it was raised to 20 after 2001.\textsuperscript{143} In 2012, in compliance with its international obligations, China increased that number again to 34,\textsuperscript{144} but in terms of the number of films released in US and Canadian theatres, which was estimated to be 659 in 2013,\textsuperscript{145} the number permitted by China is negligible. It is of course the right of a country to have screen quotas, according to Article IV of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{146} However, in terms of the transnational licensing of foreign movies, the screen quota that China enforces no doubt limits the ability of foreign copyright owners to enter the market. Therefore, it came as no surprise when the US requested consultation with China in the WTO concerning these quotas on 10 April 2007.\textsuperscript{147} As with the previous discussions on censorship and import quotas, though, it is clear that foreign companies still face severe restrictions five years after the WTO case DS363. Nevertheless, another way to enter the Chinese market without worrying about the quota limit is through Chinese-foreign cooperative film production.\textsuperscript{148} A co-production film can

\begin{itemize}
\item[139.] Ibid.
\item[140.] Ibid.
\item[141.] Ibid art 2.
\item[146.] General Agreement on Tariffs and Trade, 1994 [hereinafter GATT 1994], art IV.
\item[148.] See generally, Measures for the Administration of Chinese-Foreign Cooperative Film Production, 2004.
\end{itemize}
be deemed a domestic product and, thus, can bypass the strict quota limit China imposes.\footnote{149} In terms of television stations, foreign audio-visual works are under more restrictions in comparison with local productions. In order to import a foreign title for television broadcast, the state-owned television stations must navigate a series of complicated procedures. For instance, the particular types of imported content are limited, so no foreign news reporting programme is allowed. All the audio-visual works are divided into two types: foreign films and dramas provided to television stations for broadcast (hereafter foreign film and television dramas), and educational, scientific, cultural and all other categories of television programmes (hereafter other television programmes).\footnote{150} All importations must first be submitted to provincial administrative departments, then to the SAPPRFT for examination; the SAPPRFT makes the final decision as to whether a foreign production can be imported.\footnote{151} The provincial level administrative radio and television departments are in charge of the first instance of checking foreign film and television dramas and most other television programmes, and they must submit their opinions to the SAPPRFT for final approval;\footnote{152} in cases where the applicants are district-level television stations and provincial television stations, and the object they intend to import belongs to the category of other television programmes, the provincial-level administrative radio and television departments can make the final decisions themselves.\footnote{153} If the theme of these programmes involves politically sensitive content, the provincial-level administrative radio and television departments must submit them to SAPPRFT for the final decision.\footnote{154} These departments have to make a quarterly report to SAPPRFT for archiving as well.\footnote{155} In any other cases, the SAPPRFT has the final say on whether a foreign audio-visual title can be imported or not.\footnote{156}

In terms of importing foreign titles for television broadcasting, there is also a strict limit on the broadcast hours for foreign audio-visual productions.\footnote{157} A regulation document from the SARFT indicates that ‘the number of foreign animated works imported by the qualified institutes must equal their own production, and an institute without its own domestic productions will be disqualified from importation’.\footnote{158} Furthermore, the SARFT has promised to support ‘Chinese original production’ with regard to ‘funding, broadcasting recommendations, intellectual property protection, etc.’.\footnote{159} In global terms, these requirements are beyond reproach and are not new. Take the ‘Television without Frontiers’ (TVWF) Directive of the European

\begin{itemize}
  \item[150.] Foreign Television Programme Import and Broadcast Management Regulations, 2004, art 2.
  \item[151.] Ibid art 3.
  \item[152.] Ibid art 11.
  \item[153.] Ibid art 13.
  \item[154.] Ibid.
  \item[155.] Ibid art 16.
  \item[156.] For the censorship criteria, see ibid art 15.
  \item[157.] Ibid art 18.
\end{itemize}
Union (EU) as an example, which requires television channels within the internal market to reserve, whenever possible, more than half of their transmission time for European works.\textsuperscript{160} However, they are of great importance for foreign copyright owners in helping them understand the barriers they will face in the Chinese television sector. Moreover, there is an alternative way to enter the Chinese market without the quota limit: Sino-foreign joint venture productions. Co-productions are deemed domestic productions and, thus, are not subject to quota limits.\textsuperscript{161}

With regard to the Chinese online streaming sector, the situation is more complex. According to current legislation, to provide online streaming services of audio-visual products (both foreign and local), the service providers must acquire the corresponding licence or permit without exception.\textsuperscript{162} However, there existed a loophole, as discussed above, by which the online streaming service providers could introduce many more foreign works without worrying about quotas. Many foreign titles were not even censored by the authorities before being put online, and that actually gave the online streaming platforms a competitive advantage: it is possible for them to simulcast foreign content with their foreign copyright owners. This advantage made online streaming platforms much more competitive than the state-owned television stations, since the latter have to endure a much longer censorship procedure.\textsuperscript{163} Moreover, they are also much more competitive than unauthorized distributions,\textsuperscript{164} since online streaming platforms can also offer copyright content free, in a stable quality standard, and in a much faster way than the time-consuming process of illegal downloading. During the 2014 Chinese People’s Political Consultative Conference, the famous Chinese director, Guoli Zhang, noted that the current online streaming market was unfair to local productions, because foreign titles could ‘get into our online streaming sites without limitations’.\textsuperscript{165} However, the SAPPRFT has subsequently closed that window with an official notice in late 2014,\textsuperscript{166} as well as by setting an online streaming quota for foreign audio-visual works in early 2015.\textsuperscript{167}

\textbf{4.2 Enforcement campaigns}

It is not new for the Chinese government to regulate the cultural market by using enforcement campaigns; it did so in the pre-Internet era. For example, in 1986, three years

\textsuperscript{160} See Directive 2007/65/EC.
after the famous 1983 yanda (Strike Hard) campaign, the then National Publication Bureau, the State Administration of Industry and Commerce (SAIC), and the Ministry of Public Security (MPS) jointly issued an Emergency Notice Regarding Striking Hard Against Illegal Publishing Activities.\footnote{Emergency Notice Regarding Striking Hard Against Illegal Publishing Activities, 1986.} It revealed an unobtrusive but similar campaign against unlawful publications in terms of yanda. In 1987, the State Council subsequently issued the Notice Regarding Striking Hard Against Illegal Publishing Activities (1987), stressing that ‘[e]xcept for those publishing units approved by the State, no unit or individual may publish to society for open distribution any book, periodical or audio/visual publication. Violators shall be deemed as engaging in illegal publishing activities’.\footnote{Notice Regarding Striking Hard Against Illegal Publishing Activities, 1987, art 1 <http://www.people.com.cn/electric/flfg/d4/870706.html> accessed 2 August 2016.} This position was reiterated by the Supreme People’s Court of China (SPC) and the Supreme People’s Procuratorate of China (SPP) in 1987 and 1991 respectively\footnote{Notice Regarding Severely Punishing Illegal Publishing Criminal Activities According to Law, 1987; Notice Regarding Severely Punishing Illegal Publishing Criminal Activities, 1991.} and by the State Council of China again in 1996,\footnote{Notice Regarding Resolutely Clamping Down on Illegal Publishing Activities, 1996, art 1.} and was further incorporated into the 1997 and 2001 versions of the Regulations on the Administration of Publications. During this period, that policy was implemented nationwide and produced considerable results. For instance, according to the Summary of the Symposium on the Work of Punishing Illegal Publishing Criminal Activities in 1988, which was jointly hosted by GAPP, SPC, SPP, MPS, the Ministry of Radio, Film and Television and SAIC, some 16.13 million copies of illegal books, 4.74 million copies of illegal periodicals, 6.56 million copies of illegal newspapers, 1.51 million copies of illegal audio tapes, and approximately ninety thousand copies of illegal video tapes were seized.\footnote{GAPP, SPC, SPP, MPS, Ministry of Radio, Film and Television, and SAIC, ‘Summary of the Symposium on the Work of Punishing Illegal Publishing Criminal Activities’ [1988] People.com.cn <http://www.people.com.cn/electric/flfg/d4/880308.html> accessed 4 August 2016.} These practices were later regularized by the establishment of the so-called Saohuang Dafei campaign in 1989.\footnote{A Mertha, The Politics of Piracy: Intellectual Property in Contemporary China (Cornell University Press, New York 2005).} The aim of this campaign is to ‘sweep away pornography’ (saohuang) and to ‘strike out against illegal publications’ (dafei).\footnote{Ibid.} It is led by the National Saohuang Dafei Working Office (hereinafter the Office),\footnote{The Saohuang Dafei Office includes the Propaganda Department of CPC incorporating 28 member units, such as the Committee of Political and Legislative Affairs, the State Commission Office of Public Sectors Reform, the International Communication Office of the CPC Central Committee, the General Office of the State Council, SPC, SPP, Ministry of Education, Ministry of Industry and Information Technology, MPS, Ministry of State Security, and the Ministry of Transport. See L Shen, ‘Investigating the Saohuang Dafei Office’ [2010] Southern Weekly <http://www.infzm.com/content/40655> accessed 4 August 2016.} which includes representatives from 28 national departments, such as the Propaganda Department of the Chinese Communist Party (CPC) and the MPS.\footnote{Ibid; see also A Mertha, supra (n 173) at 142.} Since its establishment, the Saohuang Dafei Office has launched numerous campaigns on an annual basis, aiming to eradicate illegal publications, including those that are the result of piracy. In the 23rd National Saohuang Dafei Work Conference by Videophone, Yunshan Liu, the former Minister of the Propaganda Department of the CPC, indicated that the works of the

\footnotesize
\begin{itemize}
  \item \footnote{Emergency Notice Regarding Striking Hard Against Illegal Publishing Activities, 1986.}
  \item \footnote{Notice Regarding Severely Punishing Illegal Publishing Criminal Activities According to Law, 1987; Notice Regarding Severely Punishing Illegal Publishing Criminal Activities, 1991.}
  \item \footnote{Notice Regarding Resolutely Clamping Down on Illegal Publishing Activities, 1996, art 1.}
  \item \footnote{A Mertha, The Politics of Piracy: Intellectual Property in Contemporary China (Cornell University Press, New York 2005).}
  \item \footnote{Ibid.}
  \item \footnote{The Saohuang Dafei Office includes the Propaganda Department of CPC incorporating 28 member units, such as the Committee of Political and Legislative Affairs, the State Commission Office of Public Sectors Reform, the International Communication Office of the CPC Central Committee, the General Office of the State Council, SPC, SPP, Ministry of Education, Ministry of Industry and Information Technology, MPS, Ministry of State Security, and the Ministry of Transport. See L Shen, ‘Investigating the Saohuang Dafei Office’ [2010] Southern Weekly <http://www.infzm.com/content/40655> accessed 4 August 2016.}
\end{itemize}
Saohuang Dafei Office in 2010 could be divided into three priority levels: cracking down on illegal publications, tackling pornographic content and fighting piracy.\(^{177}\) Therefore, these campaigns are more like a subtle form of *ex post* censorship, as they help to clean out illegal and unorthodox materials in general,\(^ {178}\) rather than on a piece-meal basis.

After entering the Internet era, this campaign has been severely tested by digital technologies, as now the major distributors of these illegal materials are no longer commercial publishers and pirates but individuals. Hence, the Chinese government is facing the same problem as copyright owners in preventing unauthorized content from entering the market. Interestingly, but not surprisingly, in the face of massive amounts of nearly untraceable illegal content online, they both focus and rely on Internet service providers (ISPs) to do part of their jobs.\(^ {179}\) To some extent, free online distribution, as carried out by private individuals, is arguably destroying the business of physical piracy.\(^ {180}\) Moreover, the challenge raised by digital technologies has created a degree of freedom as many individual critics of the government have been tolerated\(^ {181}\) and the wider latitude allows ISPs to enjoy a degree of flexibility in the face of the censorship rules since the vague criteria in practice leave them a degree of discretion.\(^ {182}\)

Despite these divergences, top-down campaigns have been launched at the beginning of each year, without exception.\(^ {183}\) The 2009 campaign aiming at vulgar content shut down more than 9000 pornographic websites alone. The ‘Eliminate Pornography and Illegal Publications – Cleanse the Internet 2014’ campaign (hereinafter Cleanse the Internet Campaign 2014)\(^ {184}\) has forced Chinese ISPs to self-censor their sites since April 2014, and this campaign lasted until November 2014.\(^ {185}\) The ISPs are now forced to apply additional technical measures to their platforms and software so as to filter out illicit content within their systems. According to a recent report from the Office, government agencies have confiscated some 12 million illegal copies of all kinds of cultural goods, and shut down more than 750 infringing websites.\(^ {186}\)

During the Cleanse the Internet Campaign 2014, the Chinese government shut down several famous websites, including the subtitle-sharing platform Shooter.com and one of the largest video-sharing sites YYeTs. One Chinese commentator believes

\(^{177}\) Shen, supra (n 175).


\(^{179}\) See Shen, supra (n 175); see also G King et al., ‘How Censorship in China Allows Government Criticism but Silences Collective Expression’ (2013) 107 American Political Science Review 326, 339.

\(^{180}\) Priest, supra (n 142) at 830.

\(^{181}\) King et al., supra (n 179) at 339.

\(^{182}\) B Feng and S Wang, supra (n 99).

\(^{183}\) Shen, supra (n 175).

\(^{184}\) This campaign was initiated by the Saohuang Dafei Office, the National Internet Information Office, the Ministry of Industry and Information Technology, and the Ministry of Public Security.


that the shutting down of these sites can be attributed to a Motion Picture Association of America (MPAA) report,\(^\text{187}\) in which Xunlei.com and YYeTs.com were listed as Chinese sites with serious copyright problems.\(^\text{188}\) However, it has also been noted that this move ‘was connected more to the desire to limit viewership of foreign content than tackle pirated content’.\(^\text{189}\) Rather ironically, many more similar sites appeared after the Chinese government had shut down Shooter and YYeTs in the name of anti-piracy,\(^\text{190}\) and the government has to date taken no measures against them. This inactivity could be attributed to lax enforcement; yet another explanation might be that the potential danger of collective action has been eliminated, since the flow of Chinese Internet users has now been diverted to multiple smaller sites. Moreover, selective enforcement is also preferable for the Chinese government because it is not possible to eliminate all acts of piracy.\(^\text{191}\) In the first three months of 2015, the newest ‘Cleanse the Internet Campaign 2015’ had already sequestrated 1.74 million illegal publications and nearly 1 million pirate copies,\(^\text{192}\) and that trend looks set to continue.\(^\text{193}\)

5 CONCLUSION: CONTROL OR PROMOTE?

It should be clear from the above discussion that, besides the copyright laws, the Chinese government uses its censorship system, along with its import quotas and enforcement campaigns, to adjust wrongdoings that it finds in its cultural market. It is also notable that, in a strict sense, many of the abovementioned ‘opinions’ and ‘notices’, which are issued by national departments such as the SAPPRFT and the Ministry of Culture, are not actually laws but ‘other administrative regulatory documents’,\(^\text{194}\) which are the lowest ranking of all national regulatory documents in China’s legal system with respect to legal effect. These administrative regulatory documents must not conflict with any of the higher legislation and regulations, yet they are nevertheless the most direct, flexible and effective legal instruments the Chinese government has to regulate the cultural market. Seen together, these different levels of rules form a net that places greater emphasis on controlling than promoting China’s cultural sector.

The emphasis on content control is embedded in China’s copyright legislation, censorship regulations and enforcement campaigns. The aim of its copyright law, according to Article 1 of the Copyright Law of the People’s Republic of China (hereinafter CLC), is to protect ‘the copyright of authors in their literary, artistic and scientific


\(^{190}\) Examples include Sub.makedie.me and Subom.net.

\(^{191}\) See generally He, supra (n 2); see also T Wu, ‘Tolerated Use’ (2008) 31 Colum. J. L. & Arts 617, 628.

\(^{192}\) He, supra (n 2).

\(^{193}\) S Tiezzi, supra (n 178).

\(^{194}\) Interpretations of the Supreme Court on Certain Issues Concerning the Application of the Administrative Procedure Law of the People’s Republic of China, 2000, art 3.
works and the rights and interests related to copyright’, to encourage ‘the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially’, and to promote ‘the progress and flourishing of socialist culture and sciences’. From the plain texts of Article 1, there is however no sign of a hierarchy to the listed purposes. Moreover, the ‘limited times’ requirement of the copyright clause in the US Constitution, the motivation of which is regarded as ‘a hostility deeply rooted in Anglo American law and politics to government conferred monopoly’ is absent in its Chinese counterparts. This omission not only supports the conclusion that China has no preference in the listed objectives of copyright, but also infers that the ‘hostility’ to a government conferred monopoly that Landes and Posner describe is not a motivation for the Chinese government to enact a law that restricts copyright. Moreover, unlike the US, where freedom of speech is protected by the First Amendment, which stipulates that the Congress will ‘make no law ... abridging the freedom of speech’, freedom of speech is only one of the basic rights listed in the Constitution of the People’s Republic of China (hereinafter the Constitution of China). No clause in the Constitution of China provides that freedom of speech is inviolable, whereas its Article 13 provides that ‘[c]itizens’ lawful private property is inviolable’. From this we can infer that when freedom of speech and property rights collide, the latter will probably prevail, and, if private property is deemed ‘unlawful’, such as a paid-for but pirate copy or a legally purchased work on sensitive topics which was published elsewhere, it is not then ‘inviolable’. Moreover, the vagueness of the concepts of a ‘socialist society that is advanced ethically and materially’ and ‘socialist culture and sciences’ allows the Chinese censorship system considerable leeway for interpretation.

Freedom of speech is even more fragile in the face of censorship systems. Creating and disseminating cultural works is but one form of expression which is recognized by and constitutes the foundation of the copyright jurisprudence. However, from the above discussion about China’s censorship system, it is evident that the entire system is about eliminating content that is deemed detrimental to the socialist society, and the government has sufficient instruments to control and determine who is eligible to create and distribute content, and what is allowed in the market. Even though foreign countries, such as the US, have managed to initiate disputes with China in the WTO regarding some of the abovementioned problems, apparently nothing substantial has changed with regard to the censorship system, due to the fact that setting import quotas are recognized and accepted by international practice, and it is within China’s autonomy to set censorship, as long as it is non-discriminative. Further, when the detrimental content is already in the market de facto, there is still another policy lever at China’s disposal: enforcement campaigns.

The policy considerations behind the enforcement campaigns launched by the Saohuang Dafei Office are identical to those behind the censorship system. Indeed,
campaigns are actually a flexible policy tool that the government can employ to assist its censorship system. The aim is to wipe out illicit works, including pirate copies in the market, from a different angle, but apparently anti-piracy is not the main concern. Interestingly, the purpose of these campaigns is seemingly consistent with the request of the anxious foreign copyright owners in the Chinese market: to remove illegal copies from the market. However, campaigns are guided by national policies, which are represented by the representatives from different departments within the Saohuang Dafei Office, so the policy considerations behind them vary greatly. For instance, units such as the Propaganda Department of the CPC and the Ministry of Culture tend to focus on the wide online distribution of unorthodox and pornographic content, whereas units such as SPC and the National Copyright Administration focus more on cracking down on piracy. The SAPPRFT might also take the cultural market in general into consideration. These are all indications that the Chinese government is seeking a dynamic balance between these goals.

At the enforcement level, the main focus of the self-censorship of the Chinese ISPs is on ‘heterodox’ rather than ‘infringing’ content. On the one hand, piracy is of course a matter of concern for China, but when it overlaps with ‘heterodox’ content, no doubt the Chinese government puts greater focus on the latter. On the other hand, the copyright of illegal content is vulnerable in the face of censorship as well. In that case, although the copyrightability of such work is no longer rejected by the CLC, copyright owners cannot exercise their economic rights in China, but can only enforce their rights when being infringed upon, or enjoy the incidental enforcement effects brought by the Saohuang Dafei campaigns, irrespective of whether they want these rights enforced or not. Furthermore, illegal content, which means it is either uncensored or has failed to pass censorship, possibly carries ideas and thoughts which are not welcomed by the CPC, and, in the form of mass-market products, is apparently more popular with many Chinese citizens than China’s local productions. Hence, striking hard on such content, sometimes in the name of foreign copyright owners, not only serves the purpose of protecting China’s nascent market, but can also subtly serve the purpose of blocking unwelcome foreign cultural influences over Chinese citizens.

In sum, censorship in the cultural sector is but a part of the larger picture of China’s information censorship, whose main purpose is to identify and remove information that poses a threat to the powers that be. The Chinese government is very open in terms of the content being distributed across different channels. It is also clear that the possibility for foreign capital to conduct business is severely restricted in China. Therefore, foreign copyright holders have to rely on local service providers. However, given the ambiguous ex ante censorship criteria and the punishment officially licensed local distributors will receive for letting ‘bad stuff’ in, many foreign works will be denied entry de facto, simply because no practitioner would dare take the risk. Even for those works that have passed the harsh censorship examination and have already entered the Chinese market via traditional means, they still have to face explicit and implicit restrictions, such as discrimination between local and foreign works in broadcasting hours, and import quotas. Moreover, that they are ‘safe’ now does not mean that they will be ‘safe’ in the future, since the ex post censorship, along with enforcement campaigns, will ensure that when a once ‘safe’ object becomes a threat to the ‘socialist culture and society’, it will soon

disappear from public view. Apparently, at least for now, the protection of copyright and free expression means less for the Chinese government than content control. China is also cleverly using the discretion in its regulatory net to evade WTO attacks on its trade barriers. Therefore, the Chinese government is clearly trying to develop its cultural industry by protecting copyright and by allowing a degree of free expression in the creative process, but with the premise of controlling the content. Whether that premise will impair that goal is a question which requires further study, but one that falls outside the scope of this article.