

The Bloody Case That Started From a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China

Robert S. Rogoyski¹ and Kenneth Basin²

I. INTRODUCTION.....	238
II. TRANSFORMATIVE USES AND THEIR TREATMENT UNDER CHINESE AND U.S. LAW	239
A. <i>Hu Ge and Clip Culture in Contemporary China</i>	239
B. <i>Treatment of The Steamed Bun Under Chinese Copyright Law</i>	241
C. <i>Treatment of The Steamed Bun Under American Copyright Law</i>	244
III. INTELLECTUAL PROPERTY: AMERICAN POLICY VS. AMERICAN IDEALS	245
A. <i>American Foreign Policy: In Pursuit of Freedom</i>	245
B. <i>American Intellectual Property Policy: In Pursuit of Money</i>	249
1. 1980s and 1990s.....	249
2. Recent Years	251
C. <i>Black Letter Results of the Current American Strategy</i>	252
IV. THE BENEFITS OF A POLICY COMMITMENT TO TRANSFORMATIVE USES	254
A. <i>The Nexus Between a Pro-Transformative Use Policy and Democratic Ideals</i>	254
B. <i>Advantages for the U.S. Economic Agenda</i>	259

¹ Associate, Quinn Emanuel Urquhart Oliver & Hedges, LLP; J.D., *cum laude*, Harvard Law School, 2005; LL.M., *with distinction*, University of Hong Kong, 2008.

² Associate, Greenberg Glusker Fields Claman & Machtinger, LLP; J.D. *magna cum laude*, Harvard Law School, 2008; winner, Sears Prize, 2007.

C. <i>Free Expression Successes in China</i>	260
V. RECOMMENDATIONS FOR A MORE EFFECTIVE TRANS- FORMATIVE USE POLICY	262
VI. CONCLUSION	263

“Freedom is participation. Freedom is distribution. Freedom is interaction. Freedom is the ability to influence and be influenced in turn. Freedom is the ability to change others and to be changed as well.”

Jack M. Balkin – Digital Speech and Democratic Culture: The-
ory of Freedom of Expression for the Information Society.

I. INTRODUCTION

In 2006, Chinese video blogger Hu Ge attained cult fame in China by publishing *The Bloody Case That Started from a Steamed Bun*, a parody of director Chen Kaige’s tepidly-received film *The Promise*, on the Internet. By recasting Kaige’s historical epic as a news report about a murder spurred by a steamed bun and fending off a threatened copy-
right infringement and defamation lawsuit from the spurned director, Hu Ge opened a debate about the social role of parody in a healthy society.³ But just as *e’gao*, a web-based movement of film and music parody, began to take off, the Chinese government clamped down. New regulations required anyone wanting to post short videos on the Internet to seek government approval.⁴ Other regulations required music modified from its original form to be submitted to the Ministry of Culture, even if the changes were made for non-commercial purposes.⁵

It would be easy to write off the Chinese government’s new regula-
tions as a bald attack on free speech. However, *The Bloody Case That Started from a Steamed Bun* and many other *e’gao* parodies affected by the new regulations were not overtly political—they were merely satiri-
cal takes on general cultural phenomena. There is an additional expla-
nation: unlike U.S. copyright law, Chinese copyright law does not recognize a fair use exception for parody, and the new regulations issued by the Chinese government were arguably enacted—at least in part—to enforce existing law. The irony is that although the U.S. has long been a strong advocate of democratic reform and free expression in China and the development of Chinese copyright law was heavily

³ Wu Ni & Wen Chihua, *Rebel With a Mouse*, CHINA DAILY, July 6, 2006, available at http://www.chinadaily.com.cn/china/2006-07/06/content_634463.htm (last visited Apr. 13, 2008).

⁴ Jane Macartney, *E Gao Ergo Parody*, TIMES ONLINE, Aug. 16, 2006, http://timescorrespondents.typepad.com/sinofile/2006/08/e_gao_ergo_paro.html (last visited Apr. 13, 2008).

⁵ Wu Jiao, *E’gao: Art Criticism or Evil?*, CHINA DAILY, Jan. 22, 2007, available at http://www.chinadaily.com.cn/china/2007-01/22/content_788600.htm (last visited Apr. 13, 2008).

influenced by U.S. foreign policy pressure, it is now being deployed in a manner that suppresses free expression.

This paper will argue: (1) that Chinese copyright law provides insufficient protection for parody and other transformative uses of copyrighted materials under the law; (2) that existing American foreign policy objectives with respect to intellectual property have been in conflict with American democratic ideals and democratic foreign policy objectives; and (3) that the United States can and should pursue specific revisions to China's copyright law that implement a democratically-minded intellectual property policy agenda. Part II of this paper will examine the provisions of China's copyright law that are potentially relevant to parody and transformative use and analyze the Hu Ge situation under existing Chinese law, with special comparison made to the likely treatment of Hu Ge under American copyright law. Part III will then examine how American foreign policy regarding intellectual property has acted in direct conflict with the development of broader democratic ideals in China. This paper will then evaluate the largely political process by which Chinese copyright law developed into its current state, the heavy-handed U.S. pressure that played a central role in the genesis of China's supposedly "modern" copyright regime, and the ironic contrast between the U.S.'s actions and its rhetoric of "freedom" and "democracy." Part IV of this paper will advocate a pro-transformative use stance on copyright law in China that is consistent with democratic ideals embodied in U.S. intellectual property law. Finally, Part V will propose concrete changes to China's copyright statute which should be sought by the U.S. in order to effect those ideals.

II. TRANSFORMATIVE USES AND THEIR TREATMENT UNDER CHINESE AND U.S. LAW

A. *Hu Ge and Clip Culture in Contemporary China*

In December 2005, Hu Ge, a Shanghai-based freelance video editor, paid ten dollars to see acclaimed director Chen Kaige's newly released movie *The Promise*.⁶ Finding the movie to be mediocre and wanting to practice his video editing skills, Hu Ge put together a twenty-minute parody of the movie titled *The Bloody Case That Started From a Steamed Bun* (hereinafter, *The Steamed Bun*) and sent it to a few friends over the Internet.⁷ Little did Hu Ge realize that he had just

⁶ Dexter Roberts, *A Chinese Blogger's Tale*, BUSINESS WEEK, Mar. 2, 2006, available at http://www.businessweek.com/globalbiz/content/mar2006/gb20060302_026709.htm (last visited Apr 13, 2008).

⁷ *Id.*

released an incredibly powerful “viral video.”⁸ The parody, which satirizes Chen Kaige’s big-budget epic by “refashioning the story line into a mock legal-investigative TV program,” soon became one of the most downloaded clips in China, and Hu Ge became a household name.⁹ In February 2006, Chen Kaige responded by threatening to sue Hu Ge for defamation and various copyright violations.¹⁰

Hu Ge’s parody is an example of a worldwide phenomenon known as “clip culture,”¹¹ the production and sharing of short video clips by individual Internet users, usually ranging from a few seconds to several minutes in length.¹² These clips tend to fall in three general categories.¹³ The first category consists of totally home-made amateur video clips, which can be live-action, animated, or a combination of both.¹⁴ The second category involves montage works that paste together various slivers of existing video and audio works along a theme. Finally, the third category contains clips that are excerpts of existing movies or broadcast video works.

Clips in the third category, which represent a significant percentage of all clips available, have led to copious litigation by copyright owners, and the extent to which they violate copyright laws is generally straightforward. But these clips do not exist alone—they are part of an interdependent social ecosystem of clip production and sharing. Works in the first and second categories demonstrate the creative potential of this new medium. Although artists, musicians, and creators of other expressive works have always adapted the ideas of those who came before them, the technology of the “information age” has made it much easier for the average individual to do so. While many “homegrown” clips in the first category are wholly original, many are not, and montage clips in the second category, by definition, are not. Using low-cost audio-visual recording equipment and readily available editing software, anyone can become the next Hu Ge and create a parody clip, animated short, or montage video that is viewed by millions. Clip culture, however, does not stand alone on the copyright battlefield for

⁸ See Viral Video, WIKIPEDIA, at http://en.wikipedia.org/wiki/Viral_video (last visited Apr. 15, 2008) (“The term viral video refers to video clip content which gains widespread popularity through the process of Internet sharing, typically through email or IM messages, blogs and other media sharing websites.”).

⁹ See Roberts, *supra* note 6.

¹⁰ *Id.*

¹¹ See generally Michael Geist, *The Rise of Clip Culture Online*, BBC NEWS, at <http://news.bbc.co.uk/1/hi/technology/4825140.stm> (last visited Apr. 13, 2008).

¹² See *id.*

¹³ *Id.*

¹⁴ *Id.*

transformative uses of previous works in China. Transformative uses of copyrighted works that are more traditionally recognized as “derivative works” are also at the forefront of concern; these works blur the boundary line between copyright “owners” and “users.” This often brings the socially valuable creative efforts of some into direct conflict with those of others. Modernization and openness to Western culture in China have brought forms of creative expression that raise difficult questions about copyright law and social policy. In the music realm, works by Chinese artists and musicians use digital and analog sampling to produce new songs. In literature, local adaptations of works by foreign authors, such as J.K. Rowling’s *Harry Potter* series, are flourishing in China.¹⁵ These books are distinguishable from simple copies of Rowling’s novels: some use the Harry Potter idiom as a backdrop for entirely new Harry Potter adventures that also draw on Chinese history and folklore,¹⁶ while others take the form of practical books for adolescents that quote various Harry Potter works to illustrate proper behavior.¹⁷

B. *Treatment of The Steamed Bun Under Chinese Copyright Law*

The statuses of parodies and other transformative uses of prior works are unclear under the Copyright Law of the People’s Republic of China (hereinafter, Copyright Law). Under China’s civil law system, reported cases have little instructive value for other courts; moreover, there do not appear to be any reported decisions with fact patterns analogous to Hu Ge-type parodies. That said, their prospects are bleak. The basic problem is that parodies, clips, and other transformative works are arguably covered by the plain text of the Copyright Law—that is, if the provisions are interpreted strictly or in a way that mimics foreign jurisprudence.

There are at least six ways that a transformative work such as *The Steamed Bun* could come under direct attack under the Copyright Law: the Article 10(14) right of adaptation; the Article 10(6) right of distribution; the Article 10(5) right of reproduction; and the moral rights of authorship, alteration, and integrity under Art. 10(2), Art. 10(3), and Art. 10(4), respectively.¹⁸ The relevant provisions read as follows:

¹⁵ See Tim Wu, *Harry Potter and the International Order of Copyright*, SLATE, June 27, 2003, <http://www.slate.com/id/2084960/> (last visited Apr. 14, 2008).

¹⁶ See *id.*

¹⁷ See, e.g., 丁丁, *哈利波特成长密码* [*The Harry Potter Growing Up Code*] (中国青年出版社 [China Youth Press]) (2006).

¹⁸ See Copyright Law (P.R.C.) (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001), art. 10 translated in <http://www.chinaiprlaw.com/english/laws/laws10.htm> (last visited Apr. 14, 2008) (hereinafter 2001 Copyright Law).

Article 10: The term “copyright” shall include the following personal-ity rights and property rights: . . .

(2) the right of authorship, that is, the right to claim authorship and to have the author’s name mentioned in connection with the work;

(3) the right of alteration, that is, the right to alter or authorize others to alter one’s work;

(4) the right of integrity, that is, the right to protect one’s work against distortion and mutilation;

(5) the right of reproduction, that is the right to produce one or more copies of a work . . . ;

(6) the right of distribution, that is, the right to make available to the public the original or reproductions of a work through sale or other transfer of ownership; . . .

(14) the right of adaptation, that is, the right to change a work to create a new work of originality¹⁹

As a general matter, a parody uses recognizable elements from the original work as a platform for satire, so one can characterize the whole of *The Steamed Bun* as an “adaptation” that constitutes a “new work of originality” under Article 10(14). In this particular case, the fact that Hu Ge copied portions of *The Promise* and distributed them over the Internet must be conceded for the purposes of Article 10(6). Although instructive precedent on substantiality of copying in cases of transformative video works is lacking in Chinese case law discussing Article 10(5) and the statute is written in broad terms, *The Steamed Bun* is twenty minutes long and is filled with footage from the underlying film. Despite the absence of clear guidelines, twenty minutes of copying likely would be substantial under the Copyright Law.²⁰ If China were to draw on substantiality jurisprudence from Western copyright regimes, the simple and oft-repeated maxim, “what is worth copying is worth protecting,”²¹ could prevail, and the threshold, in turn, could be set very low.

Regarding moral rights, *The Steamed Bun*’s failure to credit Chen Kaige’s authorship of the underlying film footage—and, thus, its violation of Article 10(2)—is easily remediable. However, by its very nature, a transformative work such as *The Steamed Bun* conflicts with a copyright owner’s rights of alteration and integrity under Article 10(3) and Article 10(4): a parody is an “alteration” of a work that relies on some measure of “distortion” to make a point.

¹⁹ *Id.*

²⁰ Even short clips that reproduce only a small amount of the original work also face a serious risk under this provision.

²¹ Peterson, J., *University of London Press, Ltd v. University Tutorial Press, Ltd.*, 2 Ch. 601 (1916).

The only shield available to the makers of transformative works comes in the form of Article 22(2) of the Copyright Law, which reads as follows:

Article 22: In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owners, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this law shall not be prejudiced . . .

(2) appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point.²²

Again, the meaning of this clause is unclear in Chinese jurisprudence. The key word is probably “appropriate”: one could argue that an appropriate quotation in the context of a parody that “comments on” the underlying work may be the entire underlying work or a very substantial portion of it. However, there are two problems with this line of reasoning. First, it defines “appropriate” in a way that nullifies the word “quotation”: it is difficult to call copying the entirety of a work a form of “quotation.” Second, the obvious inference from the phrasing of the exception (even in translation) is that it was drafted with a different medium of quotation in mind: text quotations in newspapers, books, or other print media. From this perspective, using a large percentage of the underlying work would be a clear violation. If the notion of what is “appropriate” is limited by Chinese courts to a conception of quotation similar to the actual practice of newspapers, only a small amount of quotation may be acceptable. Moreover, an allowance for “quotation” for commentary does not indicate an allowance for editing, particularly in light of the aggressive protection of moral rights in Article 10. As one scholar has put it, “moral rights in China have been spontaneously raised to a sacrosanct position; [the law] . . . universally confers moral rights to an author with only rare limitations, and sometimes in precedence over economic rights.”²³

Like most parodies, *The Steamed Bun* relies heavily on the underlying work to convey its message. Though *The Steamed Bun* case ultimately never went to court, under the likely narrow reading of Article 22(2), *The Steamed Bun* appears to be a copyright violation. By the same measure, other transformative uses of underlying works—such as sampling by musicians and transformative literature—similarly would be vulnerable to copyright litigation because they do not “comment”

²² 2001 Copyright Law, *supra* note 18, art. 22.

²³ He Zhonglin, *Author's Moral Rights in U.K. and China*, JUDICIAL PROTECTION OF IPR IN CHINA, Jan. 14, 2002, <http://www.chinaiprlaw.com/english/forum/forum22.htm> (last visited Apr. 13, 2008).

on the underlying work in a traditional sense. After applying The Copyright Law, few, if any, transformative works are likely to be left standing.

C. *Treatment of The Steamed Bun Under American Copyright Law*

While *The Steamed Bun* fares poorly under China's Copyright Law, it would probably fare substantially better under the United States copyright regime. Compared to most foreign jurisdictions, the U.S. has been particularly explicit about its protection of parody. The U.S. Copyright Act protects as "fair use" certain uses of copyrighted works "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."²⁴ Determining whether a use is "fair" requires an examination of four factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."²⁵ The language "for purposes such as" is broad and inclusive, and the specific mention of "criticism" suggests that parody may be contemplated. Indeed, the Supreme Court has made clear that parodies fall within the scope of "fair use" under the Copyright Act, regardless of the perceived quality of the parody.²⁶ For example, in holding that 2 Live Crew's 1989 satirical take on Roy Orbison's "Oh, Pretty Woman" was protected under the Copyright Act, the court noted that the effectiveness of parody relied on "recognizable allusion to its object through distorted imitation," justifying an extremely substantial quantity of copying.²⁷

The Steamed Bun seems like a clear case of fair use according to the four factors enumerated above. First, the purpose and character of the use is critical and parodic, and was posted to the Internet without an expectation or ability for Hu Ge to reap commercial gain; consequently, the first factor probably favors Hu Ge. Second, the highly creative nature of cinematic work would favor director Chen Kaige. Third, although a fairly substantial amount of Chen Kaige's original

²⁴ 17 U.S.C. § 107 (2007).

²⁵ *Id.*

²⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) ("The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.").

²⁷ *Id.* at 588.

work was used in creating Hu Ge's video, the U.S. Supreme Court has explicitly recognized that effective parody requires a relatively substantial amount of copying.²⁸ Moreover, the portion of *The Promise* copied by Hu Ge represented a fraction of the video—and none of the sound—of the original film. On the whole, this factor seems to favor Hu Ge. Fourth, a parodic, Internet-based, short comedy film likely would not supplant or usurp the market for Chen Kaige's feature-length historical epic, and any detriment to the original work's prestige caused by the parody is not considered cognizable harm under the U.S. Copyright Act.²⁹ As a result, this fourth factor also weighs in Hu Ge's favor. Overall, the balance of factors under the fair use analysis clearly indicates that Hu Ge's work would be protected under American copyright law.

III. INTELLECTUAL PROPERTY: AMERICAN POLICY VS. AMERICAN IDEALS

A. *American Foreign Policy: In Pursuit of Freedom*

While the new Obama administration has yet to develop a strong foreign policy identity, in recent years, one could credibly argue that the watchword of American foreign policy—in rhetoric if not in practice—has been “freedom.” Freedom, and the imperative to spread it, occupied a prominent ideological position in the administration of George W. Bush. In his second inaugural address, Bush proclaimed “complete confidence in the eventual triumph of freedom . . . because freedom is the permanent hope of mankind, the hunger in dark places, the longing of the soul.”³⁰ The Washington Post noted that Bush used the word “freedom” eight times during his 2004 State of the Union address, twenty-one times during the 2005 address, and seventeen times in 2006; in the same speeches, the Post also counted one use of “liberty” in 2004, seven uses in 2005, and four uses in 2006.³¹

Consistent with this rhetoric, one of the defining characteristics of American economic policy under the Bush administration was to use trade policies to encourage and reward regimes that are characterized

²⁸ *Id.* at 587-89.

²⁹ *Id.* at 591-92 (“[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”).

³⁰ See *There is No Justice Without Freedom*, WASHINGTON POST, Jan. 21, 2005, at A24, available at <http://www.washingtonpost.com/wp-dyn/articles/A23747-2005Jan20.html> (last visited Mar. 24, 2009).

³¹ See *Lowered Expectations Reflect Political and Fiscal Realities*, WASHINGTON POST, Feb. 1, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/31/AR2006013101620.html>

by political and economic freedom. In a speech in favor of a Free Trade Area of the Americas in April 2001, President George W. Bush argued that “open trade reinforces the habits of liberty that sustain democracy over the long term.”³² Additionally, in January 2004, the U.S. Government established the Millennium Challenge Account (MCA), a development fund run by a government corporation that would award aid to recipient nations based on indicators of good governance, economic freedom, and investments in people.³³ By linking developmental aid to factors such as respect for civil liberties, political rights and the rule of law, the MCA seeks to both guarantee the effectiveness and sustainability of its investments, and to encourage developing nations to improve their standing on these factors in order to qualify for aid.

In the past, American foreign and trade policy toward China in particular has attempted to use trade leverage to promote personal freedom and human rights within China.³⁴ Until 2000, the United States conducted annual reviews of China’s Most Favored Nation trade status as leverage to improve Chinese compliance with labor and human rights standards.³⁵ Even the legislative act that ended this practice noted that “[t]he human rights record of the People’s Republic of China is a matter of very serious concern to the Congress,” condemned a long list of reported Chinese human rights abuses and restrictions on organized dissent,³⁶ and at least one senator expressed the view that ending annual review of Chinese trade status would actually bolster the United States’ efforts to promote human rights there.³⁷ When compromises have been made between economic goals and obvious democratic and human rights issues, they often have been rationalized by the

³² George W. Bush, *Remarks to the Organization of American States* (Apr. 17, 2001), available at <http://www.encyclopedia.com/doc/1G1-75479704.html> (last visited Apr. 12, 2008).

³³ Millennium Challenge Corporation, *About MCC*, MCC.GOV, at <http://www.mcc.gov/about/index.php> (last visited Apr. 12, 2008).

³⁴ See W. Gary Vause, *Tibet to Tiananmen: Chinese Human Rights and the United States Foreign Policy*, 42 *VAND. L. REV.* 1575, 1576 (1989).

³⁵ See Normal Trade Relations for the People’s Republic of China Act, Pub. L. No. 106-286, 114 Stat. 880 (2000) (ending the practice of annual review of China’s trade status).

³⁶ *Id.*

³⁷ See 146 Cong. Rec. S8729 (daily ed. Sept. 19, 2000) (statement of Sen. Harkin) (“In the case of China, I am convinced that granting PNTR will not hinder our efforts to improve human rights there. I believe, in fact, it will actually help us in that endeavor.”) (cited in John H. Goolsby, *Is the Garment Industry Trying to Pull the Wool Over Your Eyes? The Need for Open Communication to Promote Labor Rights in China*, 19 *LAW & INEQ.* 193, 195 n.10 (2001)). It bears noting, however, that most observers regarded the United States’ shift in policy as a concession to economic interests that would be unlikely to achieve meaningful human rights gains. See, e.g., Goolsby, at 195; Jill M. Brannelly, *Note: The United States’ Grant of Permanent Normal Trade Status to China: A Recipe for Tragedy or Transformation?*, 25 *SUFFOLK TRANSNAT’L L. REV.* 565, 585 (2002).

belief that democracy will, as a matter of course, follow from economic stability and prosperity.³⁸ Meanwhile, Chinese observers have certainly been cognizant of the United States' "freedom"-oriented foreign policy focus, as the United States, under the Bush administration, took a more aggressive posture on the use of military and economic resources to export democratic ideals. This was exemplified by the eventual justifications for the 2003 invasion of Iraq:³⁹ "Chinese scholars have emphasized the continuity of the Bush Doctrine with President Clinton's foreign policy, and consider the Bush Doctrine as the culmination and maturation of the United States' post-Cold War grand strategy."⁴⁰

With respect to culture and the development of China's civil society, U.S. foreign policy toward China has, at times, demonstrated admirable concern for free expression issues. After a series of incidents⁴¹ in which Internet giants like Microsoft, Yahoo, and Google were implicated in apparently assisting the Chinese government in censoring the web-based activities of Chinese citizens, representatives of those corporations were haled before a session of the House Subcommittee on Africa, Global Human Rights, and International Operations, where they were accused by Subcommittee Chairman Representative Christopher

³⁸ See Charles Li, *Internet Content Control in China*, 8 INT'L J. COMM. L. & POL'Y 1 (2004) ("the U.S. foreign policy set by the Clinton administration and continued by George W. Bush is based on the belief that once China enters the world market, democracy will flow into China."); Carol M. Rose, *Privatization – The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 706 (2006) ("as China increasingly shifts formerly state-run operations to private enterprise, Western democracies continue to echo the hope that [Scottish Enlightenment philosopher James] Steuart expressed over 200 years ago: that freer markets make citizens more rights-conscious and ultimately force rulers to open up more breathing room to democratic processes."); Lan Cao, *The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOKLYN J. INT'L L. 97, 101 (1995) (noting that the economic success of China "poses a serious challenge" to the presumption that economic success and privatization/democratization go hand-in-hand). See also Bush, *supra* note 32.

³⁹ Although initially justified by reference to the threat of weapons of mass destruction, the United States' 2003 invasion of Iraq has subsequently been recast in terms of the need to stabilize the Middle East by establishing Iraq as a liberal outpost of freedom, and many observers believe that this was the underlying motivation for the Bush administration's march to war all along. See Orlando Patterson, *God's Gift?*, N.Y. TIMES, Dec. 19, 2006, at A33.

⁴⁰ Zhiyuan Cui, *Comparative Visions of Global Public Order (Part I): The Bush Doctrine and Neoconservatism: A Chinese Perspective*, 46 HARV. INT'L L.J. 403, 404 (2005).

⁴¹ See Christopher Stevenson, Note, Breaching the Great Firewall: China's Internet Censorship and the Quest for Freedom of Expression in a Connected World, 30 B.C. INT'L & COMP. L. REV. 531, 531-32 (2007) (recounting a series of Internet censorship incidents in China, including the takedown of a blog written by a research assistant in the Beijing bureau of the New York Times, the conviction and 10-year sentence for emailing "state secrets" of a Chinese journalist who was tracked down by identifying digital information provided by Yahoo, and the decision by Google to offer a new search engine, hosted in China, that would exclude blogging or emailing capabilities and comply with Chinese content restrictions).

Smith (R-NJ) of a “sickening collaboration” with the Chinese government that was “decapitating the voice of the dissidents” there.⁴² Representative Tom Lantos (D-CA) asked the companies’ representatives how their corporate executives could sleep at night, and Rep. Smith likened them to Nazi collaborators.⁴³ As early as October 2002, legislators introduced into the House and Senate the “Global Internet Freedom Act” (GIFA),⁴⁴ which would establish an Office of Global Internet Freedom within the International Broadcasting Bureau “to develop and implement a comprehensive global strategy to combat the state-sponsored and state-directed ‘Internet-jamming’ and user persecution conducted by repressive foreign governments.”⁴⁵ In addition, after the congressional hearings at which he grilled representatives of the Internet’s corporate giants, Representative Smith introduced the “Global Online Freedom Act of 2006,”⁴⁶ which “incorporates elements of GIFA, but extends that bill to include stiff civil and criminal penalties for U.S. companies that offer assistance to governments that censor, block, monitor, or restrict access to the Internet.”⁴⁷

Also consistent with the official rhetoric of freedom is the fact that the U.S. has long been a source of financial support for democracy promotion programs in China. This funding ranges from direct support of dissident voices and programs like the Voice of America and Radio Free Asia to democracy projects that work on rule-of-law collaboration, village elections, and projects sponsored by the National Endowment for Democracy.⁴⁸ U.S. financial support of “freedom” in China also includes more subtle forms of promoting democracy and cultural openness, such as educational and cultural exchanges and the funding of programs that train grassroots labor rights organizations to conduct outreach.⁴⁹

⁴² Tom Zeller, Jr., *Web Firms Are Grilled on Dealings in China*, N.Y. TIMES, Feb. 16, 2006, at C1

⁴³ See Stevenson, *supra* note 41, at 532–33; *The Internet in China: A Tool for Freedom or Suppression?: Joint Hearing of Before the House Committee on International Relations*, 109th Cong. 5-7 (2006), available at <http://www.foreignaffairs.house.gov/archives/109/26075.pdf> (last visited Apr. 15, 2008).

⁴⁴ S. 3093, 107th Cong. (2002); H.R. 5524, 107th Cong. (2002).

⁴⁵ Stevenson, *supra* note 41, at 548. Efforts to enact the bill failed, however, and nearly identical versions of the bill that were introduced in 2003, 2005, and 2006 proved equally unsuccessful. See H.R. 4741, 109th Cong. (2006); H.R. 2216, 109th Cong. (2005); H.R. 48, 108th Cong. (2003).

⁴⁶ H.R. 4780, 109th Cong. (2006).

⁴⁷ Stevenson, *supra* note 41, at 548–49.

⁴⁸ Ying Ma, *China’s Stubborn Anti-Democracy*, POLICY REVIEW, Feb. 1, 2007, available at <http://www.hoover.org/publications/policyreview/5513661.html> (last visited Oct. 22, 2008).

⁴⁹ *Id.*

The U.S. also puts heavy pressure on China to reform its democracy and human rights record via official government statements. As then-Assistant Secretary of State for Democracy, Human Rights, and Labor Lorne Craner proclaimed in February 2004:

Why is the emergence of democracy in China important to U.S. policy? The United States stands up for democracy and human rights around the world, and we maintain a fundamental belief that freedom is better than oppression, that liberty is better than tyranny, that rule of law works better than power, and that respect for human rights is better than arbitrary abuse of individuals. As President Bush stated last November, "Our commitment to democracy is tested in China. That nation now has a sliver, a fragment of liberty. Yet, China's people will eventually want liberty pure and whole." . . . We believe in the need for democratization in China because we believe that the Chinese people have as much a right to basic and fundamental freedoms as so many others around the world enjoy. Democratically governed nations are more likely to secure peace, deter aggression, expand open markets, promote economic development, combat international terrorism and crime, rule responsibly, uphold human rights and fundamental freedoms, avoid man-made humanitarian crises, and improve human health . . . The U.S. Government will continue to make human rights and democracy a core part of our relations with China. We cannot sit back and hope that market forces and trade alone will secure political freedom and the rule of law.⁵⁰

B. *American Intellectual Property Policy: In Pursuit of Money*

In spite of the prominence of the notion of "freedom" in contemporary American ideology and foreign policy, American foreign policy in the intellectual property arena would best be captured by a different word: "money."

1. 1980s and 1990s

The primary guiding force for the modern evolution of Chinese copyright law has been an American-led, top-down system of pressure which has been focused on U.S. economic and trade interests to the exclusion of social interests like the protection of parody. As Andrew Mertha notes, "China's first copyright law was shaped by foreign pressure, with the result that foreigners enjoyed greater legal protection under China's Copyright Law than China's own citizens."⁵¹ The pri-

⁵⁰ U.S. State Department, *Craner Says China Must Meet International Human Rights Norms*, USINFO, Feb. 3, 2004, <http://usinfo.org/wf-archive/2004/040203/epf204.htm> (last visited Oct. 22, 2008).

⁵¹ ANDREW C. MERTHA, *POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 118–19 (Cornell University Press 2007).

mary source of that pressure has been the United States Trade Representative, as part of a series of decidedly undiplomatic⁵² negotiations designed solely to preserve the access of American products to the Chinese marketplace, often to the detriment of other aspects of the Sino-American relationship.⁵³ The position of the United States Trade Representative, in turn, has been largely captured by the influence of intellectual property trade organizations and, in particular, the lobbying efforts of copyright-intensive industries.⁵⁴ These industries pushed American policy on China with a single goal in mind: improving market access and reducing piracy to increase their own profitability. In the 1990s, in particular, the United States repeatedly threatened China “with a series of economic sanctions, trade wars, non-renewal of Most Favored Nation . . . status, and opposition to entry into the World Trade Organization” over disputes about inadequate intellectual property protection for American goods.⁵⁵ These threats led to a “series of compromises by the Chinese government and the signing of [several] intellectual property agreements.”⁵⁶ However, they also led to increased hostility toward all types of American foreign policy pressure among the Chinese citizenry and government.⁵⁷

William Alford provides a stark example of the extent to which American interactions with China in the intellectual property context have focused exclusively on trade economics to the detriment of all else. Recounting the Chinese government’s 1989 crackdown on students and workers who had occupied Tiananmen Square, Alford notes that, “as the Chinese government spent May 19 putting the finishing touches to the declaration of martial law that was to signal a tragic end to the Beijing Spring of 1989, American negotiators were busy putting their own finishing touches to a memorandum regarding computer software protection.”⁵⁸ Free expression was on one side crushed and, on the other, forgotten.

⁵² *Id.* at 36 (“In fact, trade negotiations led by the United States Trade Representative have traditionally been characterized by a singular lack of restraint: banging the table, shouting, and engaging in tough talk are all an integral part of the process.”).

⁵³ *Id.* (“Officials in the Department of State complain that the USTR runs roughshod over its painstakingly crafted bilateral relationships with U.S. trading partners, ostensibly for narrow, parochial, domestic business-related goals. Many Chinese concur.”).

⁵⁴ *Id.* at 59–60.

⁵⁵ Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 133 (2000).

⁵⁶ *Id.*

⁵⁷ *Id.* at 133–134.

⁵⁸ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 112-13 (Stanford University Press 1997); see also Marjorie Cohn, *The World Trade Organization: Elevating Property Interests Above Human*

2. Recent Years

Although not intentionally so, American efforts to influence Chinese intellectual property policy in the 1980s and 1990s were at best agnostic toward—and probably detrimental to—the Chinese position on intellectual property doctrines that implicate free expression, such as parody. In keeping with this practice, more recent American initiatives have failed to introduce the subject of intellectual property regulation as a limitation on free speech into the dialogue with China.

In May 2005, with China recently having emerged as the United States' third-largest trade partner, the U.S. State Department called the counterfeiting and piracy situation there “out of control” and threatened, once again, to bring disputes before the World Trade Organization if China failed to commit itself more fully to protecting American intellectual property.⁵⁹ Since then, the United States has, in fact, initiated two disputes with China before the World Trade Organization, challenging restrictive Chinese trade policies on the importation and distribution of products from copyright-intensive industries and alleging Chinese failure to protect American intellectual property products from piracy.⁶⁰ Similarly, when Chinese President Hu Jintao visited the White House in April 2006, access to Chinese markets for American intellectual property and the protection of that intellectual property dominated the agenda. On the White House's South Lawn, Bush hailed China's “commitments . . . to improve enforcement of intellectual property rights.”⁶¹ Decidedly absent from the U.S.'s complaints and praises has been any concern about the effects of these policies on parody, free expression, and broader notions of democratic freedom in China.

Rights, 29 GA. J. INT'L & COMP. L. 427, 427 (2001) (criticizing the World Trade Organization for “decisions that have struck down protections for labor, the environment, food safety, and human rights as ‘trade barriers,’ while enshrining intellectual property rights,” demonstrating that “the WTO's *raison d'être* is the elevation of property interests above the protection of human rights”).

⁵⁹ U.S. State Department, *China Should Take Tougher Stance Against IPR Piracy*, Wayne Says, USINFO, May 31, 2005, <http://usinfo.org/wf-archive/2005/050531/epf207.htm> (last visited Mar. 26, 2009).

⁶⁰ Brooks Bolek, *U.S. Asks WTO for China Piracy Panel*, HOLLYWOODREPORTER.COM, Oct. 12, 2007, http://www.hollywoodreporter.com/hr/content_display/business/news/e3i696e0b26ea44411fe4ca15093fac931c (last visited Apr. 13, 2008).

⁶¹ Office of the Press Secretary, *President Bush and President Hu of People's Republic of China Participate in Arrival Ceremony*, U.S. WHITE HOUSE, Apr. 20, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/04/20060420.html> ((last visited Mar. 26, 2009).

C. *Black Letter Results of the Current American Strategy*

American foreign policy efforts to date, which have largely relied on the application of pressure via the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (or "TRIPS Agreement"), have produced some visible progress toward the U.S.'s economic goals. In spite of China's reputation as a "Wild West" of intellectual property piracy, the actual letter of the Chinese Copyright Law promises robust protection for copyrighted works. Moreover, after years of struggle, the promise of WTO membership was enough to finally spur China to institute long-demanded reforms in the protection of copyrights, trademarks, patents, and trade secrets—reforms that brought China into compliance with the TRIPS Agreement and largely harmonized Chinese law with that of most other developed nations.⁶² In theory, if not in practice, the United States' existing policy has succeeded in generating a Chinese legal regime that provides basic protections for copyrighted works—all the while helping to protect the economic interests of the U.S.'s major copyright-intensive industries. In seeking these economic gains, however, the U.S. has helped to cement a long history in China of using the laws governing expression to restrict democratic participation.

Looking back to Imperial China, efforts to control unauthorized copying were not grounded in a philosophy of artistic protection, but rather, served as a means of top-down control. Restrictions on copying created state monopolies over the publication of key materials, such as calendars and almanacs, supporting the emperor's assertion that he was the link between human and natural events.⁶³ Those same laws protected high-ranking government officials, who often engaged in printing activities on the side.⁶⁴ In addition to preserving these monopolies, pre-publication review also afforded Chinese imperial authorities an opportunity to review and block the publication of heterodox materials.⁶⁵ This system, however, was apparently seldom exercised for the benefit of private producers of innocuous texts.⁶⁶ In short, "the idea of limiting the unauthorized copying of books first arose not from a belief that the contents of such works were the property of their authors, but

⁶² See Marisa Anne Pagnattaro, "The Google Challenge": Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China, 44 AM. BUS. L.J. 603, 616 (2007).

⁶³ William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3, 12 (1993).

⁶⁴ *Id.*

⁶⁵ *Id.* at 13.

⁶⁶ *Id.* at 14.

from the crown's desire to provide printers with an incentive not to publish heterodox materials."⁶⁷ While Western systems later supplemented this rationale with a belief in the property rights of individuals against one another and against the state, this concept never developed independently in China.

The Chinese adaptation of copyright as a means of idea control continued to dominate through the twentieth century. During the Guomindang era, in order to qualify for a copyright, books, newspapers, and other creative works had to be vetted by the Ministry of Internal Affairs or the Central Propaganda Department to ensure that they did not involve "doctrines or affairs of the Guomindang."⁶⁸ Even authors who were uninterested in copyright protection were subject to serious penalties for releasing such works without a permit.⁶⁹ While setting up a system of ideological control, however, the Guomindang system did little to actually preserve authors' and artists' rights.⁷⁰ Further efforts at copyright reform under the Chinese Communist Party were similarly undermined by a government interest in preserving its own ideological authority that was stronger than its desire to protect artists' rights. As Alford notes, "Energetic though they have been, the Chinese government's attempts to promote more vigorous adherence to its intellectual property laws have been overtaken by a simultaneous and far more strenuous effort to reassert a strong degree of direct state control over the flow of ideas."⁷¹

The historical failure of indigenous Chinese law to offer adequate protection for parody, an art form with a strong inherent subversive potential, seems natural in light of the strong ideological imperative that permeates the native Chinese approach to intellectual property. However, during the period of openness that began after the reforms of Deng Xiao Ping in the early 1980s, China opened its eyes to the world, searching for inspiration in its quest for sweeping reform. It was during this time that the U.S. first had a real opportunity to promote an intellectual property agenda in China that would further the ideals of freedom and democracy; this opportunity has been squandered. Instead, the U.S. focused on installing a Western-style copyright regime in order to protect sales of American pop music recordings and similar products

⁶⁷ *Id.* at 18.

⁶⁸ Alford, *supra* note 58, at 51.

⁶⁹ *Id.*

⁷⁰ *Id.* at 52 ("These elaborate efforts at 'modernizing' the law notwithstanding, there appears, from accounts of Chinese and foreign observers alike, to have been little change in Chinese practice during the Nationalist government's two decades in power on the mainland.")

⁷¹ *Id.* at 92.

in the Chinese marketplace. This resulted in a putatively “modern” copyright regime that lacks protections for things like parody and satire—forms of expression that garner Constitutional protection under the First Amendment in the U.S. Moreover, the Chinese government has felt compelled to protect its Western-style copyright regime by resorting to policies such as licensing requirements for hosting websites and requiring government approval for posting clips and modifying music.⁷² To the extent that the rubric of intellectual property protection is a veneer that disguises the Chinese government’s true motive of controlling expression, the failure of U.S. intellectual property policy to seek black-letter protection for institutions such as parodic expression is lamentable. On the other hand, if the Chinese Government is sincerely seeking to protect copyrights and live up to its international obligations via these policies, the failure of U.S. intellectual property policy to promote a Chinese intellectual property regime that facilitates democracy is ironic as well.

In situations like the Chinese government’s response to *e’gao*, the damage to free speech wrought by overreaching copyright protection is obvious. From an American perspective, the chilling effect imposed by government approval for the creation of parodic works requires little theoretical explication. The Chinese citizenry, however, lacks a historical basis for or experience with the grave threats such restrictions would place on a cultural space steeped in free expression; as a result, the public outcry about these policies has been minimal.

It seems, then, that the United States’ one-dimensional foreign policy with respect to intellectual property, one based entirely on economic goals to the exclusion of all else, has served to perpetuate a long anti-expressive, antidemocratic streak by successive Chinese regimes. The U.S. has not only missed the opportunity to promote “freedom” and democracy through its intellectual property policy, but also has contributed to China’s repertoire of mechanisms for control.

IV. THE BENEFITS OF A POLICY COMMITMENT TO TRANSFORMATIVE USES

A. *The Nexus Between a Pro-Transformative Use Policy and Democratic Ideals*

Black letter law and chilling effects are important: they make the realm of paper and theory relevant to our everyday lives. Yet, one might be tempted to look askance at *e’gao* in China—or YouTube clips

⁷² See Macartney, *supra* note 4; Jiao, *supra* note 5.

in the U.S.—and ask whether we really need a few laughs from an apolitical clip parody or another video commentary responding to *Chocolate Rain*.⁷³ With a proper perspective, the answer is a resounding “yes.” In the aggregate, clip culture and the public participation it exemplifies translates the stuff of our everyday lives into democracy; these are the cultural and political expressions that make our democracy real.

Culture allows us to define our notions of self and serves as a substrate for all of our interactions with others.⁷⁴ As Professor Jack Balkin has explained, democracy in the broad sense is “far more than a set of procedures for resolving disputes. It is a feature of social life and a form of social organization.”⁷⁵ A democratic culture, therefore, is one characterized by free expression and public participation not only in the formal structures of democratic governance, but in the cultural ideas and expressions that fill our daily lives as well:⁷⁶

A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free.⁷⁷

Although people have always participated in the production of culture, the advent of digital technologies—and the Internet in particular—has made this aspect of democratic life more salient.⁷⁸ Mass media technologies such as radio and television ushered in an era where the reach of a single voice was no longer limited by space; a select few speakers with access to infrastructure could suddenly reach millions with a message. The Internet has further broken down the barriers to both mass communication and mass participation, making it possible for almost any individual with a computer to attempt to capture the world’s attention. Speakers who would have had access to the mass media are turning increasingly to the Internet as well; perhaps most importantly, though, the Internet has created an interactive space

⁷³ See YouTube.com: Tay Zonday, *Chocolate Rain* Music Video (Tay Zonday 2007), <http://www.youtube.com/watch?v=EwTZ2xpQwpA> (last visited Oct. 22, 2008).

⁷⁴ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 32–35 (2004).

⁷⁵ *Id.* at 32.

⁷⁶ *See id.* at 32–35.

⁷⁷ *Id.* at 33.

⁷⁸ *Id.* at 35.

where traditional notions of expertise and professional status take a back seat to the resonance of the message itself.

For example, during the 2008 U.S. presidential primary election race, recording artist will.i.am released a video on the Internet entitled "Yes We Can."⁷⁹ The clip was essentially a "mashup" music video that took the text and recordings of speeches by Democratic Presidential Candidate Barack Obama and set them to music. Although will.i.am is a well-known recording artist with access to more traditional channels of mass media as a member of the popular American music group The Black Eyed Peas, the clip provided a uniquely advantageous form of direct access to a mass audience. The response was thunderous. Tens of millions saw the original clip, which was soon picked up by the traditional media and eventually became the first web clip to earn an Emmy.⁸⁰ A barrage of response clips quickly followed, including political commentaries that co-opted the message of the original⁸¹ as well as all manner of parodies.⁸² As a whole, the phenomenon represents just one example of the power of access and participation in the aggregate: a participatory mass exchange transcending geographical boundaries, with the most fervent, amusing, and eloquent voices rising to the top.

While the years of human history prior to the advent of the Internet demonstrated that we can survive without *The Steamed Bun*, *Yes We Can*, and their clip culture kin, the Internet era has opened new frontiers for the kind of public participation in cultural meaning-making that is constitutive of democratic culture, and thus the daily practice of life in a democratic society. Critically, these daily impressions and interactions that influence us also inform our choices about civic participation and, therefore, play an essential role in democratic governance. When combined with an appropriate legal regime, a democratic society could empower the participation of individuals in the culture that surrounds them while still protecting the economic interests and incentives of professional content creators. In so doing, a society's core values, legal regime, and public practice can align to strengthen its democracy.

⁷⁹ YouTube.com: will.i.am *Yes We Can* Music Video (will.i.am and Mike Jurkovic 2008), <http://www.youtube.com/watch?v=jjXyqcx-mYY> (last visited Oct. 16, 2008).

⁸⁰ *will.i.am's "Yes We Can Song" Video Awarded Emmy(R) for New Approaches in Day-time Entertainment*, REUTERS, June 16, 2008, <http://www.reuters.com/article/pressRelease/idUS146320+16-Jun-2008+MW20080616> (last visited Oct. 16, 2008).

⁸¹ See, e.g., YouTube.com: *john.he.is* Music Video, (The Public Service Administration 2008), <http://www.youtube.com/watch?v=3gwqEneBKUs> (last visited Oct. 16, 2008) (converting the original into an attack on Republican Presidential Candidate John McCain).

⁸² See, e.g., YouTube.com: *Three Little Words: I Like Turtles* Video, (Barely Political 2008), <http://www.youtube.com/watch?v=XA2Z9fVRohk> (last visited Oct 16, 2008). Although seemingly unrelated to the message of will.i.am's music video, this clip might fall into the legal category of parodies that poke fun at the "seriousness" of the original.

But the Internet “pipes” that spread information can be blocked or filtered by a “Great Firewall,” and the mass media that could broadcast diverse public opinions can be bridled by government authority and limited to “trotting out the party line.” In effect, the wrong legal regime for resolving disputes between individuals, businesses, and their government can become a burdensome yoke that serves only the economic interests of businesses and the political interests of entrenched government, reducing individuals to passive consumers of cultural and political products.

It is in this manner that U.S. intellectual property policy towards China has served to denude and hinder its oft-repeated foreign political policy goals of “spreading freedom.” Unqualified American insistence on protective measures of copyright means that are worthwhile exceptions to protection, such as transformative uses with powerful democratic implications, are ignored and ultimately forgotten. Each step away from participation and each avenue of expression that is foreclosed by the legal regime represents a departure from the ideal of public participation and, ultimately, democratic governance. Yet, history has shown that political pressure can yield powerful results; were the U.S. to have a single mind about its intellectual property influence, pressure on China to reform its legal system could lead to socially positive forms of change.

Thus far, the United States’ attitude toward China regarding intellectual property has been grounded in its interest in exporting goods from its intellectual property-based industries to China. However, if they are truly interested in promoting free speech and democratization in the developing world, the United States and its Western allies must work to export values as well as products—and do so in a manner that is pragmatically and ideologically consistent. The American fair use doctrine, upon which parody protection is based in the United States, is regarded as the First Amendment’s key check on the Copyright Act, recognizing the vital American value of free speech in the intellectual property arena.⁸³ Changing the U.S. strategy to emphasize more vigorously the protection of parody and transformative use within Chinese copyright law would represent a meaningful step toward promoting free speech in China. Neil Netanel, for example, has suggested that copyright law can be used to induce democracy in authoritarian regimes, to consolidate democracy in nascent democratic systems, and to enhance democracy in more mature democracies.⁸⁴ Netanel advocates

⁸³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

⁸⁴ See generally Neil Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217 (1998).

a robust allowance for parody in mature democracies: “In allowing for . . . highly derivative but subversive reformulations of cultural icons—like counterculture parodies of Mickey Mouse or the bootleg sale in American inner cities of ‘Black Bart Simpson’ T-shirts—copyright law would further the goal of expressive diversity and serve, at least to some extent, to loosen media conglomerates’ hold on public discourse in advanced democratic states.”⁸⁵ This same argument can be applied with equal salience in authoritarian regimes such as China, which have adopted copyright measures, as a defense against the expressive monopoly of the state.

The categories of works at issue—parodies, clip culture generally, and transformative adaptations—have great potential in China to aid the development of democratic culture. At one level, this development can take the form of social criticism and commentary. Though Chen Kaige may have been upset by the “distortion” of *The Promise* in *The Steamed Bun*, “what makes authors angry is precisely what they are least likely to write, and therefore often what copyright needs to permit.”⁸⁶ The Chinese Copyright Law’s total preclusion of parody threatens to destroy a whole channel for public participation—one which has already helped to stimulate an emerging popular consciousness, particularly among Chinese youth. Luo Ming, a social observer from the Sichuan Academy of Social Sciences in Chengdu, has noted that “[m]aking a parody video is an effective way [for Chinese youth] to identify themselves and create a sub-cultural statement so as to rebel against the status quo.”⁸⁷ Or, as Peking University student Wang Xiongjun told the *China Daily*, “it is a vehicle for people to deconstruct burning issues. It is an interesting, spiritual pursuit.”⁸⁸ Transformative outlets of expression allow average Chinese citizens to appropriate and democratize their own cultural benchmarks, encouraging the kind of cultural participation that is vital to the development of “a just and attractive society.”⁸⁹

This popular consciousness has the potential to expand beyond cultural matters alone, into a burgeoning political consciousness, or perhaps even activism. Xia Xueluan defines *e’gao* as “a subculture characterized by satirical humour, revelry, grassroots spontaneity, a de-

⁸⁵ *Id.* at 278.

⁸⁶ Wu, *supra* note 15.

⁸⁷ See Ni & Chihua, *supra* note 3.

⁸⁸ See Jiao, *supra* note 5.

⁸⁹ See William W. Fisher, “Theories of Intellectual Property,” in *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001), at 35–36 (discussing the importance of semiotic democracy to social planning theories of intellectual property).

fiance of authority and mass participation.”⁹⁰ That element of defiance of authority suggests a prominent role for *e’gao* in expanding notions of democracy and free speech in the modern People’s Republic of China. Another professor at Peking University, Chen Xuguang, suggested to the *China Daily* that, “[f]or youngsters who turn down authoritative notions and desire to express their feelings and ideas, a movie is out of reach, while the Web is far more accessible. It could be regarded as a subversion of traditional film by new media.”⁹¹ Chen stops just short of the next logical step: not only can *e’gao* serve as a subversion of traditional media, but it also can serve as a subversion of traditional messages as a whole. Another Chinese youth puts the issue into even more striking terms: “It was Hu Ge who inspired me to realize that we don’t have to follow the lead of authority,” 24-year-old Shenzhen native Wuming Zhihai, producer of another parody called *When the Master Meets a Steamed Bun*, told the *China Daily*; “[w]e can express our own opinions through parodies.”⁹²

However, the question remains: if transformative uses are such a boon to semiotic expression and democratic ideals, why do several Western nations fail to offer them the kind of robust protection being advocated here? While it is true that many developed democracies fail to provide significant protection for transformative uses, this comparison, however, is not truly apt with respect to China. China is not a developed democracy; it is a developing nation with a largely autocratic, one-party state. As Netanel’s analysis suggests, its different political and development status calls for a different set of intellectual property norms.⁹³

The full pursuit of American democratic ideals should mean supporting all reasonable tools for democratic development and free expression. To date, that side of American foreign policy has unwittingly taken a backseat to short-term economic gains. It is not necessary, however, to view America’s long-term democratic and short-term economic goals as irreconcilable.

B. *Advantages for the U.S. Economic Agenda*

Lofty notions of exporting democracy aside, this application of pressure may prove particularly attractive as part of a broader, partnership-based approach toward Sino-American trade relations and toward the lasting and meaningful protection of intellectual property rights in

⁹⁰ See Jiao, *Supra* note 5.

⁹¹ See Ni & Chihua, *supra* note 3. .

⁹² *Id.*

⁹³ See generally Netanel, *supra* note 86, at 274-78.

China. The United States' sticks-over-carrots-based approach to trade negotiations with China on intellectual property matters, which has been characterized by an American threat of trade sanctions, followed by a comparable Chinese threat, a period of exchanged rhetoric, and a last-minute short-term fix with no lasting results on Chinese cultural norms or enforcement measures regarding intellectual property rights, has been criticized by many scholars as ineffective or even counter-productive.⁹⁴ As Peter Yu has noted, the general compatibility between Confucian tradition of "interaction with the past" and American-style transformative parody offers an opportunity for the United States to "promote a sustainable intellectual property regime" by "mak[ing] the Chinese aware of the benefits of intellectual property rights" and "reduc[ing] the skepticism of the Chinese people toward Western intellectual property rights."⁹⁵ In effect, by packaging parody protection—an exception to copyright protection—as part of generally constructive and collaborative approach to intellectual property reform in China, the United States might make greater progress toward achieving the level of protection it has sought for so long.

C. *Free Expression Successes in China*

While *e'gao* and the Clip Culture boom in China powerfully demonstrate the pro-democratic potential of parody, recent Chinese experience illustrates the important role that other transformative uses may play in further stimulating democratic, participatory cultural expression in China without seriously jeopardizing the background interests of American (or other) copyright owners.

Consider the issue of Harry Potter adaptations, such as *Harry Potter and Leopard-Walk-Up-to-Dragon*. Though highly transformative, these works are not true parodies, in that they do not seek to poke fun at or comment upon the source material. Rather, they are more akin to a form of "fan fiction":⁹⁶ they draw on the characters from the Harry Potter world, but the storylines are new, and often include elements from local folklore and history.⁹⁷ Through these transformative works, local writers can do something the original authors cannot: they can

⁹⁴ See, e.g., Yu, *supra* note 55.

⁹⁵ *Id.* at 222–25.

⁹⁶ See Fan Fiction, WIKIPEDIA, http://en.wikipedia.org/wiki/Fan_fiction (last visited Apr. 15, 2008). ("Fan Fiction (alternatively referred to as fanfiction, fanfic, FF or fic) is a broadly defined term for fiction about characters or settings written by admirers of the original work, rather than by the original creators. The term usually applies to works that are uncommissioned and unauthorized by the owner/creators and publishers of the original and usually (but not always) works which are not professionally published.")

⁹⁷ See Wu, *supra* note 16.

seize on international symbols that don't fit local culture and rework them into something more meaningful and relevant for the population.⁹⁸ This powerful form of expression combines internationally known symbols and idiosyncratic cultural markers to generate a message that is deeply salient to Chinese consumers without replacing the market for the original works.

The argument in the music realm is similar. American rapper Dr. Dre produced a hit song called "The Next Episode" on his album "2001," which was actually released in 1999. Several years later, Chinese rapper Duan Si Si sampled a large portion of underlying music from "The Next Episode" and used it as the background track for her own Chinese-language rap song. "The Next Episode" is written almost entirely in thick, highly-regional American slang, and talks about Dr. Dre and others doing drugs, partying, and otherwise "living it up" in Southern California. Beyond representing an escapist fantasy, it has little relevance to Chinese listeners, even if they could decipher the lyrics. Duan Si Si's low-budget and little-known version, on the other hand, is a much more abstract, Chinese-language song that addresses themes of heroism, the tragedy of conflict, and loneliness. Although Dr. Dre has been an enormously successful recording artist in the U.S., Duan Si Si's transformation of his song presents a message to Chinese listeners that Dr. Dre himself could never produce. At the same time, the argument that her song represents some form of harm to Dr. Dre is a weak one at best: Duan Si Si's version is in no plausible way a substitute for "The Next Episode" in the American market; for most Chinese consumers, Chinese rap and American "gangsta" rap are probably two totally different genres. Even casual listening makes it abundantly clear that Duan Si Si's work is not that of Dr. Dre himself, dispelling any chance of mistaking one artist for the other; moreover, any arguments about Dr. Dre's potential to license his music to foreign rappers to make totally different songs in different genres of music seem far-fetched at best.

Even within its currently restrictive legal context, then, the Chinese experience is rife with examples of Chinese individuals taking advantage of modern technology to create transformative works that demonstrate the power of free expression and encourage democratic cultural participation. Legally legitimizing such behavior would enhance and encourage these trends in the future.

⁹⁸ *Id.*

V. RECOMMENDATIONS FOR A MORE EFFECTIVE TRANSFORMATIVE USE POLICY

If the United States is to meaningfully shift its intellectual property policy focus with respect to China from pure economics to a combination of economics and democracy, the first step is seeking a revision in China's Copyright Law that would better represent the United States' broader foreign policy interests and democratic ideals. To that end, we propose that the United States' lobbying efforts be directed toward encouraging developments in Chinese intellectual property law consistent with international norms of free expression. Indeed, it is still possible to push for idealized protection for transformative use in China that is even stronger than what exists in the U.S. and that is tailored to China's status as a nation undergoing massive economic and cultural change. This could take the form of an amendment to Article 22 that would create an additional exception to copyright protection in favor of transformative uses:

Article 22: In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owners, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this law shall not be prejudiced. . . .

(13) production, distribution, or performance of a substantially distinct, highly transformative work, such as a parody or unauthorized sequel, that is either marked or readily identifiable as such.

Such an amendment would provide definite and clear protection for highly transformative works. In order to further the purposes of copyright, however, it sets a high bar on the person making a transformative work. The requirements that the new work be "substantially distinct" and "highly transformative" are intended to ensure that the new work involves a substantial input of effort, creativity, or both in the enterprise. These requirements protect an original author's incentive to create by precluding protection for minor alterations that would essentially be exact substitutions in the market for the underlying work. Thus, simple knock-offs and their close relatives would remain susceptible to infringement suits. In addition, an amendment of this sort would protect a creator's interests in their reputation. The words "marked or readily identifiable as such" supplement the attribution requirement already present in Article 22 of the Copyright Law.⁹⁹ Requiring either that the work be so distinct that a person would not confuse it with a work by the original creator or that the creator of the transformative work alert the public that it is an unauthorized derivation would pre-

⁹⁹ 2001 Copyright Law, *supra* note 19, art. 22.

vent creators of transformative works from masquerading as the original creator. This in turn limits the potential for public confusion as to the origin of the new work.

Armed with such a shield, *The Steamed Bun*, a Chinese take on Harry Potter designed for Chinese readers, or a transformative Chinese rap song—and all of their implications for free expression, democratic culture, and political consciousness—would be saved from destruction at the hands of the Copyright Law. *The Steamed Bun* is clearly highly transformative because of its criticism of the underlying work; this factor, in combination with its genre, setting, and overall dramatic character make it so distinct from *The Promise* that it probably need not be labeled. A Chinese take on Harry Potter, on the other hand, may have a harder time meeting the requirements of the amendment; because such a work would be intended to fit into the Harry Potter world, it would probably have to be marked as unauthorized unless obviously parodic. If the new Harry Potter copies parts of a story line from an existing Harry Potter novel, it should fail the test; on the other hand, a transformative Harry Potter that contains an entirely new plot that only draws on the Harry Potter world could pass muster under this revised Article 22. For highly transformative music that is not clearly identifiable as including samples, creators could follow the existing practice of marking legal information on a CD jacket, the official website from which it is downloaded, or a similar source.

The foregoing is merely one possible avenue for reform. The Copyright Law is relatively new, and compared with Western nations, the Chinese Government tends to take a more experimental view of legislating.¹⁰⁰ The Chinese government also writes in broad terms, has the capacity to revoke and rewrite legislation, and, as past experience with U.S. intellectual property has shown, is willing to at least listen to world opinion. If the U.S. government can shed the “sticks-over-carrots” approach, there is still time for meaningful and cooperative engagement on coordinated, forward-looking intellectual property policy.

VI. CONCLUSION

In spite of almost a generation of Western pressure on China on the issue of intellectual property, Chinese copyright law has failed to develop meaningful protection for parody and other transformative uses of copyrighted works. In failing to pursue a policy agenda that

¹⁰⁰ See Sebastian Heilmann, *Policy Experimentation in China's Economic Rise*, 43 STUDIES IN COMPARATIVE ECONOMIC DEVELOPMENT 2 (2008), available at <http://www.springerlink.com/content/4514xlq717298tj7/> (last visited Oct 27, 2008).

emphasizes transformative uses, the United States has largely sold out its own democratic values in favor of short-term economic gains.

With its unique place at the nexus of ideology and commerce, however, the issue of transformative uses offers an ideal avenue through which the United States may channel a new strategy that would achieve meaningful social and economic gains for the United States and China alike. On the whole, the promotion of transformative uses as a proxy for the general protection of free speech and democratic ideals represents a comparatively noninvasive forum through which the United States may promote its values in China and the rest of the developing world. The U.S. State Department's calls for a Chinese crackdown on piracy in 2005 were couched not as protecting American interests, but protecting Chinese business interests and nurturing the country's ongoing industrial transformation.¹⁰¹ Adopting the protection of transformative uses as a key issue in its discussions with China on intellectual property matters would allow the United States simultaneously to pursue economic interests in a manner consistent with ideological and humanitarian interests in free expression while avoiding counterproductive clashes at the WTO and anti-democratic changes in Chinese law.

¹⁰¹ See U.S. State Department, *supra* note 59.