

**THE YANG OBEYS,
BUT THE YIN IGNORES:
COPYRIGHT LAW AND SPEECH
SUPPRESSION IN THE PEOPLE'S
REPUBLIC OF CHINA**

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ABSTRACT

Copyright law can either promote or restrict free speech: while copyright preserves economic incentives to create and publish new expression, it also fences off expression from public use. For this reason, the effect of copyright law on speech in a given country depends on the particular manner in which it is understood, legislated, and enforced.

This Article argues that copyright law in the People's Republic of China (PRC) serves as a tool for speech suppression and censorship. Whereas China has engaged in official censorship for thousands of years, there has historically been little appreciation for proprietary rights in art and literature. Just as China's early twentieth century attempts to recognize copyright overlapped with strict publication controls, the PRC's modern copyright regime embodies the view that copyright is a mechanism for policing speech and media.

The decade-long debate that preceded the PRC's first copyright statute was shaped by misunderstanding, politics, ideology, and historical forces. Scholars and lawmakers widely advocated that Chinese copyright law discriminate based on media content and carefully circumscribe authors' rights. These concerns, intensified by the Tiananmen Square crackdown, bore directly on the

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content of China's 1990 Copyright Law. While the Copyright Law has evolved over the past two decades (especially in response to the advent of digital technology), a censorship-oriented philosophy has continued to inform its content and interpretation. China's conflation of copyright protection and speech control is especially egregious at the enforcement stage: government "anti-piracy" efforts double as censorship campaigns, and copyright enforcement is often subjugated to the objectives of China's media control bureaucracy.

This unhappy reality highlights the need for the United States to revise its approach to Chinese intellectual property reform. Although the U.S. has both pushed for stronger copyright protection in China and criticized PRC censorship practices, it has largely ignored the impact of Chinese copyright law on free speech. U.S. political interests and Chinese society would be better served by a more holistic policy.

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I. INTRODUCTION

In July 2006, the Chinese government launched a "100 Day Campaign Against Piracy," an intense nationwide effort to stem the rampant sale of pirated media in China. The campaign specifically targeted pirated DVDs of Hollywood movies, including *Superman Returns*, which had debuted in movie theaters that summer.¹ At the end of the campaign, Chinese authorities proudly announced that they had confiscated millions of pirated items and raided tens of thousands of publishing and distribution outlets, of which hundreds were forcibly closed.² A Warner Home Video executive praised the campaign as an "important step in developing the potential of the legitimate video business in China," stating that China's "strong efforts . . . allow us to distribute *Superman Returns* and future titles into stores that previously only carried pirated versions of international films."³ From the vantage point of the West, the 100 Day Campaign appeared to be a success.⁴

1. *China Gets Superman Returns DVD 2 Months Early*, SUPERHEROHYPE, (Sept. 27, 2006), <http://www.superherohype.com/features/articles/91927-china-get-superman-returns-dvd-2-months-early>.

2. Bay Fang, *Hollywood Studios Sue Chinese Stores for Movie Piracy*, U.S. NEWS, (Sept. 13, 2006), <http://www.usnews.com/usnews/biztech/articles/060913/13movieschina.htm>; "Fan Dao Dan Bai Ri Xing Dong" *Quan MianJing Hua Wo Guo Chu Ban Wu Shi Chang [The "100 Day Anti-Piracy Campaign" Comprehensively Cleansed China's Publications Market]*, GUANG MING RI BAO [GUANGMING DAILY], Oct. 25, 2006, available at <http://www.shdf.gov.cn/cms/html/190/2150/200610/690454.html>.

3. *China Gets Superman Returns DVD 2 Months Early*, *supra* note 1. In all likelihood, the increase in sales was not entirely attributable to the 100 Day Campaign. Warner Brothers moved up the China DVD release of *Superman Returns* by two months, priced the DVDs from RMB 14 to RMB 22 (approximately \$1.77 to \$2.78, at the time), and used an encryption technology that made it difficult for pirates to make quality copies of the DVDs. *Id.*

4. *Id.*

But the Western press did not tell the full story. The 100 Day Campaign was conducted under the auspices of the national "Clean Up Pornography and Destroy Illegal Publications" office, which was established in the immediate wake of the Tiananmen Square crackdown and has conducted regular censorship campaigns ever since.⁵ Although the 100 Day Campaign's ostensible focus was copyright infringement, its broader purpose was to "cleanse" China's cultural market and "safeguard the country's culture."⁶ The extensive raids conducted throughout China resulted in the confiscation of not only pirated DVDs, but also millions of media items containing disapproved content, such as pornography and "illegal publications of a political nature."⁷ Liu Binjie, head of China's General Administration of Press and Publications, praised these results, but emphasized the continuing need to improve the "atmosphere of public opinion" in China.⁸ The 100 Day Campaign may have boosted *Superman Returns* DVD sales, but it clearly concerned more than copyright infringement.

Western nations and corporations have long been apprehensive about Chinese intellectual property enforcement. China is by far the world's foremost producer of pirated goods, accounting for over 80 percent of counterfeit articles seized worldwide.⁹ Experts estimate that 90 percent of all media sold within China is counterfeit,¹⁰ and the Motion Picture Association¹¹ alleges that Chinese piracy costs Hollywood hundreds of millions of dollars

5. Xing Yuhao "Fan Dao Ban Bai Ri Xing Dong" Zhang Xian Wo Guo Da Ji Dao Ban Jue Xin ["100 Day Anti-Piracy Campaign" Demonstrates China's Determination to Wipe Out Piracy], GUANG MIN RI BAO [GUANGMING DAILY], July 15, 2006, http://www.gmw.cn/01gmr/2006-07/15/content_450198.htm. For more on the "Clean Up Pornography and Destroy Illegal Publications" campaign, see *infra* Parts III.E, V.B.

6. Wo Guo "Fan Dao Ban Bai ri Xing Dong" 14 Ri Zai Beijing Tu Shu Da Xia Qi Dong [China's "100 Day Anti-Piracy Movement" Kicks Off at the Beijing Book Building on the 14th], XINHUA, (July 14, 2006), http://www.gov.cn/jrzg/2006-07/14/content_336260.htm.

7. "Fan Dao Ban Bai Ri Xing Dong" Quan Mian Jing Hua Wo Guo Chu Ban Wu Shi Chang [The "100 Day Anti-Piracy Campaign" Comprehensively Cleansed China's Publications Market], *supra* note 2; Fan Dao Ban Bai Ri Xing Dong Bu Shou Ruan [100 Day Anti-Piracy Campaign Not Soft], REN MIN RI BAO [PEOPLE'S DAILY], Sept. 17, 2006, <http://culture.people.com.cn/GB/22219/4824359.html>.

8. Sui Xiaofei, Liu Binjie: Yao Gong Gu Ti Gao "Fan Dao Ban Bai Ri Xing Dong" Cheng Guo [Liu Binjie: Consolidate and Improve the Results of the "100 Day Anti-Piracy Campaign"], XINHUA, (Nov. 1, 2006), <http://news.cctv.com/china/20061101/105625.shtml>.

9. Renata Goldirova, *Counterfeit Goods Flood Europe*, BUS. WEEK, (June 1, 2007, 2:43 PM), http://www.businessweek.com/globalbiz/content/jun2007/gb20070601_909719.htm.

10. Kristi Heim, *Inside China's Teaming World of Fake Goods*, SEATTLE TIMES, (Feb. 13, 2006, 1:13 PM), http://seattletimes.nwsourc.com/html/chinainfocus/2002782434_chinapiracy12.html.

annually.¹² While such figures are subject to criticism,¹³ the seriousness of China's piracy problem cannot reasonably be denied. As one scholar states, Chinese "enforcement of intellectual property laws may well be described as unsatisfactory if not dismal or in crisis."¹⁴ Warner Brothers' quickness to praise the 100 Day Campaign reflects Western media companies' apprehension over piracy in the Chinese market—even a temporary enforcement effort that boosts sales of a single DVD title is considered an "important step" in Chinese copyright protection.

But as the 100 Day Campaign demonstrates, Chinese copyright enforcement comes with some troubling baggage. The nationwide anti-piracy campaign may have successfully removed millions of infringing DVDs from the marketplace, but it also provided the Chinese regime with an opportunity—or, more cynically, an excuse—to crack down on expression that it considers threatening, such as political dissent, religious information, and other so-called "unhealthy" media.¹⁵ So long as the United States and other Western nations insist that China respect freedom of speech as a condition for "full member[ship] in the international community,"¹⁶ it will not be sufficient to merely ask whether, or to what extent, China protects copyright holders' interests. To paraphrase a Chinese expression, the Yang may obey, while the Yin ignores;¹⁷ China may boast of ramped-up copyright protection, but that does not tell the full story of China's copyright regime. It is just as important to ask *what* "copyright"

11. The Motion Picture Association is the Motion Picture Association of America's international counterpart. See *About the Motion Picture Association*, <http://www.mpa-i.org/aboutus.html> (last visited Dec. 16, 2010).

12. Clifford Coonan, *Studios Retool Anti-Piracy Tactics*, VARIETY, (Nov. 29, 2007, 2:07 PM), <http://www.variety.com/article/VR1117976756.html>.

13. See SHUJEN WANG, FRAMING PIRACY: GLOBALIZATION AND FILM DISTRIBUTION IN MODERN CHINA 26 (2003) ("Because illegal sales and distribution are private acts, the needed data have to be based on extrapolation from very limited information. Furthermore, it is problematic to assume that each illegal copy would displace a sale at standard market prices. Finally, the estimates are based on reduction in 'gross revenues' rather than on net loss to the industries").

14. JIANQIANG NIE, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 217 (2006).

15. *Changchun Shi Kai Zhan "Fan Dao Ban Bai Ri Xing Dong" Cheng Ji Xi Ren [Results of Changchun City's "100 Day Anti-Piracy Campaign" Satisfactory]*, http://www.chinajilin.com.cn/jldt/zhengwen_2006-10-23_44483.htm (last visited April 4, 2010); *Fan Dao Ban Bai Ri Xing Dong Bu Shou Ruan [100 Day Anti-Piracy Campaign Not Soft]*, *supra* note 7; Huang Yihui, *Wei Fa Wu Pin Shi Zhong Xiao Hui An Zhi Yue 10 Wan Yuan [10 Million Yuan Worth of Illegal Goods Publicly Destroyed]*, DONG NAN ZAO BAO [SOUTHEAST MORNING PAPER], Aug. 4, 2006, <http://news.sohu.com/20060804/n244613208.shtml>.

16. David Goldman, *Congress Slams China and Microsoft, Praises Google*, CNNMONEY.COM, (Mar. 24, 2010), http://money.cnn.com/2010/03/24/technology/china_google_hearing/index.htm (quoting U.S. Senator Byron Dorgan, D-N.D.).

17. 阳奉阴违 (*Yang Feng Yin Wei*).

means and *how* copyright laws are enforced in the People's Republic of China ("PRC").¹⁸

Although copyright law is said to promote free speech by incentivizing the creation and dissemination of creative works, it also constitutes a literal restriction on expression. Depending on its formulation and implementation, copyright law may limit speech—or, as the case may be, limit certain types of speech. This Article argues that Chinese copyright law perpetuates China's long history of media regulation and speech control. The decade-long debate that precipitated the PRC's first copyright statute reveals that scholars and lawmakers did not envision copyright as an "engine of free expression,"¹⁹ but rather as a means of promoting only those works deemed beneficial to Chinese socialism, and as a tool for discouraging the production of heterodox media. This ideological objective, intensified by the 1989 Tiananmen Square crackdown, influenced the original content of Chinese copyright law, and has informed copyright law's evolution and interpretation over the past two decades. Not only does the substance of Chinese copyright law support China's censorship system, but as the 100 Day Campaign illustrates, copyright enforcement overlaps with and furthers the regime's efforts to control the content and exchange of ideas. These realities point to the need for Western nations to adopt a more holistic approach to Chinese intellectual property reform. Underenforcement is a legitimate concern, but it should not overshadow the necessity of disentangling copyright law from censorship policies.

II. BACKGROUND

A. COPYRIGHT AND SPEECH IN THE WEST

Copyright consists of a bundle of exclusive rights that allows authors and artists to exploit the commercial value of their creative works. This "limited monopoly"²⁰ subsists from the moment of creation in original works (such as novels, paintings, songs, and architectural designs²¹) and normally lasts until 70 years after the author's death.²² Because copyright inheres in the "en-

18. Throughout this Article, I use "China" and "PRC" interchangeably to refer to the People's Republic of China (Mainland China), to the exclusion of Special Administrative Regions (Hong Kong and Macau) and the Republic of China (Taiwan). This is for convenience only, and should not be interpreted as an opinion on the sovereign status of any of these regions.

19. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

20. 1-1 MELVILLE B. NIMMER & DAVID NIMMER, *Constitutional Aspects of Copyright*, in NIMMER ON COPYRIGHT § 1.03[A] (Matthew Bender Rev. Ed.), available at LexisNexis.

21. 17 U.S.C. § 102(a) (2006).

22. 17 U.S.C. § 302(a) (2006).

closure” of expression²³—persons other than the copyright holder generally may not copy or otherwise use copyrighted material without permission—it limits speech in a literal sense. From its inception, copyright has existed in tension with freedom of speech.

While primitive notions of literary property existed in antiquity,²⁴ the development of copyright is normally traced to the invention of the printing press in the fifteenth century.²⁵ The Venetian privilege system, which arose after Johann Speyer brought printing to the city in 1469, represents the “earliest genuine anticipation” of modern copyright.²⁶ The Venetian government granted “privileges” (exclusive printing rights) to Speyer and others in order to promote commerce.²⁷ By the mid-1500s, however, privileges had become a tool for suppression, as they were conditioned upon submission to official censorship and oversight.²⁸

The early history of British copyright followed a similar course: “The introduction of the printing press into England meant for the government at first a new trade to be encouraged, and then an instrument to be controlled.”²⁹ The Crown encouraged the book trade but, as in Venice, printing regulations soon became mired in censorship concerns. From 1538 to 1694, England maintained a strict censorship policy that specifically targeted religious heresy and sedition, to which printing regulation was key.³⁰ The licensing system that developed during this period gave rise to the concept of copyright.³¹ The “stationer’s copyright,” as it was then called, served as an instrument of state censorship until England’s final Licensing Act expired in 1694.³²

23. See generally James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33 (2003) (comparing expansion of copyright to England’s Enclosure Movement).

24. RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 11 (1996).

25. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) (“it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection”); L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 20 (1968) (stating that once William Clayton introduced printing press to England in 1476, the advent of copyright was “inevitable”).

26. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 9 (1993).

27. *Id.* at 9–10.

28. *Id.* at 11; Carla Hesse, *The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance*, *DÆDALUS*, Spring 2002, at 26, 30.

29. PATTERSON, *supra* note 25, at 21.

30. *Id.* at 23–24.

31. *Id.* at 43–44.

32. See L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into the Need for a Federal Statute of Unfair Competition*, 17 *DAYTON L. REV.* 385, 399

In 1709, Parliament passed what many consider the first true copyright law: the Statute of Anne.³³ Whereas earlier licensing statutes were essentially censorship laws,³⁴ the Statute of Anne articulated the basic policy underpinning modern Anglo-American copyright law: “the Encouragement of Learning.”³⁵ According to this utilitarian rationale, copyright provides a necessary incentive for authors to produce and publish creative works.³⁶ In the late eighteenth century, the Framers of the United States Constitution appealed to this same philosophy in empowering Congress to “promote the Progress of Science and useful Arts” through the granting of patents and copyrights.³⁷

Because copyright law encourages authors and artists to disseminate their creations to the public, it has been characterized as “the engine of free expression.”³⁸ However, even in its modern incarnation, copyright conflicts with free speech. As Melville B. Nimmer famously observed, copyright law flies “directly in the face of” the First Amendment, “in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright.”³⁹ U.S. courts have acknowledged this conflict,⁴⁰ but typically respond with the re-

(1992) (“The stationers’ copyright was a copyright purely and simply for publishers . . . that was used as an instrument of monopoly and a device of censorship”). Patterson and Birch have characterized the final Licensing Act as “the most important act of censorship in the history of Anglo-American copyright.” L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* (Craig Joyce ed., 2009), printed in 46 HOUS. L. REV. 215, 248 (2009). The Licensing Act “protected the stationers’ copyright by making it an offense to print or import ‘any Copy or Copies Booke or Bookes’ that any person had the right solely to print . . .” *Id.* at 360–61. The express purpose of the Act was to prevent the printing of “heretical seditious schismatical or offensive Bookes or Pamphlets,” by means of the licensing system. *Id.* at 360.

33. PATTERSON & BIRCH, JR., *supra* note 32, at 248; JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 8 (2008).

34. PATTERSON, *supra* note 25, at 143.

35. See 8-7 NIMMER & NIMMER, *supra* note 20, Appendix 7[A] (providing full text of Statute of Anne).

36. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (the “economic philosophy” underlying copyright “is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . .”).

37. U.S. CONST. art. I, § 8, cl. 8.

38. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); cf. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 2 (2000) (“the Copyright Act enables speakers to make money from speaking and thus encourages them to enter the private marketplace of ideas”).

39. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1969–1970).

40. See, e.g., *Golan v. Gonzales*, 501 F.3d 1179, 1188 (10th Cir. 2007) (copyright law subject to First Amendment scrutiny if it “alter[s] the traditional contours of

frain that copyright law has built-in accommodations that mitigate any tension with free speech.⁴¹ Specifically, the fair use doctrine⁴² and the idea/expression dichotomy⁴³ are said to provide sufficient latitude to make use of copyrighted material, or information conveyed by such material, without violating copyright law.⁴⁴

Many scholars are skeptical as to whether these “accommodations” adequately safeguard free speech, especially in light of copyright’s rapid expansion in recent decades. Writes David S. Olson, “[t]he balance between First Amendment speech interests and individuals’ interest in commenting on, using, or hearing copyright-eligible speech has been changed so severely as to have been, in practical effect, upended.”⁴⁵ As the scope of copyright has ballooned and new legislation has chipped away at speech-friendly doctrines,⁴⁶ copyright’s residual potential for suppression has become evident.⁴⁷ Copyright and censorship are not sy-

copyright protection” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 n.12 (11th Cir. 2001) (“While the First Amendment disallows laws that abridge the freedom of speech, the Copyright Clause calls specifically for such a law”); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1171 (5th Cir. 1980) (“For years, Courts and commentators have recognized a potential conflict between copyright and the First Amendment”).

41. See, e.g., *Eldred*, 537 U.S. at 219 (“[C]opyright law contains built-in First Amendment accommodations”). Significantly, however, in *Eldred* the Supreme Court rejected the view that copyright law is “categorically immune from challenges under the First Amendment.” *Id.* at 221.

42. Pursuant to the fair use doctrine, secondary users may, under certain circumstances, use a copyrighted work without the author’s permission and without paying remuneration. See 4-13 NIMMER & NIMMER, *supra* note 20, § 13.05 (explaining fair use doctrine).

43. *Assoc. Int’l v. Altai, Inc.*, 982 F.2d 693, 703 (2d Cir. 1992) (noting the “ideal expression dichotomy” refers to the “fundamental principle . . . that a copyright does not protect an idea, but only the expression of the idea”).

44. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“First Amendment protections [are] already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use”).

45. David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1414–15 (2009).

46. See *id.* at 1406–14 (describing changes to copyright law over recent decades); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 723, 739 (1999) (noting that under the Digital Millennium Copyright Act (“DMCA”), which was passed in 1998, “there is no such thing as a section 107 [fair use] defense,” and the DMCA’s built-in user protections are “of doubtful puissance”).

47. To cite a recent example of copyright’s censorial potential, in July 2010, U.S. Senate candidate Sharron Angle sent a cease-and-desist letter to her opponent, Senator Harry Reid, accusing his campaign of copyright infringement for reposting her former website to the Internet, which allegedly showed that she had espoused more extreme positions during her primary campaign. Reid promptly removed the web-

nonymous, but as history reveals, “copyright law[] emerged simultaneously with censorship,”⁴⁸ and the former may aid the latter—especially if its doctrines do not adequately accommodate free speech.

B. A BRIEF HISTORY OF COPYRIGHT AND SPEECH IN CHINA

1. *Printing Regulation in Imperial China*

China provides a compelling counterexample to the proposition, oft-repeated in Western scholarship, that printing technology necessitates copyright.⁴⁹ Printing first emerged in China in the seventh century, during the Tang dynasty, and had developed into a thriving industry by the Song Dynasty (960–1279 C.E.).⁵⁰ Although Chinese printers traditionally favored xylographic (wood-block) printing,⁵¹ movable-type technology appeared as early as the eleventh century—much earlier than Gutenberg’s press.⁵² The Chinese printing industry has been subject to official control since its advent, yet Imperial China saw “only very tentative development of ideas of copyright,” and “these concerns were never incorporated into the legal code.”⁵³ China’s long history of printing regulation is more indicative of a desire to shield society from undesirable printed materials than of an appreciation for private rights in literary property.⁵⁴

The legacy of Chinese literary censorship predates printing technology by several centuries. Beginning in 213 B.C.E., Emperor Qin Shi Huang notoriously conducted a massive biblioclasm that targeted subversive “private learning.”⁵⁵ When Chinese printing was still in its infancy, Tang dynasty rulers for-

site. Eric Kleefeld, *Angle Sends Cease-and-Desist to Reid—For Reposting Her Own Website*, TALKING POINTS MEMO, (July 5, 2010), <http://tpmdc.talkingpointsmemo.com/2010/07/angle-sends-cease-and-desist-to-reid-for-reposting-her-own-website.php>.

48. BETTIG, *supra* note 24, at 18.

49. See sources cited in *supra* note 25.

50. CHAN HOK-LAM, *CONTROL OF PUBLISHING IN CHINA, PAST AND PRESENT 2* (1983).

51. Cynthia J. Brokaw, *On the History of the Book in China*, in *PRINTING AND BOOK CULTURE IN LATE IMPERIAL CHINA* 3, 8 (Cynthia J. Brokaw & Kai-wing Chow eds., 2005).

52. *Id.* at 8. While many scholars peg the advent of Chinese movable-type printing technology in the eleventh century, see, e.g., CHAN, *supra* note 50, at 2, there does not appear to be a consensus as to precisely when it was invented. It is clear, however, that at the very latest, movable-type printing had been introduced in China 150 years prior to the Gutenberg press. ZHENG CHENGSI & MICHAEL PENDLETON, *COPYRIGHT LAW IN CHINA* 14–15 (1991).

53. Brokaw, *supra* note 51, at 7, 19.

54. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 13–15 (1995).

55. YURI PINES, *ENVISIONING ETERNAL EMPIRE: CHINESE POLITICAL THOUGHT OF THE WARRING STATES ERA* 181 (2009).

bade the transcription and distribution of works considered adverse to the state's interests.⁵⁶ By the Song dynasty, China had "promulgated elaborate laws and regulations governing the publication and distribution of literary works to uphold [the state's] prerogatives, purge unorthodox ideas and expressions, and stem the leak of information on state affairs and military defense."⁵⁷ Subsequent dynasties likewise policed the printing industry in order to promote state interests and enforce ideological orthodoxy.⁵⁸ Although Imperial China never achieved consistent, widespread enforcement of these policies,⁵⁹ it did engage in irregular but harsh campaigns against suspected dissidents.⁶⁰

Despite this long history of publication control, a copyright statute has never been discovered among Imperial China's extensive legal codes.⁶¹ At most, only very primitive notions of copyright developed in China prior to the twentieth century. Beginning with the Song dynasty, the Imperial Court claimed an exclusive right in certain publications.⁶² Some have characterized this as a simple copyright system.⁶³ Concededly, the state's motives in guarding this privilege were not wholly invidious,⁶⁴ and the Imperial Court was even known to grant licenses of

56. CHAN, *supra* note 50, at 2.

57. *Id.* at 2–3.

58. *Id.* at 22.

59. Brokaw, *supra* note 51, at 7; Timothy Brook, *Censorship in Eighteenth-Century China: A View from the Book Trade*, 22 CAN. J. HIST. 177, 192 (1988).

60. See Brokaw, *supra* note 51, at 19 ("It seems to have been the case that the Chinese government acted most effectively through focused campaigns of censorship and punishment . . ."). The most notorious censorship campaign during China's long imperial history is Emperor Qianlong's late-eighteenth century "literary inquisition." For an account of this period, see FREDRICK W. MOTE, *IMPERIAL CHINA 900–1800* 923–28 (1999).

61. ZHENG & PENDLETON, *supra* note 52, at 16.

62. *Id.* at 12. Notably, the state's exclusive privilege in these works covered not only publication, but also transcription, distribution, and *possession*. CHAN, *supra* note 50, at 4.

63. See, e.g., ZHENG CHENGSI, *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW* 87 (1987); Zhou Dafeng, *Zhongguo Gu Dai Zhu Zuo Quan Fa Tan Yuan [The Origins of Ancient Chinese Copyright Law]*, SHANG YE WEN HUA [BUS. CULTURE], no. 2, 2009 at 136, 136; Feng Nianhua, *Wo Guo Song Dai Ban Quan Bao Hu Yu Xian Dai Ban Quan Fa de Bi Jijiao [A Comparison of Chinese Copyright Protection in the Song Dynasty and Modern Copyright Law]*, TU SHU GUAN GONG ZUO YU YAN JIU [LIBRARY WORK & RES.], no. 1, 2005 at 24, 24.

64. The Imperial Court was not merely interested in suppressing heterodox and seditious ideas. Enforcing its exclusive rights in official works did serve to protect profits, which is consistent with modern copyright theory. CHAN, *supra* note 50, at 5; Brokaw, *supra* note 51, at 17. And promulgating official versions of the Confucian Classics did not merely serve to define orthodoxy; because the civil service examination system required that candidates memorize Confucian texts with exactness, the dissemination of unauthorized copies (which were often flawed) clearly undermined the system's integrity. Brook, *supra* note 59, at 185.

sorts.⁶⁵ Nonetheless, as William P. Alford points out, this system is best seen as “part of a larger framework for controlling the dissemination of ideas, rather than as the building blocks of a system of intellectual property rights.”⁶⁶ This is evident from the lopsided manner in which publication policies were enforced. Although the state claimed an exclusive privilege in the Buddhist Tripitaka and Taoist canon, it permitted Buddhists and Taoists to freely publish religious literature.⁶⁷ By contrast, the Song emperor Huizong harshly enforced printing laws against Manichaeist religious societies whose publications were deemed seditious.⁶⁸

This is not to say that literary property was a nonissue in Imperial China.⁶⁹ China had a booming printing industry by the Song dynasty.⁷⁰ As technology advanced over the next several centuries, the costs of printing decreased and commercial printing continued to grow.⁷¹ While the industry’s highly diffuse nature may have lessened the effects of piracy,⁷² some profit-driven printers sought to prevent unauthorized copying. A well-known example from the late Song Dynasty is Master Cheng of Meishan, who included a notice in his *Dongdu Shilüe* stating “no reprints allowed.”⁷³ Historical records indicate that printers were occasionally successful in persuading officials to take action against piracy.⁷⁴ Notable though these instances are, the late Qing scholar Ye Dehui indicates that they were mere isolated cases rather than widespread practice.⁷⁵ Even though late Impe-

65. See CHAN, *supra* note 50, at 19 (under the Song, private parties were permitted to use government printing blocks to reprint certain texts, so long as they paid a fee to do so).

66. ALFORD, *supra* note 54, at 17.

67. CHAN, *supra* note 50, at 3–4, 10.

68. *Id.* at 5.

69. While Chinese authors and artists traditionally “welcomed copying as a compliment,” those who “derived their social prestige from knowledge more arcane than Confucianism or who earned their livelihoods from technical knowledge” were likely more attuned to notions of literary property. Jonathan Ocko, *Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context*, 8 YALE J.L. & HUMAN. 559, 569–70 (1996) (book review).

70. CHAN, *supra* note 50, at 2.

71. Brooke, *supra* note 59, at 181.

72. Because Chinese printers favored xylography, China’s printing industry was remarkably mobile and decentralized. Brokaw, *supra* note 51, at 9; Brooke, *supra* note 59, at 193–94. Direct competition between printers would possibly have been less intense than it would have been had the industry been highly concentrated, as it was in England.

73. Xue Hong & Guo Shoukang, *China, in* INTERNATIONAL COPYRIGHT LAW & PRACTICE § 1[1] (Melville B. Nimmer & Paul Edward Geller eds., rev. Sept. 2007).

74. ZHENG, *supra* note 63, at 86; see also CHAN, *supra* note 50, at 20 (describing “two government directives forbidding unscrupulous people from pirating the works of the author-publisher”).

75. CHAN, *supra* note 50, at 20.

rial China's book trade was significantly larger than that of Europe,⁷⁶ it did not give rise to a formal copyright system.

The history of Chinese printing bears the imprint of strict government control, but does not reveal a deep concern for private literary property. The state's exclusive rights in official works may have resembled copyright in some respects, but in truth they "were only tangentially, if at all, concerned . . . with the creation or maintenance of property interests of persons or entities other than the state."⁷⁷ Rather, this system served as a mechanism for suppressing heterodox ideas. Isolated instances of officials taking action against literary piracy were neither commonplace nor grounded in a legal framework. Censorship has deep roots in China, but copyright is apparently a modern phenomenon.

2. Copyright in Early Twentieth Century China

China did not officially embrace copyright until the early twentieth century, and even then it was, in Alford's words, "at gunpoint"—foisted on China by Western powers.⁷⁸ While some Chinese officials recognized the desirability of foreign-styled intellectual property laws, they exhibited naiveté as to their purpose and function.⁷⁹ Strikingly, each of China's early attempts to implement copyright legislation coincided or overlapped with efforts to police the publishing industry. China's first copyright statute, which the Qing government passed in 1910,⁸⁰ was actually an amendment to a draconian publications law that mandated harsh punishment for those who slandered imperial authorities.⁸¹ Because the Qing dynasty was overthrown in 1911, the 1910 copyright law never had much practical effect.

China's two subsequent copyright laws were likewise promulgated in conjunction with oppressive publication laws. In the early years of the Republic of China, President Yuan Shikai

76. Brokaw, *supra* note 51, at 11.

77. ALFORD, *supra* note 54, at 17.

78. *See id.* at 30–55 (describing the "Turn-of-the-Century Introduction of Western Notions of Intellectual Property"). Copyright was first recognized in China in a 1903 treaty with the United States.

79. *See id.* at 45–46 ("The same documents that reflect a lack of familiarity on the part of Ministry of Commerce officials with many facets of intellectual property law and a naiveté about what the adoption of such law would entail also evidence both an appreciation that economically successful nations had patent laws and the perception that trademarks might help foster commerce").

80. DA QING ZHU ZUO QUAN LU [COPYRIGHT ACT OF THE GREAT QING DYNASTY], <http://zh.wikisource.org/zh-hans/> (last visited Sept. 7, 2010).

81. CHAN, *supra* note 50, at 25; *see also* LEE-HSIA HSU, GOVERNMENT CONTROL OF THE PRESS IN MODERN CHINA, 1900–1949 10 (1974) (describing provisions of publications law).

sought to suppress public expression in a bid to crown himself emperor.⁸² In 1914, he implemented a law prohibiting any publication that opposed the government, threatened public peace or morals, or revealed state secrets.⁸³ The following year, he supplemented this law with a copyright act modeled on the 1910 statute.⁸⁴ In 1928, the Nationalist government passed yet another copyright law, again as part of a larger effort to control publications.⁸⁵ Under the 1928 law, the Ministry of Internal Affairs could refuse to register a work—a prerequisite for copyright protection—if it conflicted with Nationalist ideology or was prohibited by other laws.⁸⁶ The Nationalists subsequently enlarged the scope of this prohibition during the 1930s.⁸⁷

China's early copyright statutes were consistently promulgated together with other measures that were designed to control the media. Whatever protections these laws purported to bestow "automatically . . . [gave] way in the face of what was taken to be an unquestionable need to control the flow of ideas."⁸⁸

3. *Copyright in the Early People's Republic*

When the People's Republic of China was established in 1949, the victorious Communists declared all existing laws null and void.⁸⁹ There was apparently little official concern for copyright in the PRC's first three decades. Some preliminary regulations on copyright were drafted in the 1950s, but a copyright system was never instituted.⁹⁰ Authors' rights were instead governed by standardized publishing contracts that provided for royalty payments, but even this system succumbed under the pressure of the late 1950s political campaigns and the Cultural Revolution.⁹¹ Whereas Marxist-Leninism provided little justifi-

82. CHAN, *supra* note 50, at 26.

83. *Id.*

84. *Id.*

85. *See id.* at 27 (noting that the 1928 copyright law passed in close proximity to other measures that were designed "to restrict public expression and suppress political opposition").

86. ALFORD, *supra* note 54, at 51; *see* Zhu Zuo Quan Fa [Copyright Act] art. 22 (promulgated by Nationalist Gov't of Republic of China May 14, 1928) (R.O.C.), available at <http://zh.wikisource.org/zh-hans/%E8%91%97%E4%BD%9C%E6%AC%8A%E6%B3%95/%E6%B0%91%E5%9C%8B17%E5%B9%B4>.

87. ALFORD, *supra* note 54, at 51; CHRISTOPHER A. REED, GUTENBERG IN SHANGHAI: CHINESE PRINT CAPITALISM, 1876–1937 223 (2004).

88. ALFORD, *supra* note 54, at 55.

89. Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949–1984: Prelude to the Chinese Copyright Law*, 9 COLUM.-VLA J.L. & ARTS 477, 478 (1984–1985).

90. *See* ZHENG, *supra* note 63, at 90 (describing regulations on copyright drafted during 1950s); Sidel, *supra* note 89, at 479–82 (same).

91. Sidel, *supra* note 89, at 483–87.

cation for copyright, it condoned government control of ideas. It almost goes without saying that government censorship and speech regulation have been a norm in the PRC since its birth.⁹² Consistent with Chinese history, the PRC's early decades are characterized by harsh government campaigns against dissidents and neglect of private authorial rights.

III. CREATING A MODERN CHINESE COPYRIGHT REGIME

A. VENTURING INTO "VERY UNFAMILIAR TERRITORY"

It was not until after the Cultural Revolution and Chairman Mao's death that China again turned its sights to the creation of a copyright system. In 1979 (shortly after Deng Xiaoping initiated his "open door and reform" policy), the PRC signed a trade agreement with the United States in which it committed to promulgate intellectual property ("IP") laws "with due regard to international practice."⁹³ China passed a Trademark Law and a Patent Law relatively quickly, but copyright proved to be both more difficult and more controversial. Despite China's 1979 commitment, copyright legislation met with heated resistance from many segments of the government and society.⁹⁴ The PRC's protracted copyright debate would ultimately span more than a decade. China provided preliminary copyright guidance to judges in 1984 by means of the Trial Regulations on Copyright Protection of Books and Periodicals ("Trial Regulations"), which were kept classified.⁹⁵ China publicly recognized copyright in

92. While this assertion most likely does not require a citation, I nonetheless refer the reader to Lucian W. Pye's assessment, made on the occasion of the PRC's 50th anniversary: "[T]he People's Republic of China still adheres to a single ideology, and the authorities in Beijing continue to demand that the Chinese people give at least lip service to that doctrine and make no attempts to challenge it. Fifty years of coping with an oppressive ideology has had profound consequences for China's public life. The stifling of spontaneity has produced a pathetically low intellectual level of public discourse. Intellectuals in particular have had to retreat into the security of their private worlds. . . . Consequently for half a century China's intellectual life has been one of the most vacuous and sterile in all the world." Lucian W. Pye, *An Overview of 50 Years of the People's Republic of China: Some Progress, but Big Problems Remain*, 159 CHINA Q. 569, 573 (1999).

93. PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 66 (2d ed. 2003).

94. See ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 121–24 (2005) (describing reasons for copyright controversy; identifying different camps in the copyright debate).

95. FENG, *supra* note 93, at 65–66; see Trial Regulations on Copyright Protection of Books and Periodicals (promulgated by the Ministry of Culture of the People's Republic of China, June 5, 1984, effective Jan. 1, 1985) (P.R.C.) [hereinafter Trial Regulations], *translated at* <http://chinacopyrightandmedia.wordpress.com/1984/06/05/trial-regulations-on-copyright-protection-of-books-and-periodicals/>.

1986,⁹⁶ but did not succeed in passing a comprehensive copyright statute until 1990.

The copyright controversy owed in part to widespread misunderstanding as to the nature of copyright. When research into copyright law formally began in 1979, there was virtually no contemporary Chinese scholarship on the topic.⁹⁷ As two Chinese scholars observed in 1983, copyright law was still “very unfamiliar territory” (*shi fen mosheng de lingyu*).⁹⁸ Those in government did not altogether understand the concept—in fact, they could not even agree on the correct translation for “copyright.”⁹⁹ Widespread failure to appreciate the purposes of copyright directly impacted the content and course of the copyright debate.

But the problem was not merely one of misunderstanding. Copyright law challenged China’s reigning ideology and the Communist regime’s political imperatives. Despite the PRC’s newfound openness, Chinese scholars and lawmakers insisted that the country’s copyright law bear “Chinese characteristics.”¹⁰⁰ The political unrest of the late 1980s, which culminated in the Tiananmen Square incident of 1989, only increased official resistance to Western copyright philosophy.

96. The General Principles of the Civil Law provides that “[c]itizens and legal persons shall enjoy rights of authorship (copyrights),” but did not elaborate on the substance of copyright. General Principles of the Civil Law of the People’s Republic of China art. 94 (promulgated by the Standing Comm. of the Nat’l People’s Cong. effective Jan. 1, 1987), translated at <http://en.chinacourt.org/public/detail.php?id=2696> (P.R.C.).

97. See Sidel, *supra* note 89, at 498 (“Until 1982 no scholarly books or articles on copyright protection had appeared in the Chinese legal literature, and it was not until late 1983 that a detailed study publicly appeared . . .”).

98. Yin Lantian & Chen Hong, *Jin Kuai Zhi Ding Shi He Wo Guo Guo Qing de Ban Quan Fa: Fang Zhongguo Chu Ban Gong Zuo Zhe Xie Hui Ban Quan Yan Jiu Xiao Zu Shen Rengan Tong Zhi* [Quickly Establish a Copyright Law Suitable to Chinese National Conditions: An Interview with Comrade Shen Rengan of the Chinese Publishing Workers’ Association Copyright Research Group], FA XUE ZA ZHI [L. SCI. MAG.], no. 3, 1983 at 35, 35.

99. MERTHA, *supra* note 94, at 121. Disagreement over the proper translation for “copyright” endured for many years. See Zhang Yongjiang, *Qian Tan Ban Quan He Zhu Zuo Quan* [Discussing “Copyright” and “Copyright”], FA LU SHI YONG [NAT’L JUDGES C.L.J.], no. 1, 1988 at 20, 20 (describing various competing translations for “copyright”). Even today, the two major translations—*banquan* and *zhuzuoquan*—both remain in common use.

100. Ding Xuejun, *Guan yu Lian Li Wo Guo Ban Quan Fa Lü Zhi Du de Guo Xiang* [A Vision for the Establishment of China’s Copyright System], FA LU KE XUE—XI BEI ZHENG FA YUAN XUE XUE BAO [LEGAL SCI.—J. NORTHWESTERN UNIV. POL. & L.], no. 1, 1989 at 73, 73.

B. RECONCILING COPYRIGHT WITH CHINA'S POLITICAL ENVIRONMENT

Justifying copyright law during the early reform era was no easy task; Alford aptly describes it as “squaring circles.”¹⁰¹ Recognition of property-like rights in art or literature did not fit well with either Marxist or Confucian thought,¹⁰² especially since the beneficiaries of these rights would typically be intellectuals. The necessity of rationalizing copyright within the framework of China’s prevailing ideology had two major implications for 1980s legal discourse. The first is rhetorical: proponents of copyright relied heavily upon politically acceptable (if not always credible) tropes in characterizing copyright law. The second, more significant upshot is substantive: copyright advocates not only conceded, but consistently emphasized, that copyright norms should be tailored to China’s political circumstances.

1. *Copyright Rhetoric*

As intellectuals returned from the countryside (both figuratively and literally) in the years following the Cultural Revolution, Deng Xiaoping reclassified them as part of the working class.¹⁰³ Copyright proponents similarly characterized copyright law in uniquely socialist terms. For instance, a 1985 article stated that according to Marx, “the free development of all people is conditioned upon the free development of every individual.”¹⁰⁴ Therefore, “protecting an author’s personal rights is prerequisite to the protection of the entire public’s basic rights.”¹⁰⁵ Others likewise emphasized that private copyright was merely a means of advancing socialist goals: copyright law would promote “the construction of socialist spiritual and material civilization”¹⁰⁶ and

101. ALFORD, *supra* note 54, at 56.

102. *Id.* at 57; see also RICHARD CURT KRAUS, THE PARTY AND THE ARTY IN CHINA: THE NEW POLITICS OF CULTURE 150 (2004) (“Confucianism sternly deprecated the exchange of art for money”).

103. KRAUS, *supra* note 102, at 166.

104. Gong Xiaohang & Shi Lisha, *Ban Quan Li Fa Yu Gong Min Ji Ben Quan Li de Bao Zhang* [Copyright Legislation and the Ensuring of Citizens’ Basic Rights], HEBEI FA XUE [HEBEI L. SCI.], no. 3, 1985 at 2, 3.

105. *Id.*

106. Huang Qinnan, *Lun Bao Hu Zhu Zuo Quan* [Protecting Copyright], FA XUE YAN JIU [CHINESE L.J.], no. 2, 1982 at 47, 47. In the early reform era, there arose a concept of “two civilizations”: “socialist material civilization” and “socialist spiritual civilization.” Constructing a “socialist spiritual civilization” referred to the building up of “socialist citizens’ with lofty ideals, moral integrity, a good education, and a strong sense of discipline,” and was seen as interrelated with, and equally important to, society’s material advancement. See HENRY YUHUAI HE, DICTIONARY OF THE POLITICAL THOUGHT OF THE PEOPLE’S REPUBLIC OF CHINA 242–43 (2001).

satisfy “the cultural needs of the masses.”¹⁰⁷ Early scholarship often cited Yugoslavia, the Soviet Union, and other socialist nations—rather than the Western countries that originated copyright—as examples of robust copyright systems.¹⁰⁸ Thus, by the end of the decade, writers could legitimately advocate that society should permit authors, by means of copyright, to “become richer, for this is also a principle of socialism.”¹⁰⁹

Some copyright scholars went so far as to cite the Cultural Revolution—which was still a recent and bitter memory—as proof that China needed a copyright regime. In one of the first articles to publicly advocate a comprehensive copyright law, scholar Huang Qinnan recounted how cultural production had ground to a halt when authors’ rights were abrogated during the Cultural Revolution.¹¹⁰ Another scholar made a similar point, writing that the denial of authors’ freedoms during the Cultural Revolution, at the hands of the Gang of Four,¹¹¹ made it impossible to satisfy the people’s “spiritual” needs.¹¹² Others were much more blunt (not to mention hyperbolic): one author declared that copyright was absolutely essential in order to “eliminate the chaos caused by the Gang of Four’s abolition of copyright.”¹¹³ The allegation that the Gang of Four had precipitated the “chaos” of the Cultural Revolution through a denial of copyright is dubious, but it highlights the lengths to which commentators went to make copyright palatable in China.

107. Gu Anran, *Xin Zhongguo Di Yi Bu Zhu Zuo Quan Fa Dai Shu* [An Overview of the New China’s First Copyright Law], *ZHONGGUO FA XUE* [CHINA L. SCI.], no. 6, 1990 at 52, 56.

108. See, e.g., Gong & Shi, *supra* note 104, at 3 (describing fair use doctrine as understood in Hungary, Poland, Yugoslavia, Romania, and Bulgaria); Zhang Yuyong, *Lun Zhu Zuo Quan He Dui Zhu Zuo Quan de Fa Lü Bao Hu* [On Copyright and the Legal Protection of Copyright], *FA XUE PING LUN* [L. REV.], no. 4, 1985 at 76, 79 (discussing copyright terms in Soviet Union and Poland in contrast to those in “industrialized capitalist countries”); Qiu Boyou, *Lun Dui Zhu Zuo Quan de Bao Hu* [On the Protection of Copyright], *FA XUE ZA ZHI* [LAW SCI. MAG.] no. 3, 1984 at 23, 23 (citing Yugoslavia’s copyright law); Yin & Chen, *supra* note 98, at 36 (describing fair use doctrine in Yugoslavia and Soviet Union copyright law).

109. Zuo Yu, *Zhu Zuo Quan He Zhu Zuo Quan Fa Qian Lun* [On Copyright and Copyright Law], *QUN YAN* [POPULAR TRIB.], no. 7, 1990 at 22, 24.

110. Huang, *supra* note 106, at 48.

111. The “Gang of Four” refers to four political leaders—Jiang Qing (Chairman Mao’s wife), Zhang Chunqiao, Yao Wenyuan, and Wang Hongwen—who rose to power during, and helped to orchestrate, the Cultural Revolution. After Deng Xiaoping came to power, the Gang of Four was arrested, charged, tried, and convicted for various treasonous offenses. EDWIN PAK-WAH LEUNG, *ESSENTIALS OF MODERN CHINESE HISTORY: 1800 TO THE PRESENT* 121–27 (2006).

112. Ding, *supra* note 100, at 73.

113. Zhao Fu, *Wo Guo Chu Ban Wu Ban Quan de Qi Yuan* [The Origin of Chinese Copyright in Publications], *CHONGQING SHI FAN DA XUE XUE BAO* (ZHE XUE SHE HUI KE XUE BAN) [J. CHONGQING NORMAL UNIV. (PHIL. & SOC. SCI. ED.)], no. 3, 1981 at 105, 105.

2. Tailoring Copyright to “Chinese National Conditions”

Chinese lawmakers and scholars did not simply dress up Western-styled copyright in politically acceptable terminology. Legal discourse on copyright, particularly from the early reform era, is replete with calls to “establish a copyright law suitable to Chinese national conditions”¹¹⁴—to tailor the *substance* of copyright to China’s political circumstances. China needed a “socialist copyright law”¹¹⁵ with “Chinese characteristics,”¹¹⁶ which reflected different values and concerns than those embodied in capitalist societies’ copyright regimes.¹¹⁷ While conceding the obligation to “consult” (*cankao*) international copyright norms, Huang Qinnan, for example, emphasized that the content and scope of copyright in China must be determined on the basis of its political system.¹¹⁸ According to another academic, advancing China’s socialist agenda was “an important guiding thought” as the PRC’s first copyright statute took shape.¹¹⁹ Political considerations played a prominent role in the copyright debate that preceded the 1990 Copyright Law.

C. REGULATING CONTENT THROUGH COPYRIGHT LAW

When China first committed itself to implementing a copyright system, there was little understanding among lawmakers as to what copyright law actually was. As had been the case in the early twentieth century, Chinese authorities tended to regard copyright “more as a means of regulating the publishing industry than a mechanism for protecting the rights of authors.”¹²⁰ In fact, some argued that copyright legislation ought to be rolled into a publications law.¹²¹ Combined legislation never got off the ground, yet this conflation evidently persisted; even academics occasionally referred to copyright law as “publications law” (*chubanfa*).¹²² But the issue was not simply one of confusion;

114. Yin & Chen, *supra* note 98, at 35.

115. Guo Haiqing, *Shi Lun Wo Guo de Zhu Zuo Quan Bao Hu* [*Discussing Copyright Protection in China*], XUCHANG XUE YUAN XUE BAO [J. XUCHANG UNIV.], no. 3, 1987 at 93, 97.

116. Ding, *supra* note 100, at 73.

117. See generally Fei Anling, *Lun Zuo Zhe Zai Zhu Zuo Quan Fa Zhong de Diwei* [*On the Status of Authors in Copyright Law*], ZHENG ZHI LUN YAN [POL. SCI. & L. TRIB.] no. 4, 1987 at 43, 43 (contrasting China with “capitalist” nations).

118. Huang, *supra* note 106, at 47.

119. Gu, *supra* note 107, at 56.

120. MERTHA, *supra* note 94, at 121.

121. See *id.* (In December 1979, the group responsible for drafting China’s copyright law proposed a draft that combined copyright and publication legislation).

122. See, e.g., Ouyang Pengcheng, *Ban Quan Yu Ban Quan Fa* [*Copyright and Copyright Law*], FA XUE ZA [LAW SCI. MAG.] no. 5, 1986 at 15, 15 (proposing a “publications law” (*chubanfa*) with “Chinese characteristics” to protect copyright);

renowned IP scholars also argued that China's copyright law—like other publication regulations—should stem the tide of undesirable media. Creating a copyright regime with Chinese characteristics meant crafting the law in such a way that it complemented other speech controls.

Copyright advocates in the 1980s do not appear to have seriously questioned that copyright law might legitimately regulate media content. Shen Rengan, who headed the Publishers Association of China's Copyright Research Group in the early 1980s (and who currently serves as director of the Copyright Society of China), stated that "defamatory, deceptive, or pornographic works" are not ordinarily protected by copyright.¹²³ Another 1980s writer similarly stated that the copyright in objectionable works should be withdrawn, lest authors enjoy moral or economic rights in works deemed harmful to society.¹²⁴ In fact, copyright proponents cited the proliferation of "unhealthy" literature as evidence of the need for a copyright regime. As Huang Qinnan wrote in the seminal article referenced above, copyright legislation was necessary to stop the spread of "illegal publications" and to "overcome unhealthy tendencies in publishing and printing work."¹²⁵ In a socialist country, another author explained, the purveyors of ideologically unacceptable literature should not only be excluded from the law's protection, but should be held legally responsible for their actions¹²⁶—and copyright law was essential to fight such "cultural crimes."¹²⁷

While the class of literature deemed "unhealthy," "illegal," or "prohibited"—and therefore unworthy of copyright protection—was both broad and amorphous, the early copyright literature mentions certain types of works more frequently than others. Seditious literature certainly received its share of condemnation,¹²⁸ but the most common target of those advocating

Wu Zhangfa, *She Hui Zhu Yi Fa Zhi Zai She Hui Zhu Yi Jing Shen Wen Ming Jian She Zhong de Zuo Yong* [The Utility of a Socialist Legal System in the Construction of Socialist Spiritual Civilization], *SHE HUI KE XUE* [J. of Soc. Sci.] no. 8, 1984 at 40, 42 (advocating "publications law" (*chubanfa*) so that "the copyrights in literary, artistic, and scientific works receive legal protection").

123. Yin & Chen, *supra* note 98, at 36.

124. Guo Dengke, *Zhu Zuo Quan Ke Ti de Gou Cheng Yao Jian* [The Composite Elements of the Object of Copyright], *HEBEI FA XUE* [HEBEI L. SCI.] no. 6, 1989 at 27, 28.

125. Huang, *supra* note 106, at 47, 49.

126. Guo, *supra* note 115, at 93.

127. *See id.* at 96 ("[P]rotecting copyright and implementing copyright regulations is extremely necessary in order to overcome unhealthy tendencies in publishing and printing work, and fight cultural crimes . . .").

128. *See, e.g.,* Wang Yongyuan, *Tan Tan Wo Guo Zhu Zuo Quan Fa de Ruo Gan Fa Lü Wen Ti* [Several Legal Questions Pertaining to China's Copyright Law], *GUIZHOU JING GUAN ZHI YE XUE YUAN XUE BAO* [J. GUIZHOU POLICE OFFICER

content-based restrictions in copyright law seems to have been pornography.¹²⁹ This is not to say that pornography was perceived as a greater threat than political heterodoxy; in practice, the PRC tends to devote far more resources to controlling political speech than obscenity.¹³⁰ But for hundreds of years, China has publicly denounced “licentious” literature as a means of legitimizing politically-motivated censorship.¹³¹ As Frederick W. Mote writes, “publicizing the drive to eliminate sexually explicit or morally marginal materials reinforce[s] the high moral tone claimed for the simultaneous effort to eliminate sedition.”¹³² By invoking the specter of pornography, legal writers in the 1980s could more easily justify the position that China’s copyright law should be crafted to discourage “unhealthy” expression, political and otherwise.

While maintaining that copyright law ought to discourage undesirable media (and even punish those who produce it¹³³), copyright proponents simultaneously trumpeted the law’s capacity to promote “beneficial” creativity. Writers thus ostensibly embraced the utilitarian philosophy of copyright—one scholar explained that “[p]romptly establishing a national copyright sys-

VOCATIONAL C.] no. 3, 1990 at 21, 23 (condemning “reactionary works”); Ding, *supra* note 100, at 74 (stating that works that are “reactionary,” “harm national sovereignty,” or “reveal state secrets” should not receive protection); Fu Dingsheng, *Ban Quan Bao Hu de Shi Zuo Pin de Biao Xian Xing Shi: Tan Ban Quan Ke Ti de Zai Ti Xing* [Copyright Only Protects a Work’s Expressive Form: Discussing the ‘Medium-ness’ of the Object of Copyright], FA XUE [LEGAL SCI.] no.1, 1988 at 34, 35 (discussing “reactionary” and other antisocial works unprotected).

129. See, e.g., Guo, *supra* note 124, at 28 (believing that copyright should be withdrawn from pornographic works); Wang Ruizhen, *Jian Lun Wo Guo Dui Ban Quan de Fa Lü Bao Hu* [A Simple Discussion of China’s Legal Protection of Copyright], SHE HUI KE XUE [J. OF SOC. SCI.] no. 11, 1988 at 20, 20 (condemning “pornographic” and “obscene” works); Guo, *supra* note 115, at 97 (stating the same views about pornography); Ouyang, *supra* note 122, at 15 (stating the same views about pornography).

130. Richard Cullen & Hua Ling Fu, *Seeking Theory From Experience: Media Regulation in China*, DEMOCRATIZATION, issue 2, 1998 at 155, 162.

131. See Wenxiang Gong, *The Legacy of Confucian Culture in Maoist China*, 26 SOC. SCI. J. 363, 369 (1989) (“The earliest recorded censorship instance is probably Confucius’ deletion of ‘obscene pieces’ when he edited *The Book of Odes* and other classical texts handed down from still earlier times”); see also MOTE, *supra* note 60, at 927 (official ban on “licentious” literature began during Kangxi reign (1661–1722)).

132. *Id.* at 927. Mote makes this observation specifically with reference to the notorious Qianlong literary inquisition, described *supra* in note 60.

133. See Guo, *supra* note 115, at 93 (“[T]hose works that oppose the socialist system, corrupt socialist values, and harm socialist countries’ sovereignty or reveal state secrets should not be recognized or protected by socialist countries’ laws, [for] the circumstances are grave, and [the purveyors of these works] should be held legally accountable”); Huang, *supra* note 106, at 50 (“Not only should [the law] not bestow a copyright on any reactionary or pornographic works, but it should also hold the creators accountable”).

tem is necessary in order to encourage the people's creative spirit . . . and to promote further development in China's creative enterprise"¹³⁴—but only inasmuch as it furthered socialist spiritual and material civilization.¹³⁵ The 1980s copyright literature often speaks of creative freedom, but almost always with an important caveat: that it be employed to produce politically and socially acceptable works.¹³⁶

This underscores a fundamental difference between Western and Chinese political philosophy as applied to copyright. Western copyright does not normally discriminate against works on the basis of perceived social value; “[o]ne of the more enduring observations in all of copyright” is that it would be a “dangerous undertaking” for judges (or, impliedly, other governmental officers) to “constitute themselves final judges of the worth” of a given work.¹³⁷ Copyright law instead assumes that society benefits when the public, rather than the government, possesses the right to determine a work's value.¹³⁸ This orientation conjures up the “marketplace of ideas”¹³⁹—the notion that the most valuable ideas (or creative works, in the copyright context) will naturally emerge when diverse ideas and works compete for the populace's acceptance. By contrast, Chinese political philosophy has traditionally encouraged governmental paternalism in determining which works or ideas have value and which ought to be kept out of the public forum.¹⁴⁰ From this view, encouraging cre-

134. Cai Shuguang, *Ban Quan Zhi Du de You Lai Yu Fa Zhan* [*The Origins and Development of Copyright*], ZHONGGUO SHE HUI KE XUE YAN JIU SHENG YUAN XUE BAO [J. GRADUATE SCH. CHINESE ACAD. SOC. SCI], no. 4, 1983 at 79, 80.

135. Ding, *supra* note 100, at 74.

136. See, e.g., Ding, *supra* note 100, at 74 (“Creative freedom is not unlimited, and all creators must be diligent in creating excellent works that are beneficial to the people's bodily and spiritual health, and to the construction of socialist spiritual civilization . . .”); Huang, *supra* note 106, at 48, 50 (advocating that copyright protect author's “creative freedom,” but only insofar as he uses it to create “true, good, and beautiful works”).

137. Robert A. Gorman, *Copyright Courts and Aesthetic Judgments: Abuse or Necessity?*, 25 COLUM. J.L. & ARTS 1, 1 (2001) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903)).

138. Cf. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 856 (5th Cir. 1979) (“In our view, the absence of content restrictions on copyrightability indicates that Congress has decided that the constitutional goal of encouraging creativity would not be best served if an author had to concern himself not only with the marketability of his work but also with the judgment of government officials regarding the worth of the work.”).

139. Although the philosophy underpinning this metaphor predates the twentieth century, Oliver Wendell Holmes—who made the “enduring observation” in *Bleistein*, *supra* note 137—is credited with originating the “marketplace” metaphor itself. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (articulating marketplace metaphor).

140. ALFORD, *supra* note 54, at 57.

activity is desirable only to the extent that it supports officially defined orthodoxy.

D. LIMITING AUTHORS' AUTONOMY

Recognition of authorial rights was not an especially significant consideration in the pre-Copyright Law debate. Even though China had committed itself in 1979 to the protection of authors' rights, authorities were quite hesitant to make concessions to potential copyright holders.¹⁴¹ Thus, when the PRC reinstated a contract-based royalty system for authors in 1980, many officials argued that a separate copyright law was no longer necessary¹⁴²—even though the bare provision of a right to remuneration fell pitifully short of full-fledged copyright protection and did virtually nothing to protect authors against widespread piracy. Authors such as Ba Jin (one of the most well-known and widely-read Chinese authors of the twentieth century¹⁴³) complained of China's rampant piracy problem and advocated the implementation of a robust copyright system,¹⁴⁴ but ideological and political concerns weighed strongly against granting authors greater autonomy vis-à-vis the state.

The question of authorial autonomy in the PRC has been described as “a protracted struggle for professional status and security.”¹⁴⁵ Because professionalism “conveys a right to speak” and “alters the power between patron and artist,”¹⁴⁶ the PRC has historically sought to maintain control over the intellectual class. Speaking at Yan'an in 1942, Mao Zedong outlined the Communists' vision for authors and artists, declaring that “[l]iterature and art are subordinate to politics” and conscripting authors and artists as soldiers in a “cultural army.”¹⁴⁷ Creative talent was to be devoted entirely to the Communists' cause—to “inspire peasants, rather than delight one's self and impress fellow artists.”¹⁴⁸ Following the PRC's establishment, tension between artistic professionalism and political control persisted.¹⁴⁹ The PRC began

141. Sidel, *supra* note 89, at 488.

142. *Id.* at 493–94.

143. See David Barboza, *Ba Jin, 100, Noted Novelist of Prerevolutionary China, is Dead*, N.Y. TIMES, Oct. 18, 2005, at A25.

144. Ba Jin, *Tan Ban Quan [On Copyright]*, WEN YI YAN JIU [LITERATURE & ART STUD.] no. 229, 1984 at 29, 29–30.

145. KRAUS, *supra* note 102, at 143.

146. *Id.* at 148.

147. *Talks at the Yanan Forum on Literature and Art*, MARXISTS INTERNET ARCHIVE, http://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3_08.htm (last visited Mar. 30, 2010).

148. KRAUS, *supra* note 102, at 152. Kraus does, however, observe that Mao supported greater artistic professionalism in some respects. *Id.* at 152–53.

149. *Id.* at 156–58.

dismantling the author royalty system in the late 1950s,¹⁵⁰ and by the Cultural Revolution, the concept of individual authorship had all but disappeared.¹⁵¹ Although Deng Xiaoping later reclassified intellectuals as members of the working class, the debate over China's copyright law revealed a lingering hesitancy to endow them with broad new rights.

As Shen Rengan stated in 1983, "authors' rights must be perfectly coordinated with the people's interests."¹⁵² According to academics Gong Xiaohang and Shi Lisha, socialist copyright philosophy is premised on this principle.¹⁵³ For this reason, 1980s commentators tended to speak of authors' rights in qualified terms: under a Chinese copyright system, only "lawful" or "legitimate" rights and interests would receive protection.¹⁵⁴ As these commentators were quick to point out, "enjoyment of rights carries with it corresponding duties; since citizens have creative freedom, a political right, they also have a duty to refrain from abusing this right."¹⁵⁵ Copyright law, as envisioned in 1980s China, should not permit authors to "abuse" the very "creative freedom" that copyright supposedly protects.¹⁵⁶ To this end, any copyright legislation ought to be crafted so as to ensure that authors' rights are "consistent with the needs of socialist spiritual civilization."¹⁵⁷

150. Sidel, *supra* note 89, at 485-87.

151. FENG, *supra* note 93, at 65.

152. Yin & Chen, *supra* note 98, at 37.

153. Gong & Shi, *supra* note 104, at 3.

154. See, e.g., Hu Shixiang, *Lun Zhu Zuo Quan de Fa Lü Bao Hu* [On the Legal Protection of Copyrights], ZHENGZHOU DA XUE XUE BAO [J. ZHENGZHOU UNIV. (PHIL. & SOC. SCI.)], no. 3, 1989 at 33, 35-36 ("lawful interests"; "lawful rights"; "legitimate rights"); Ma Xiaogang, *Tan Tan Ban Quan Guan Li* [On Copyright Oversight], ZHONGGUO CHU BAN [CHINA PUBLISHING J.] no. 11, 1987 at 114, 114 (advocating oversight of copyright system in order to "protect authors and other copyright holders' lawful rights, except for those exempted by the principles of law").

155. Feng Chunping & Wang Xin, *Lun Zhu Zuo Quan Zhong de Zuo Zhe* [On the Author in Copyright Law], FA LÜ KE XUE [SCI. OF L.] no. 2, 1989 at 30, 33; Contemporary discourse on free speech is replete with similar statements. See, e.g., Li Xisi, *Lun Yan Lun Zi You Quan Li Ji Qi Xing Shi* [On the Right of Free Speech and its Exercise], TAN SUO [PROBE], no. 3, 1987 at 55, 57 (stating that the law must limit the free speech right of "antagonists" and "criminals" who "threaten the socialist system"); Hua Ding, *Yan Lun Zi You de Qian Ti Shi Si Xiang Ji Ben Yuan Ze* [Free Speech is Premised on the Four Cardinal Principles], LIAO WANG ZHOU KAN [OUTLOOK], no. 3, 1987 at 4, 4 ("In exercising this right [to free speech], one must obey the Four Cardinal Principles"); Cui Min & Wang Liming, *Shi Lun Yan Lun Zi You* [On Free Speech], FA XUE YU YAN JIU [LEGAL STUD. & RES.], no. 4, 1982 at 21, 22 ("Counterrevolutionaries" and "criminals" cannot be allowed to "abuse" the right to free speech).

156. Ding, *supra* note 100, at 74.

157. *Id.*

The “needs of socialist spiritual civilization” demanded not only that copyright legislation include content-based restrictions, but also that it provide for broad limitations on authors’ rights. Specifically, 1980s copyright writers identified fair use, statutory licenses, and compulsory licenses as mechanisms for preventing exclusive rights from becoming “absolute monopolies”¹⁵⁸—an understandable concern in a country that still lacked strong notions of private property.¹⁵⁹ According to Huang Qinnan, fair use in particular (the doctrine whereby one may exploit another’s work without receiving permission or paying remuneration) reflected the proper socialist spirit. Huang listed a number of uses that should be considered fair, including reproduction of copyrighted works for “political and ideological education.”¹⁶⁰ And as Gong and Shi observed, fair use was especially prominent in socialist countries’ copyright laws.¹⁶¹ Expansive fair use provisions were considered an important safeguard, ensuring both that authors could not use their rights in a manner inconsistent with societal interests,¹⁶² and that “the people” would have access to the “spiritual wealth”¹⁶³ accumulated in copyrighted works. Consistent with this view, the 1980s Trial Regulations included liberal fair use provisions, and even allowed the government to purchase copyrights as required by state interests.¹⁶⁴

Because fair use and related doctrines facilitate the unauthorized use of copyrighted material, they are normally seen as mediating the tension between copyright and freedom of expression. However, Chinese arguments favoring liberal fair use provisions must be read together with statements to the effect that copyright law should regulate expression on the basis of content. While advocates of “copyright law with Chinese characteristics” felt that broad exceptions to copyright protection were

158. Yin & Chen, *supra* note 98, at 36.

159. See Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 320–21 (2008) (stating that under Mao’s rule, “private property rights became synonymous with capitalism and the bourgeoisie—both enemies of socialism”; it was only after 1978 that “people in China began to regain consciousness of their private property rights”).

160. Huang, *supra* note 106, at 48.

161. Gong & Shi, *supra* note 104, at 3.

162. See Chen Meizhang, *Jie Jian yu Si Kao—Dui Wo Guo Ban Quan Bao Hu de Si Kao* [*Reference and Consideration—Reflections on Copyright Protection in China*], ZHI SHI CHAN QUAN [INTELL. PROP.], no. 4, 1989 at 38, 39 (“[I]f [respecting authors’ rights and coordinating them with society’s interests] come into conflict, the author’s rights must obey society’s interests”).

163. Zuo, *supra* note 109, at 23.

164. FENG, *supra* note 93, at 66–67; see Trial Regulations, *supra* note 93, arts. 14, 15.

necessary to satisfy "the cultural needs of the masses,"¹⁶⁵ they simultaneously maintained that copyright should not protect, and should punish those who create, unhealthy works. In light of this latter imperative, fair use and other limitations on copyright protection should be seen as promoting access to and use of only those works that the government deemed beneficial to society.

But even in the absence of content-based restrictions, fair use and other copyright-limiting doctrines may not significantly promote free speech. In the PRC, the trend has been to craft such provisions to primarily benefit official agents and institutions rather than individuals or society. The Trial Regulations specified eight fair uses, but only two of them—copying for personal study and limited quotation for commentary—could be exercised by individuals for private purposes.¹⁶⁶ The other, broader exemptions applied to a myriad of state organs and objectives, such as news reporting by state-run media, teaching and research within official work units, archiving by libraries, and duplication in the service of propaganda.¹⁶⁷ The purpose of fair use, so envisioned, is to foster "societal development" through government-sanctioned means; it neither requires nor encourages exemptions for individuals and private entities.¹⁶⁸ In other words, the copyright limitations advocated in 1980s China do not truly promote free speech; their more salient effect is simply to dilute copyright holders' power to prevent the government from appropriating their works for official purposes.

E. COPYRIGHT AND THE TIANANMEN SQUARE "INCIDENT"

The direction of China's copyright debate was driven not merely by misunderstanding and political ideology, but by historical circumstances as well. One of the most significant events occurred in 1989, just one year prior to the Copyright Law's passage. Political unrest had been fomenting for about two years,¹⁶⁹ and the death of former Secretary General Hu Yaobang

165. Gu, *supra* note 107, at 56.

166. Trial Regulations, *supra* note 95, arts. 15(1), (2).

167. *Id.* at arts. 15(3)–(8).

168. Cf. Chen Shaoyu, *Ban Quan Zhi Shi—Qian Tan Zuo Pin de "He Li Shi Yong"* [Copyright Knowledge—Discussing "Fair Use" of a Work], LI LUN XUE KAN [THEORY J.], no. 4, 1987 at 72, 73 ("The purpose of fair use is primarily to ensure that the masses can quickly and conveniently access all types of scientific knowledge, thereby promoting the improvement of society's scientific and cultural standards and societal development. As for those uses which harm both the author's and society's interests by engaging in the unauthorized reprinting or seeking personal gain through some other form, this conduct is a type of serious copyright infringement").

169. See HE, *supra* note 106, at 119–20 (describing anti-bourgeois liberalization campaign, which began in 1987).

on April 15, 1989 gave dissidents a reason to assemble.¹⁷⁰ Thousands of university students congregated on Tiananmen Square in Beijing to mourn Hu's passing, and the huge gathering soon grew into a full-fledged pro-democracy protest with over 100,000 participants. In early June, authorities ordered the 27th and 37th Armies of the People's Liberation Army to take control of the city. The soldiers, supported by tanks, arrived at Tiananmen Square in the early hours of June 4. Although most protesters had left, a few thousand remained. At dawn, the army opened fire on the students and advanced onto the Square with its tanks. How many were killed is unknown; estimates range from a few hundred to several thousand.¹⁷¹

The Tiananmen Square "incident," as it is called in China, spurred a conservative backlash that spilled over into the copyright debate. As Andrew Mertha writes, promulgating a copyright statute in the immediate wake of Tiananmen Square did not make sense, since "the Copyright Law was meant to protect precisely that group which was eyed with the most suspicion in 1989–90: the intellectual class."¹⁷² But China was facing pressure from the West—the United States conditioned the renewal of its 1979 trade agreement with China, which was set to expire in 1989, upon China taking serious steps toward the establishment of a copyright regime¹⁷³—and that pressure only increased after (and as a consequence of) the Tiananmen massacre.¹⁷⁴ Consequently, the final stages of the Copyright Law's drafting process took place in a politically-charged environment, "at precisely the time when the conservatives were consolidating their power."¹⁷⁵

At the Fourth Plenary Session of the Thirteenth Central Committee, which followed the events at Tiananmen Square by only a few weeks,¹⁷⁶ Chinese authorities decided to strengthen "ideological and political work."¹⁷⁷ Li Ruihuan, a one-time car-

170. For a chronology of the events leading up to June 4, see *The Crisis in China: A Look Back*, CHI. TRIB., June 11, 1989, http://articles.chicagotribune.com/1989-06-11/news/8902080567_1_tiananmen-square-hunger-strike-thousands-of-students-march.

171. See *How Many Really Died? Tiananmen Square Fatalities*, TIME, June 4, 1990, at 59, available at <http://www.time.com/time/magazine/article/0,9171,970278,00.html>.

172. MERTHA, *supra* note 94, at 215.

173. *Id.*

174. *Id.* at 2.

175. *Id.* at 215.

176. For a timeline of events following Tiananmen Square crackdown see JOSEPH FEWSMITH, *CHINA SINCE TIANANMEN: THE POLITICS OF TRANSITION xi* (2d ed. 2008).

177. Yan Sheng, *Zhong Tan Wei Jin Zuo Pin yu Zhu Zuo Quan* [Focus on Prohibited Works and Copyright], FA ZHI YU SHE HUI [LEGAL SYS. & SOC'Y], no. 21, 2009 at 388, 388.

penter and the former mayor of Tianjin, was appointed to lead the Propaganda and Ideological Work Directorate of the Communist Party's Central Committee.¹⁷⁸ Under Li's direction, China launched a long-term campaign that aimed to "clean up pornography and destroy illegal publications" (*sao huang da fei*; hereinafter "*SHDF*").¹⁷⁹ At a teleconference in August, Li implicitly linked the Tiananmen protests to a perceived failure to adequately police the media:

Especially in recent years, there've been far too many publications [on the market], with counter-revolutionary books and periodicals that promote bourgeois liberalization and suffer from serious political mistakes unworthily occupying prominent market positions, alongside a torrent of books, periodicals, and tapes of an obscene, pornographic, violent and feudal-superstitious nature. If these publications and tapes aren't thoroughly suppressed, they will produce serious spiritual pollution and social dangers. . . . Rectifying and cleaning up book, periodical and tape markets is closely related to our country's efforts to achieve long-term political stability.¹⁸⁰

Government conservatives, who were in ascendance following the June 4 crackdown, "felt that the copyright debate involved issues of ideological 'correctness' and that such issues should be explicitly included in the [Copyright Law]."¹⁸¹ Although this view was not universal among the drafters,¹⁸² it was consistent with the longstanding and widely-recognized belief that copyright law ought to include content-based restrictions—Tiananmen Square had simply made the issue that much more pressing. Ultimately, propaganda authorities saw the impending promulgation of the Copyright Law as supporting and "deepening" the *SHDF* campaign,¹⁸³ and as an additional mechanism for "earnestly rectifying the cultural market."¹⁸⁴

178. See Li Ruihuan, CHINA.ORG.CN, http://www.china.org.cn/china/CPPCC_anniversary/2009-09/16/content_18539459.htm (last visited Mar. 20, 2010) (summarizing Li Ruihuan's accomplishments).

179. Guoguang Wu, *In the Name of Good Governance: E-Government, Internet Pornography and Political Censorship in China*, in CHINA'S INFORMATION AND COMMUNICATIONS TECHNOLOGY REVOLUTION: SOCIAL CHANGES AND STATE RESPONSES 68, 78 (Xiaoling Zhang & Yongnian Zheng eds., 2009); FEWSMITH, *supra* note 176, at 34.

180. Quoted in Daniel C. Lynch, *Dilemmas of "Thought Work" in Fin-de-Siècle China*, 157 CHINA Q. 173, 178 (1999) (addition provided by Lynch).

181. MERTHA, *supra* note 94, at 125.

182. See *id.* (observing that some copyright proponents argued that the Copyright Law "should not be used as a blunt instrument for meting out punishment for ideological crimes").

183. Yan, *supra* note 177, at 388.

184. LIU JIANWEN, TRIPS SHI YE XIA DE ZHONGGUO ZHI SHI CHAN QUAN ZHI DU YAN JIU [A STUDY OF CHINA'S INTELLECTUAL PROPERTY SYSTEM UNDER THE VISION OF TRIPS] 61 (2003) (quoting a July 28, 1989 Chinese Communist Party Central Committee circular).

The decade-long debate that preceded China's 1990 Copyright Law reveals significant theoretical and philosophical divergence from copyright law as it is understood in the West. The 1980s copyright debate emphasized the necessity of controlling speech and media and limiting authors' autonomy. Whereas these concerns may have originally been rooted in a confluence of misunderstanding, politics, and ideology, the Tiananmen Square massacre brought them to the forefront, making them seem all the more urgent and relevant during the final stages of the Copyright Law's drafting.

IV. CHINESE COPYRIGHT LAW SINCE 1990

After over a decade of controversy, the Standing Committee of the National People's Congress promulgated the Copyright Law on September 7, 1990. While the statute's substance certainly reflected foreign influence,¹⁸⁵ it also bore a distinctly Chinese imprint. In an article published roughly contemporaneously with the statute's passage, academic Gu Angran wrote that the construction of socialist spiritual and material civilization was the Copyright Law's "guiding thought."¹⁸⁶ Indeed, Article 1 of the Copyright Law codifies that very purpose.¹⁸⁷ Xiao Jun similarly observed that Marxist legal theory influenced the Copyright Law.¹⁸⁸ In short, the PRC's first copyright law possessed "Chinese characteristics," reflecting the attitudes and imperatives described in the previous section. Although the Copyright Law has since been amended and supplemented with regulations, guidelines, and official interpretations,¹⁸⁹ it remains the backbone of China's copyright regime.

This Part centers on those provisions of the Copyright Law that bear upon speech and media control. The Copyright Law's

185. See MERTHA, *supra* note 94, at 118–19 ("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").

186. Gu, *supra* note 107, at 56.

187. See Copyright Law of the People's Republic of China art. 1 (promulgated by the Standing Comm. of the Nat'l People's Congress, Sept. 7, 1990, effective June 1, 1991, amended Oct. 27, 2001) (Lawinfochina) (China) [hereinafter 2001 PRC Copyright Law] ("This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the rights related to copyright, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and flourishing of socialist culture and sciences").

188. Xiao Jun, *Lun Wo Guo Zhu Zuo Quan Fa Bao Hu de Zuo Pin* [On Works Protected by China's Copyright Law], *ZHONGGUO FA XUE* [CHINESE LEGAL STUD.] no. 6, 1990 at 60, 64.

189. XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY xxxv–xxxvii (2002).

interpretation and substance have evolved over the past two decades, and yet the PRC continues to view copyright as a means of regulating public expression. Part IV.A discusses Article 4, the provision exempting prohibited works from copyright protection and precluding authors from exercising their rights in a disapproved manner. Part IV.B then addresses fair use and other copyright limitations, with special attention to the effect that technological change has had upon the development of these doctrines in China.

A. CONTENT CONTROL: THE COPYRIGHT LAW, ARTICLE 4

Article 4 is one of the more notorious provisions of China's Copyright Law. As originally promulgated and as reaffirmed in 2001, Article 4 read: "Works the publication or distribution of which is prohibited by law shall not be protected by this Law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interest."¹⁹⁰ As Peter Ganea and Thomas Pattloch observe, this content-based restriction makes sense "against the background of a government that still claims the authority to decide what people may read, watch and hear."¹⁹¹ It also reflects the tenor of 1980s legal literature, which emphasized copyright law's capacity to promote socialist spiritual civilization while maintaining that purveyors of forbidden works should have no claim upon the law's protection.¹⁹²

But as Professor Zheng Chengsi (who served on the Copyright Law drafting committee) writes, Article 4's specific content is largely attributable to "the historical circumstances surrounding the launching of 'sao huang' [SHDF] and other such activities" in post-Tiananmen China.¹⁹³ Conservatives, incensed by the Tiananmen protests, voiced strong concern that the Copyright Law might benefit the creators and purveyors of works containing prohibited content.¹⁹⁴ Others pointed out that China

190. 2001 PRC Copyright Law art. 4.

191. PETER GANEA & THOMAS PATTLOCH, *INTELLECTUAL PROPERTY LAW IN CHINA* 226 (Christopher Heath ed., 2005).

192. Cf. Ocko, *supra* note 69, at 574 (observing that Chinese copyright and publication regimes reflect intent to "create strong intellectual property rights for approved ideas," while "[d]issident works, to the extent that they get published at all, are left unprotected . . . [T]he Chinese can claim to have created intellectual property rights with 'Chinese characteristics'").

193. Zheng Chengsi, *Shi Lun Wo Guo Ban Quan Fa Xiu Ding de Bi Yao Xing* [*On the Necessity of Amending China's Copyright Law*], *ZHU ZUO QUAN* [COPYRIGHT], no. 3, 1994 at 27, 28.

194. See Shen Rengan, *Jian Xin, Xi Yue yu Qi Pan—Gai Ge Kai Fang Zhong de Zhu Zuo Quan Li Fa* [*Hardship, Joy, and Hope: Copyright Legislation in the "Open Door and Reform" Era*], *ZHONGGUO CHU BAN* [CHINA PUBLISHING J.] no. 11, 2008

already had a robust scheme for controlling media content,¹⁹⁵ yet copyright proponents still faced an uphill battle in convincing conservatives that copyright would not conflict with the existing censorship regime.¹⁹⁶ In order to assuage these concerns, the drafters came up with Article 4, which exempted “prohibited” works from the Copyright Law’s protection and forbade copyright holders from exercising their rights inconsistent with the Constitution, laws, or public interest.¹⁹⁷ Article 4’s denial of copyright protection in prohibited works clashed with the principle (required by international treaties¹⁹⁸) that copyright automatically vests in all works at the moment of creation, but in the post-Tiananmen environment, “this ‘withdrawal’ of copyright in prohibited works was a historical exigency.”¹⁹⁹

The drafters evidently intended that Article 4 effect a total denial of copyright,²⁰⁰ but academics continually disputed its meaning in the two decades following the Copyright Law’s passage.²⁰¹ The majority of commentators²⁰² who read Article 4 as denying copyright altogether contended that it was consistent with Article 17 of the Berne Convention, which authorizes governments “to permit, to control, or to prohibit by legislation or regulation, the circulation, presentation, or exhibition of any

at 12, 12 (Noting that conservatives asked, in essence, “After the spring and summer of 1989, when so many reactionary big-character posters and pamphlets appeared, do you seriously still want to bestow copyright?”); MERTHA, *supra* note 94, at 125 (“In the post-June 4 period, many conservative elements in the government felt that the copyright debate involved issues of ideological ‘correctness’ and that such issues should be explicitly included in the [Copyright Law]”).

195. Shen, *supra* note 194, at 12.

196. FENG, *supra* note 93, at 80–81.

197. 2001 PRC Copyright Law art. 4.

198. See Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, revised on July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention] (“The enjoyment and the exercise of these rights shall not be subject to any formality”).

199. LIU, *supra* note 184, at 61. Advocates of an all-out ban were apparently aware of this doctrinal conflict, but refused to let up. See *id.* at 60 (framers were clear on principle of automatic vesting, but nonetheless “took their own path”).

200. See Zheng, *supra* note 193, at 28 (“[T]he original purpose of this provision was precisely to point out that works the publication of which was prohibited fundamentally did not enjoy copyright”).

201. As recently as 2009, the provision was still being debated. See, e.g., Yan, *supra* note 177.

202. See Yang Yanchao, *Wei Fa Zuo Pin Zhi Zhu Zuo Quan Tan Jiu—Jian Lun Wo Guo “Zhu Zuo Quan Fa” Di 4 Tiao Zhi Xiu Gai* [An Analysis of Copyright in Illegal Works—On the Amendment of Article 4 of China’s Copyright Law], 25 FA XUE LUN TAN [LEGAL F.] no. 3, 2010 at 137, 138 (“The ‘no rights theory’ [of Article 4] has been dominant for a long time; that illegal works did not enjoy copyright became mainstream doctrine in the copyright industry”).

work or production.”²⁰³ Others thought that Article 4 did not actually preclude copyright in prohibited works, but merely excluded them from the Copyright Law’s *protection*.²⁰⁴ While many conceded that Article 4 violated the automatic vesting doctrine,²⁰⁵ to some extent the debate was purely academic, as even this group tended to agree that the Copyright Law might legitimately regulate content through other means.²⁰⁶ Liu Jianwen, for instance, wrote that although a total denial of copyright lacked a basis in international treaties, the second clause of Article 4, in conjunction with other laws and regulations, was sufficient to support the PRC’s censorship efforts.²⁰⁷

The Article 4 controversy finally came to a head in 2007, when the United States complained to the World Trade Organi-

203. Berne Convention art. 17; *see, e.g.*, Xiao, *supra* note 188, at 64 (Stating the Berne Convention Article 17 authorizes total denial of copyright found in Copyright Law Article 4); Gu, *supra* note 107, at 56 (same).

204. *See, e.g.*, Chen Jun, *Guan yu Wei Jin Zuo Pin Zuo Zhe Zhu Zuo Quan de Si Kao* [Thoughts on Authors’ Copyright in Prohibited Works], ZHU ZUO QUAN [COPYRIGHT] no. 3, 1991 at 36, 37–38 (stating that although authors of prohibited works receive a copyright, the Copyright Law does not protect them). This was apparently a common argument among those scholars who acknowledged automatic vesting but sought to salvage Article 4 as it was drafted. Professor Zheng forcefully argued in 1994 that this interpretation, however, was implausible—it was akin to describing a “square circle,” he said, for “announcing that a class of works ‘shall not be protected by this Law’ is the same as saying that they do not enjoy copyright.” Zheng, *supra* note 193, at 28.

205. *See, e.g.*, Liu Jianwen & Wang Qing, *Guan Yu Ban Quan Ke Ti Fen Lei Fang Fa yu Lei Xing de Bi Jiao Yan Jiu* [A Comparative Study of the Types and Method of Classifying the Objects of Copyright], BI JIAO FA YAN JIU [J. COMP. L.] no. 1, 2003 at 44, 46 (stating that copyright law violates automatic vesting); Chen Xueping & Yu Wenge, *Dui Wo Guo “Zhu Zuo Quan Fa” Di Si Tiao de Zai Ren Shi Ji Xiu Gai Jian Yi* [A Recognition of and Suggested Amendment to China’s Copyright Law], 23 DAQING GAO DENG ZHUAN KE XUE XIAO XUE BAO [J. DAQING C.], Jan. 2003, at 36, 37–38 (acknowledging conflict with automatic vesting). In fact, at a conference hosted by China’s National Copyright Administration in 1996, a majority of attendants suggested that the rule be revoked. LIU, *supra* note 184, at 60.

206. *See, e.g.*, Chen & Yu, *supra* note 205, at 38 (suggesting that Article 4 be amended so as to not deny copyright altogether, but to prohibit authors of prohibited works from exercising the right of publication—“the most important of all rights encompassed in copyright, the foundation and premise of all other rights”); Liu Chunmao, *Xi Fan Dong, Yin Hui Zuo Pin Shi Fou Xiang You Zhu Zuo Quan* [An Analysis of Whether Reactionary and Licentious Works Enjoy Copyright], FA XUE ZA ZHI [L. SCI. MAG.] no. 3, 1991 at 16, 16–17 (advocating that China adhere to the principle of automatic vesting, while maintaining that “China’s copyright law should certainly prohibit or limit the reproduction and publication of works that are reactionary, licentious, or which promote feudalistic superstition”). There were some academics, however, who thought that censorship should be administered by laws other than the Copyright Law. *See, e.g.*, Yuan Peibing, *Yi Fa Jin Zhi de Chu Ban Wu You Wu Zhu Zuo Quan* [Do Lawfully Prohibited Publications Enjoy Copyright?], FA XUE ZA ZHI [L. SCI. MAG.] no. 3, 1999 at 35, 35 (stating that whereas copyright law concerns “form,” publications laws concern “content”); Yan, *supra* note 177, at 388 (other laws should handle “prohibited works”).

207. LIU, *supra* note 184, at 61.

zation (“WTO”) that the article’s denial of copyright violated both the Agreement on Trade Related Aspects of Intellectual Property Law (“TRIPs Agreement”) and the Berne Convention.²⁰⁸ China argued that the phrase “shall not be protected by this Law” did not *preclude* copyright in forbidden works, but merely denied them the Copyright Law’s *protection*.²⁰⁹ The WTO Dispute Resolution Panel rejected China’s interpretation, calling the distinction between copyright and copyright protection “inapposite.”²¹⁰ “To the extent any copyright exists” the Panel wrote, “it would seem to be no more than a phantom right, the existence of which could not be demonstrated.”²¹¹ The Panel further held that Article 17 of the Berne Convention did not authorize Article 4’s copyright denial, explaining that while some censorship is appropriate “for reasons of public order,” the Berne Convention does not permit “the denial of all copyright protection in any work.”²¹² The Panel held that Article 4 violated both the Berne Convention and the TRIPs Agreement.²¹³

Despite the United States’ nominal victory the WTO Panel’s decision is unlikely to have a far-reaching effect.²¹⁴ The Panel’s report leaves untouched the second half of Article 4, which prohibits authors from exercising their copyrights in a manner that violates the Constitution or laws or prejudices the public interest.²¹⁵ While stopping short of a total denial of copyright, this clause precludes authors of “pornographic” or “reactionary” works from benefiting from the Copyright Law. Indeed, commentators have observed that Article 4’s copyright denial was “seemingly superfluous,” since the article’s second clause “also achieves the goal of not protecting those works the publication and dissemination of which is prohibited on account of their ille-

208. *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (last visited Mar. 31, 2010).

209. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.30, WT/DS326/R (Jan. 26, 2009) [hereinafter WTO Panel Report].

210. *Id.* ¶ 7.66

211. *Id.* ¶ 7.67

212. *Id.* ¶ 7.127.

213. *Id.* ¶¶ 7.139, 7.181.

214. Wang Qian, *WTO “Zhong Mei Zhi Shi Chan Quan Zheng Duan”*: *Meiguo Ying de Le Shen Me?* [The WTO “China–U.S. Intellectual Property Dispute”: What Did the United States Win?], *HUA DONG ZHENG FA DA XUE XUE BAO* [J. EAST CHINA UNIV. POL. SCI. & L.] no. 4, 2009 at 23, 29.

215. 2001 PRC Copyright Law art. 4; see WTO Panel Report ¶ 7.130 (noting that the latter clause of Article 4 “does not deny copyright protection but, as China acknowledges, obliges copyright owners and authorized parties to respect the law in the exercise of their rights”).

gal content.”²¹⁶ Thus, although prohibited works might technically enjoy copyright in *some* form, the Copyright Law’s protection remains elusive. Not only would asserting one’s rights most likely prove ineffectual, but doing so would also expose the author to punishment for trafficking in illegal media.²¹⁷ The technical question of whether prohibited works are copyrighted does not affect the Copyright Law’s potential for content discrimination.

At the very least, the WTO Panel report provided an opportunity for China to strip its Copyright Law of content-based restrictions. Because the report did not implicate China’s other publication and media laws, removing content restrictions from the Copyright Law would not seriously threaten China’s control over the media. Rather, it would simply eliminate copyright as a mechanism for censorship.²¹⁸ But China has shown no signs of relenting. On February 26, 2010, the PRC revoked the first clause of Article 4, but chose to retain the second, while adding an additional stipulation that the state retains the right to “supervise and administer the publication and circulation of works according to the law.”²¹⁹ Professor Song Huixian explains that lawmakers, although obligated to amend Article 4, hoped to preserve the philosophy that it embodied—“restricting the creation, distribution, and publication of politically or morally flawed opinions and works.”²²⁰ More precisely, he says, they hoped to preserve it within the four corners of the Copyright Law.²²¹

216. Chen Kai, *Jie Du Xin Zhu Zuo Quan Fa: Yi Zhu Zuo Quan Chu Zhi Ying Xiang Guan Li Bu Men Deng Ji* [Interpreting the New Copyright Law: When Pledging Copyright, [One] Should Register at the Administrative Department], ZHONGGUO XIN WEN WANG [CHINA NEWS NETWORK], (Mar. 4, 2010), <http://beijing.ipr.gov.cn/bj12312/xxyd/zjgd/619247.shtml>; see also Huang Rendong, “Zhu Zuo Quan Fa” Di Er Ci Xiu Fa Bei Jing Tan Tao [A Discussion of the Background to the Copyright Law’s Second Amendment], DONGGUAN HUANAN PATENT & TRADEMARK OFFICE CO., (Sept. 7, 2010), <http://www.dgpatent.com/vcn/nview.asp?KeyID=0BA8B6533BE8NXBWJG0XM2DQ> (same).

217. See Wang, *supra* note 214, at 29 (stating that authors of prohibited works are unlikely to sue for infringement, as doing so would require that they reveal their identities and face consequences); Yang, *supra* note 202, at 141 (“[W]hile authors [of prohibited works] enjoy copyright, they must also accept punitive measures that the state employs in the protection of the public interest”).

218. Cf. Wang, *supra* note 214, at 31 (noting that whether an author is entitled to “reproduce, disseminate, perform, or broadcast [his work] over the Internet” may be determined entirely by other laws).

219. Copyright Law of the People’s Republic of China art. 4 (promulgated by the Standing Comm. of the Nat’l People’s Congress, Sept. 7, 1990, effective June 1, 1991, amended Feb. 26, 2010) (Lawinfochina) (China).

220. Song Huixian, *Yi Yi yu Que Han: “Zhu Zuo Quan Fa” Di Er Xiu Zhi Jian* [Meanings and Shortcomings: A View of the Second Amendment to the Copyright Law], DIAN ZI ZHI SHI CHAN QUAN [ELECTRONIC INTELL. PROP.], no. 4, 2010 at 90, 90–91.

221. *Id.* at 91.

Despite the doctrinal problems created by a total withdrawal of copyright in politically objectionable works, China nonetheless included such a provision within the Copyright Law. Even after the WTO disapproved the policy, China retained the ostensibly more moderate—but effectually similar—restriction contained in the latter half of Article 4, and reiterated its authority under the Copyright Law to “supervise” the publication and dissemination of prohibited works. Copyrighted works are still treated differently on the basis of content, and authors of disapproved literature still stand to suffer.

B. COPYRIGHT LIMITATIONS OVER THE PAST TWO DECADES

The 1990 Copyright Law contained broad limitations on authors’ rights. These took the form of an expansive fair use provision and extensive statutory license regime.²²² As Peter Feng observes, these exceptions were “based on the society’s interest in limiting private enclosures in what the law regards as ‘creative’ and ‘original’ expressions. In a socialist society, one would expect such limits to be much more extensive than in a capitalist society.”²²³ Indeed, the 1980s legal literature had intimated as much, and the Trial Regulations provided for a number of fair uses. The 1990 Copyright Law narrowed the Trial Regulations’ exceptions somewhat, yet still provided significant leeway for unauthorized use of copyrighted works—especially by state organs.²²⁴ Rather than promoting free speech, however, these provisions mainly circumscribed authors’ rights while maximizing governmental control over copyrighted works. The fair use and statutory licensing regimes have evolved over the past two decades, but as shown in this section, the Copyright Law’s effect on speech has not improved. The modern trend has been to narrow copyright exceptions, especially in the context of digital media. While the Internet has had a democratizing effect on Chinese citizens’ access to information, their freedom to exchange copyrighted content has only shrunk in recent years.

222. In addition to fair use, the *idea/expression* dichotomy is one of copyright law’s main speech accommodations. See *supra* note 43 and accompanying text. However, the PRC Copyright Law has never codified this doctrine. This oversight is perplexing, but I have found no evidence that the doctrine was omitted for speech-related reasons. Fortunately, the doctrine is now widely understood in the scholarly world, and Chinese courts apply it routinely (despite its absence from statutory law). See generally Stephen McIntyre, *Trying to Agree on Three Articles of Law: The Ideal Expression Dichotomy in Chinese Copyright Law*, 1 CYBARIS INTELL. PROP. L. REV. 62 (2010) (discussing origins and status of *idea/expression* dichotomy in Chinese law).

223. FENG, *supra* note 93, at 127.

224. *Id.* at 131.

1. Copyright Exceptions Under the 1990 Copyright Law

The 1990 Copyright Law's primary copyright limitations were contained in Article 22, which enumerated twelve circumstances in which "a work may be exploited without permission from, and without payment of remuneration to, the copyright owner."²²⁵ Some of these "fair use" exemptions resembled those found in intellectual property treaties and in other countries' copyright laws, such as Article 22(2)'s exemption for "appropriate quotation . . . for the purposes of introduction to, or comments on, a work,"²²⁶ and Article 22(6)'s exemption for "reproduction . . . of a published work for use by teachers."²²⁷ However, many of the uses described in Article 22 were seen as overbroad by international standards.²²⁸ For example, the provision created broad latitude for reprinting published articles for reporting current events; printing public speeches in newspapers or periodicals; rebroadcasting by radio stations or television stations; and copying by state organs for the purpose of fulfilling official duties.²²⁹ This latter exemption—a "distinctly Chinese fair use provision"²³⁰—drew particular criticism for diluting authors' rights against the state while providing "only the vaguest of protective caveats."²³¹

The 1990 Copyright Law likewise included an extensive statutory license scheme, which "preserved the long standing socialist practice of free use . . . of published works by the media, or, more appropriately, official propaganda units."²³² Under Article

225. Copyright Law of the People's Republic of China art. 22 (promulgated by the Standing Comm. of the Nat'l People's Congress, Sept. 7, 1990, effective June 1, 1991) (Lawinfochina) (China) [hereinafter 1990 PRC Copyright Law].

226. *Id.* art. 22(1); *cf.* Council Directive 2001/29/EC, art. 5(3)(d), 2001 O.J. (L 167) 10 (EU) (stating that member states may limit copyright to facilitate "quotations for purposes such as criticism or review"); United States Copyright Act, 17 U.S.C. § 107 (2006) (stating that fair use is permissible "for purposes such as criticism [and] comment. . .").

227. 1990 PRC Copyright Law art 22(6); *cf.* Berne Convention art. 10(2) (stating that member states may permit free use of artistic or literary works "for teaching"); Council Directive 2001/29/EC, art. 5(3)(a), (stating that member states may limit copyright where work is used "for the sole purpose of illustration for teaching . . ."); 17 U.S.C. § 107 (stating that fair use is permissible "for purposes such as . . . teaching").

228. *See, e.g.,* MERTHA, *supra* note 94, at 125 (noting the World Intellectual Property Organization criticized the Copyright Law as violative of Berne); Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN. L.J. 260, 277-78 (1992-1993) ("[T]he scope of fair use in Article 22 appears to be broader than the fair use provisions in either the Berne Convention or the copyright laws of Western nations").

229. 1990 PRC Copyright Law arts. 22(3), (5), (7).

230. Yang, *supra* note 228, at 279.

231. ALFORD, *supra* note 54, at 78-79.

232. FENG, *supra* note 93, at 131.

32, newspaper and periodical publishers could reproduce articles that had been published elsewhere without the author's permission, so long as they paid remuneration.²³³ Other provisions similarly permitted media outlets to perform, record, and broadcast copyrighted works without permission,²³⁴ and sometimes without payment.²³⁵ Authors could ostensibly opt out of the licensing system by providing a declaration to this effect at the time of publication,²³⁶ but the Copyright Law failed to explain how the declaration was to be made or how disregarding it was to be remedied.²³⁷ In practice, content disseminators—state-owned media outlets—tended to claim the right to opt out, even though the prerogative technically belonged to the authors themselves.²³⁸ Like Article 22, the 1990 statutory license regime drew scholarly criticism for its overbreadth and harshness on authors.²³⁹

The Copyright Law's "appreciably . . . curtailed grant of rights"²⁴⁰ made sense, both practically and politically, when it was promulgated in 1990. By carving out broad exceptions to copyright protection, China diluted authors' rights in their creations against society in general and the state in particular. However, these exceptions did not appreciably increase ordinary citizens' expressive freedom. Because China was still a pre-digital society in 1990,²⁴¹ most individuals could not easily reproduce or widely disseminate books and other media, and therefore did not significantly benefit from the Copyright Law's leeway to exploit copyrighted works. Before digital technology became widespread in China, utilizing another's work typically required that

233. 1990 PRC Copyright Law art. 32.

234. *See id.* arts. 35, 37, 40.

235. *See id.* art. 43 ("A radio station or television station that broadcasts, for non-commercial purposes, a published sound recording needs not obtain permission from, or pay remuneration to, the copyright owner, performer or producer of the sound recording" (emphasis added)).

236. GANEA & PATTLOCH, *supra* note 191, at 249.

237. Fu Cuiying, *Wan Shan Wo Guo Zhu Zuo Quan Li Fa de Ji Ge Wen Ti* [Perfecting Various Issues in China's Copyright Legislation], *FA LU KE XUE* [SCI. L.], no. 6, 1997 at 79, 84–85.

238. *Id.*

239. *See, e.g.,* ZHENG & PENDLETON, *supra* note 52, at 163 ("It seems unreasonable to allow all newspapers and journals to reprint published contributions. There is no limit to such reprints and they could extend to the whole article. . . . [Additionally, t]he author has lost the right to negotiate a higher royalty. There is also the position of the newspaper or journal which first publishes a work; they will be the victim of this unfair statutory competition").

240. ALFORD, *supra* note 54, at 78.

241. *See* Bin Liang & Hong Lu, *Internet Development, Censorship, and Cyber Crimes in China*, 26 *J. CONTEMP. CRIM. JUST.* 103, 104 (2010) (stating that China did not "connect its first international dedicated line to the Internet" until 1994).

one make a physical copy of it using specialized equipment.²⁴² Thus, for example, it would have been difficult for an individual to take advantage of Article 22(11)'s exemption for publication and distribution of minority language translations of Chinese works.²⁴³

The primary beneficiaries of Article 22 and the statutory licensing scheme were newspapers, publishing houses, radio and television stations, and other media outlets—virtually all of which were state-owned.²⁴⁴ In fact, the Copyright Law expressly favored these entities. Many of Article 22's major fair uses, such as the exemptions for reporting current events, reprinting editorials, and publishing and broadcasting speeches, applied exclusively to media outlets and state organs.²⁴⁵ Likewise, all but one of the statutory licenses could only be exercised by media outlets or producers.²⁴⁶ A number of Chinese scholars have pointed out that, under these provisions, "the balance of the [1990 Copyright Law] overly favored state-owned cultural units that used copyrighted works."²⁴⁷

242. See Gao Yunpeng, *Hu Lian Wang Huan Jing Xia Zhu Zuo Quan He Li Shi Yong Fan Wei de Xin Bian Hua* [New Changes in the Scope of Copyright Fair Use in the Internet Environment], *DIAN ZI ZHI SHI CHAN QUAN* [ELECTRONICS INTELL. PROP.], no. 11, 2007 at 43, 44.

243. See 1990 PRC Copyright Law art. 22(11).

244. Wei Yanliang & Feng Xiaoqing, *Comments on Cyber Copyright Disputes in the People's Republic of China: Maintaining the Status Quo While Expanding the Doctrine of Profit-Making Purposes*, 7 *MARQ. INTELL. PROP. L. REV.* 149, 178 (2003) ("state-owned enterprises . . . control almost all of the newspapers, television stations, and broadcasting stations of China"); *February 2006: Media Censorship Intensifies with New Round of Crackdowns*, *HUMAN RIGHTS IN CHINA*, http://www.hrichina.org/public/contents/article?revision_id=36025&item_id=27228 (last visited Mar. 31, 2010) ("All television stations, newspapers and publishing houses are state-owned, which effectively allows the authorities to manipulate public opinion.").

245. See 1990 PRC Copyright Law arts. 22(3)–(5), (7), (9) (providing for various fair uses by newspapers, periodicals, radio stations, television stations, state organs, libraries, archives, memorial halls, and museums).

246. See *id.* arts. 32, 37, 40, 43 (statutory licenses for newspaper and periodical publishers, producers of sound and video recordings, and radio and television stations); *but see id.* art. 35 (statutory license for "performer[s] who for a commercial purpose exploit[] a published work created by another").

247. Tao Hui, *Wo Guo Zhu Zuo Quan Li Yi Ping Heng de Ying Xiang Yin Sue Yan Jiu* [Research into the Factors Influencing the Balance of Interests under China's Copyright Law], 25 *HUBEI DI ER SHI FAN DA XUE XUE BAO* [J. HUBEI UNIV. EDUC.], no. 3, 2008 at 71, 72; *see also* Zhong Chu, *Geng Jia Wan Shan He Xian Dai Hua de Zhu Zuo Quan Fa* [A More Improved and Modernized Copyright Law], *ZHONGGUO CHU BAN* [CHINA PUBLISHING J.], no. 11, 2001 at 10, 10 ("[T]he balance of the [1990 Copyright Law] tilted in favor of state-owned cultural enterprise units"); Xu Chao, *Qian Lun Xiu Gai Wo Guo Zhu Zuo Quan Fa de Bi Yao Xing He Po Qie Xing* [On the Necessity and Urgency of Amending China's Copyright Law], *ZHI SHI CHAN QUAN* [INTELL. PROP.] no. 1, 1997 at 27-28 ("[W]hen the interests of the author and the [state-owned] unit come into conflict, copyright law frequently gives priority to the unit's interests.").

This was, of course, entirely deliberate. As Shen Rengan and others explained following the Copyright Law's passage, the basic function of state-owned media outlets—"to disseminate scientific and cultural knowledge, to engage in 'thought education' of the masses"—warranted broad fair use and statutory license provisions.²⁴⁸ This harkened back to Huang Qinnan's early recommendation that copyright law permit governmental fair use for "political and ideological education,"²⁴⁹ as well as the Trial Regulations' fair use exemption for "propaganda, dissemination or public exposition."²⁵⁰ The idea was not to safeguard society's interest in free speech, but to give state-owned media, which were readily susceptible to government supervision and control, freedom to exploit copyrighted works for official purposes. The 1990 Copyright Law's expansive exceptions served to limit authors' rights and autonomy (a major concern in the wake of Tiananmen) without seriously compromising China's capacity to police the flow of information in society. Together with Article 4's content restrictions, these limitations facilitated the dissemination of approved art and literature while ensuring that authorial and societal rights did not endanger the state's censorship imperatives.²⁵¹

2. *Shrinking Copyright Exceptions Since 1990*

Throughout the 1990s and early 2000s, several factors combined to necessitate amendments to the Copyright Law. One significant issue was China's transition from a planned economy to a "socialist market economy." The 1990 Copyright Law's fair use and statutory license regimes "carried the obvious 'mark' of a socialist planned economy," as manifested by their favoring of state-owned enterprises.²⁵² Since this was seen as anticompetitive and inconsistent with market principles, many within China

248. Shen Rengan, *Xian Dai Zhu Zuo Quan Li Fa de Li Lun yu Ji Ben Yuan Ze* [*The Theory and Basic Principles of Modern Copyright Legislation*], ZHI SHI CHAN QUAN [INTELL. PROP.], no. 2, 1991 at 19, 21–22; see also Guo Dengke, *Tan Wo Guo Zhu Zuo Quan Li Fa de Ji Ben Yuan Ze* [*A Discussion of the Basic Legislative Principles of China's Copyright Law*], HEBEI FA ZUE [HEBEI L. SCI.] no. 6, 1990 at 18, 19–20 ("In China, . . . the units that use works are mostly state-owned units . . . [I]t is completely appropriate to implement necessary limitations on the author's use of his copyright and to create conditions for the work's mass dissemination").

249. Huang, *supra* note 106, at 48.

250. Trial Regulations, *supra* note 95, at art. 15(8).

251. See Gu, *supra* note 107, at 56–57, 60 (discussing social and political purposes served by Copyright Law's fair use and statutory license provisions).

252. Zhong, *supra* note 247, at 10; see also Tao, *supra* note 247, at 72 ("But the Copyright Law promulgated in 1990 bears the distinct imprint of a planned economy"); Xu, *supra* note 247, at 27 (Copyright Law was passed under conditions of a planned economy).

urged that authors' rights be given greater consideration.²⁵³ China also faced international pressure to amend the Copyright Law. The PRC had acceded to the Berne Convention in 1992 and was preparing to join the World Trade Organization in 2001, which requires compliance with the TRIPs Agreement. China would have to narrow its copyright exceptions in order to bring the Copyright Law into conformity with international law.²⁵⁴ Finally, the rapid expansion of digital technology in China caused Article 22 to become antiquated. Its enumerated fair use exemptions, while broad, were close-ended.²⁵⁵ As technology developed, a number of commentators pointed out the growing irrelevance of Article 22 in digital contexts.²⁵⁶

In 2001, China overhauled its IP regime in preparation for its accession to the WTO. Since then, China has continued to shrink and limit copyright exceptions. While the desire to conform with international treaties and to protect copyright holders' interests is laudable, the effect of new legislation on free speech should not be ignored. Nor should it be assumed that legislation cannot be crafted in a manner that both complies with international law and promotes freedom of expression.

This narrowing trend has been especially pronounced in the digital context—precisely the area in which Chinese citizens are most likely to benefit from speech-accommodating doctrines. Traditional state-owned media outlets are increasingly irrelevant.²⁵⁷ Whereas the typical Chinese citizen was a mere *consumer* when the Copyright Law was first promulgated in 1990, he

253. See, e.g., Zhong, *supra* note 247, at 10 (advocating “equality of civil rights in market competition,” reformation of Copyright Law to effectuate “fair competition,” and doing away with “vestiges” of planned economy); Xu, *supra* note 247, at 27 (“Copyright law does not attach sufficient importance to the fundamental issue of copyright as the author’s right, and . . . equates state-owned units with the country itself”).

254. See Xu, *supra* note 247, at 28 (discussing the need to bring Copyright Law into compliance with international copyright treaties).

255. By contrast, Section 107 of the U.S. Copyright Act does not list specific fair uses, but requires courts to assess four general factors on a case-by-case basis. 17 U.S.C. § 107.

256. See, e.g., Ma Zhiguo & Ren Baoming, *Wang Luo Huanjing Xia Ban Quan He Li Shi Yong Wen Ti Yan Jiu* [Research on Copyright Fair Use in the Internet Context], 21 XI’AN JIAO TONG DA XUE XUE BAO (SHE HUI KE XUE BAN) [J. XI’AN JIAOTONG UNIV. (SOC. SCI.)], 53, 58 (2001) (advocating reformation of fair use system in a manner that responds to realities of internet technology); Yuan Qing, *Shu Zi hua Xin Xi ge Ming Dui Zhu Zuo Quan Zhi Du de Ying Xiang* [The Effect of the Digital Revolution on the Copyright System], HUA ZHONG SHI FA DA XUE XUE BAO (REN WEN SHE HUI KE XUE BAN) [J. CENTRAL CHINA NORMAL UNIV. (HUMANITIES & SOC. SCI. ED.)], no. S2, 1998 at 122, 123 (development of new technology requires “redefinition” of fair use); Fu, *supra* note 237, at 84 (“fair use legislation should not merely list [fair uses], but should also generalize somewhat, only then can we resolve the issues that new technologies present”).

257. Gao, *supra* note 242, at 43, 44.

is now capable of widely *disseminating* content via the Internet at negligible cost. Given this new dynamic, it is not altogether surprising that the Chinese government (which remains “alarm[ed] over the possibility of equal access to information”)²⁵⁸ would rein in exceptions to copyright, thereby delegitimizing people’s free-wheeling exchange of copyrighted material over digital networks.

That China’s copyright limitations have become even less favorable to freedom of expression, and that this trend has been especially prominent in the digital context, is evident from the development of statutory licensing and fair use over the past decade, as well from as the introduction of legal protection for technological protection measures in China.

a. Statutory Licensing

The 2001 Copyright Law only modestly narrowed China’s statutory licensing system,²⁵⁹ mainly for the sake of compatibility with the TRIPs Agreement.²⁶⁰ Although slightly (but not uniformly²⁶¹) more favorable to authors, the regime continues to favor state-run enterprises rather than private persons or entities.²⁶² In this respect, the amended Copyright Law adheres to the “long standing socialist practice” embodied in its earlier statutory licensing provisions.²⁶³

China’s trepidation about the flow of information among private parties is most apparent from its treatment of statutory licensing on the Internet. In 2000, the Supreme People’s Court (“SPC”) published an official interpretation of the Copyright Law attempting to clarify the law’s application to disputes involv-

258. Mary L. Riley, *Regulation of the Media in China*, in *CHINESE INTELLECTUAL PROPERTY: LAW AND PRACTICE* 355-380 (Mark A. Cohen et al. eds., 1999). China has taken a number of steps to regulate and censor the Internet in recent years. See, e.g. Liang & Lu, *supra* note 2411, at 108-109 (describing the “comprehensive scope of regulations” that China has enacted to address a “broad range of issues” on the Internet).

259. For a discussion of the 2001 amendments to the statutory licensing scheme, see FENG, *supra* note 93, at 131.

260. *Id.*

261. Notably, copyright holders may no longer opt out of the license for broadcasting organizations. Compare 1990 PRC Copyright Law art. 40 (radio or television station’s broadcast license not permitted “where the copyright owner has declared that such exploitation is not permitted”) with 2001 PRC Copyright Law art. 40 (no possibility of opt out for radio or television station’s broadcast license).

262. See 2001 PRC Copyright Law arts. 23, 32, 39, 42 (addressing statutory licenses for creators of textbooks in national education program, newspapers and periodical publishers, producers of sound recordings or video recordings, and radio or television stations); but see *id.* at art. 36 (statutory license for performers or performing entities).

263. See FENG, *supra* note 93, at 131 and accompanying discussion Part IV.B.1.

ing the Internet.²⁶⁴ In Article 3 of the interpretation, the SPC stated that, like newspapers and periodical publishers, websites (which may be privately operated) could republish articles without authors' permission, so long as they paid remuneration.²⁶⁵ Despite the increasing convergence between digital and print media, the National People's Congress rejected the SPC's innovation when it amended the Copyright Law in 2001.²⁶⁶ In May 2006, the State Council²⁶⁷ issued new regulations expressly precluding Internet-based statutory licensing (at least where the author opts out of the licensing system).²⁶⁸ The SPC subsequently repealed Article 3 of its Copyright Law interpretation.²⁶⁹

As a result, "republishing of works of copyright owners on the internet without the consent of the copyright owner is [now] totally banned under Chinese law," unless fair use applies.²⁷⁰

264. XUE & ZHENG, *supra* note 189, at 57; see Zui Gao Ren Min Fa Yuan Guan Yu Shen Li She Ji Ji Suan Ji Wang Luo Zhu Zuo Quan Jiu Fen An Jian Shi Yong Fa Lü Ruo Gan Wen Ti De Jie Shi [Judicial Interpretation by the Supreme People's Court of Several Issues Relating to the Application of Law in Adjudication of Cases of Disputes Over Domain Names on Computer Networks] (adopted by Adjudication Comm'n of the Supreme People's Ct., effective Dec. 21, 2000), available at <http://www.people.com.cn/GB/channel5/28/20001220/356850.html>.

265. XUE & ZHENG, *supra* note 189, at 69; Zui Gao Ren Min Fa Yuan Guan Yu Shen Li She Ji Ji Suan Ji Wang Luo Zhu Zuo Quan Jiu Fen An Jian Shi Yong Fa Lü Ruo Gan Wen Ti De Jie Shi [Judicial Interpretation by the Supreme People's Court of Several Issues Relating to the Application of Law in Adjudication of Cases of Disputes Over Domain Names on Computer Networks] (adopted by Adjudication Comm'n of the Supreme People's Ct., effective Dec. 21, 2000), Art. 3, available at <http://www.people.com.cn/GB/channel5/28/20001220/356850.html>.

266. XUE & ZHENG, *supra* note 189, at 71.

267. The State Council is the highest administrative authority in the PRC. *The State Council*, <http://www.gov.cn/english/links/statecouncil.htm> (last visited Dec. 30, 2010). The President of the SPC ranks lower than the premier of the State Council, which reflects the judicial system's inferior position relative to the State Council. See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 195-96 (2003).

268. See Regulations on Protection of the Right to Network Dissemination of Information art. 10(1) (promulgated by the State Council of the People's Republic of China, May 10, 2006, effective July 1, 2006) [hereinafter Network Regulations], translated at http://www.wipo.int/wipolex/en/text.jsp?file_id=182147 (stating that except as provided in the fair use provisions of Articles 6 and 7, it is unlawful to provide a copyrighted work online without the copyright holder's permission); C.J. Zhipei Jiang, *The Judicial Protection of Copyright on the Internet in the People's Republic of China*, in *COPYRIGHT LAW, DIGITAL CONTENT AND THE INTERNET IN THE ASIA-PACIFIC* 15, 20 (Brian Fitzgerald et al. eds., 2008), available at <http://eprints.qut.edu.au/13632/1/13632.pdf> (unlike the SPC's 2000 interpretation of the Copyright Law, the State Council's 2006 regulations "does not make . . . statutory licensing applicable to communication through networks").

269. Jerry Yulin Zhang, *Supreme People's Court Changes its Position on Copyright*, CHINA L. & PRAC., (Feb. 2007), available at <http://www.chinalawandpractice.com/Article/1690400/Supreme-Peoples-Court-Changes-its-Position-on-Copyright-Law.html>; see Jiang, *supra* note 268, at 20 (the SPC amended Copyright Law interpretation in order to bring it into conformity with the State Council's regulations).

270. *Id.*

Whereas Internet content providers briefly enjoyed the freedom to republish copyrighted articles without authors' permission, lawmakers and regulators have revoked this speech-friendly innovation.

b. Fair Use

The 2001 Copyright Law did not significantly alter the *form* of China's fair use regime (lawmakers rejected the suggestion, made by some,²⁷¹ that China adopt a factors-based scheme reminiscent of U.S. law), but it did shrink the *scope* of fair use. The new Article 22 does not recognize any new fair uses, but simply repeats and caveats the twelve original exemptions.²⁷² The new Article 22(3), for example, still permits media outlets to use copyrighted works in reporting current events—but only for “unavoidable reason[s].”²⁷³ Additionally, copying by state organs performing official duties must now be restricted to a “proper scope.”²⁷⁴ These changes make Article 22 modestly less inimical to authors, but their effect on speech is neutral at best. The original Article 22 did not significantly promote free speech, and narrowing preexisting exemptions does not change that. If anything, the new restrictions in Article 22 only make China's fair use regime *less* accommodating of unauthorized speech.

China's fair use doctrine is even narrower in the digital context. The State Council addressed Internet-based fair use in 2006, when it issued Regulations on Protection of the Right to Network Dissemination of Information (“Network Regulations”). The Network Regulations do not recognize any new fair uses, but merely repeat eight of the twelve Article 22 exemptions with some alteration. Significantly, the Network Regulations omit the exemption for “private study, research or self-entertainment”—one of the only Article 22 fair uses directed toward individuals.²⁷⁵ And whereas Article 22(4) permits republication of “articles on current issues relating to politics, economics or religion published by . . . any other media,”²⁷⁶ Article 6(7) restricts the exemption to articles published electronically, and inexplica-

271. See, e.g., Ma & Ren, *supra* note 256, at 58 (proposing that China adopt four factors from Section 107 of U.S. Copyright Act).

272. See XUE & ZHENG, *supra* note 189, at 18–21 (detailing 2001 amendments to Article 22).

273. 2001 PRC Copyright Law art. 22(3); cf. XUE & ZHENG, *supra* note 189, at 19.

274. 2001 PRC Copyright Law art. 22(7).

275. Network Regulations, *supra* note 268, at art. 6; cf. 2001 PRC Copyright Law art. 22(1).

276. 2001 PRC Copyright Law art. 22(4) (emphasis added).

bly excludes articles on religion.²⁷⁷ In short, the Network Regulations do not meaningfully depart from the Article 22 scheme. Far from promoting free speech, the Network Regulations further circumscribe fair use and limit the types of works that may be copied on the Internet.²⁷⁸

Chinese academics frequently criticize China's fair use doctrine. One major objection is the enumerative scheme seen in Article 22 and the Network Regulations. As two professors stated in 2009, this approach "cannot adopt to the flexibility of actual judicial practice."²⁷⁹ Even though some of the fair use exemptions are quite broad, they inevitably exclude "certain conduct that conforms to the spirit of fair use" and which should be recognized as such.²⁸⁰ Ren Xiangdong worries that fair use is weakening, quoting Lawrence Lessig's statement that copyright law "has matured into a sword that interferes with any use [of another's work]."²⁸¹ Many have advocated that China transition to a factors-based regime, which they see as open-ended and more amenable to new types of fair use.²⁸² Academics are com-

277. Network Regulations, *supra* note 268, at art. 6(7). That religious content should be excluded from fair use in the Internet context is not altogether surprising; as Pitman B. Potter writes, "[r]eligion represents a fault line of sorts in the [PRC] regime's effort to build legitimacy through social policy." Pitman B. Potter, *Belief in Control: Regulation of Religion in China*, 174 CHINA Q. 317, 318 (2003). The success of illegal religious groups such as Falun Gong in mobilizing via the Internet demonstrates why China is especially concerned with curbing the online transmission of religious information. See generally Mark R. Bell & Taylor C. Boas, *Falun Gong and the Internet: Evangelism, Community, and Struggle for Survival*, 6 NOVA RELIGIO 277 (2003). Alternatively, as Jonathan Ocko has suggested to me, the omission of articles on religion may simply be an oversight.

278. See Sun Yue, Song Huixian & Liu Yonghong, *Bao Zhi yu Wang Luo Ban Quan Bao Hu Yu Xu Qiu Xian Zhuang* [Newspapers, Internet Copyright Protection, and Current Demand], ZHONGGUO XIN WEN CHU BAN BAO [CHINA NEWS PUBLISHING J.], (Aug. 17, 2009), <http://info.research.hc360.com/2009/08/17101878444-5.shtml> (observing that the scope of works that may be retransmitted by means of digital media has been narrowed). It should be noted, however, that the Network Regulations omit the author's right to opt out, which appears in Article 22(4) of the Copyright Law. *Id.*

279. Li Xuesong & Zhang Liping, *Wo Guo Zhu Zuo Quan He Li Shi Yong Li Fa Cun Zai Wen Ti Fen Xi* [An Analysis of Problems Existing in China's Fair Use Legislation], KE JI CHUANG XIN DAO BAO [SCI. & TECH. INNOVATION HERALD.] no. 1, 2009 at 221, 221.

280. Lu Haijun, *Zhu Zuo Quan Zhong He Li Shi Yong Zhi Du Li Fa Mo Shi Tan Tao* [An Investigation of Legislative Methods in the Copyright Fair Use Regime], KE JI YU FA LU [SCI., TECH. & L.], no. 2, 2007 at 38, 41.

281. Ren Xiangdong, *Wang Luo Zhu Zuo Quan He Li Shi Yong Zhi Du Yan Jiu* [Research on the Copyright Fair Use System on the Internet], 9 NANJING YOU DIAN DA XUE XUE BAO (SHE HUI KE XUE BAN) [J. NANJING UNIV. POSTS & TELECOMM. (SOC. SCI. ED.)] no. 3, 2007 at 25, 26 (quoting LARRY LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 99 (2004)).

282. See, e.g., Liu Zhigang, *Shu Zi Shi Dai Ban Quan He Li Shi Yong Zhi Du Chong Gou Zhi SiKao* [Thoughts on the Reconstruction of Copyright Fair Use in the

ing to an appreciation of the speech-protecting function of fair use, calling it the “extension of free speech into copyright law,”²⁸³ but lament the “excessively rigid” character of the doctrine under Chinese law.²⁸⁴ Unfortunately, Chinese fair use—which has never appreciably promoted free speech—has only become more restrictive over the past two decades.

c. Technological Protection Measures

The 2001 Copyright Law introduced legal protection for “technological protection measures” (“TPMs”) into Chinese law for the first time. Such measures entail the use of technology to control access to, and use of, copyrighted works.²⁸⁵ TPMs were developed to allow rights holders to exercise greater control over their intellectual property.²⁸⁶ They have been described as “the digital equivalent of barbed wire,” and include such means as digital encryption and password protection.²⁸⁷ In 1996, a series of World Intellectual Property Organization (“WIPO”) treaties gave such devices the force of law, requiring contracting parties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”²⁸⁸

The bestowal of legal protection upon TPMs is a subject of international controversy.²⁸⁹ The United States’ Digital Millennium Copyright Act (the “DMCA”), the first law to implement the WIPO treaties, provides a case in point. The DMCA distinguishes between “access controls,” which prevent or mediate users’ access to content, and “copy controls,” which prevent users from using content in a manner that infringes copyright. The DMCA’s main provisions prohibit circumvention of access con-

Digital Age, 25 QING BAO KE XUE [INFO. SCI.], 1472, 1476 (2007) (pushing adoption of factors-based approach to fair use); Lu, *supra* note 280, at 45 (advocating addition of four Section 107 factors from U.S. Copyright Act to existing Article 22); Ma & Ren, *supra* note 257, at 58 (advocating adoption of four Section 107 factors).

283. Cheng Luanluan, *Lun Zhu Zuo Quan Yu Yan Lun Zi You de Dui Li Tong* [*On the Opposition and Unity of Copyright and Free Speech*], FA ZHI YU SHE HUI [LEGAL SYS. & SOC’Y], no. 5, 2009 at 373, 373.

284. Zheng Feiyun, *Lun “He Li Shi Yong” Zai Wang Luo HuanJing Xia de Shi Yong Jie Ding* [*On the Definition of “Fair Use” in the Internet Environment*], KE JI GUANG CHANG [SCI. MOSAIC], no. 2, 2007 at 236, 239.

285. J. Carlos Fernández-Molina, *Laws Against the Circumvention of Copyright Technological Protection*, 59 J. DOCUMENTATION 41, 41 (2003).

286. *Id.* at 42.

287. BOYLE, *supra* note 33, at 85–86.

288. WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. Treaty Doc. 105-17, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty art.18, Dec. 20, 1996, S. Treaty Doc. 105-17, 36 I.L.M. 76.

289. In Europe, for instance, legal backing for TPMs has sparked protests. *See, e.g., March Against New French Copyright Law*, WIKINEWS, (May 7, 2006), http://en.wikinews.org/wiki/March_against_new_French_copyright_law.

trols (but not copy controls), and trafficking in devices that are primarily intended to circumvent either access or copy controls.²⁹⁰ Detractors charge that the DMCA goes “far beyond treaty requirements,”²⁹¹ suppresses free speech,²⁹² and threatens fair use by making it illegal to circumvent TPMs even where one’s purpose in doing so is to make fair use of protected content.²⁹³ As Lawrence Lessig writes, “Technology becomes a means by which fair use can be erased; the law of the DMCA backs up that erasing.”²⁹⁴ Thus, even if China had a robust fair use regime—and it does not—DMCA-type legislation would threaten to undermine the doctrine’s speech-accommodating character.

China has followed the United States’ lead in protecting TPMs, but has taken it a step further. The 2001 Copyright Law took a modest step, forbidding circumvention of copy controls: Article 47(6) made it illegal to “circumvent[] or destroy[] the technological measures taken by a right holder for protecting copyright or copyright-related rights in his work.”²⁹⁵ The Network Regulations then vastly expand this protection, prohibiting circumvention of *any* “technical measure” (defined to include both access and copy controls), as well as trafficking in circumvention devices and services.²⁹⁶ The net result is legal protection for technological measures that exceeds even the DMCA: whereas the DMCA merely precludes circumvention of access controls, Chinese regulations target circumvention of both access and copy controls.

More critically, Chinese TPM protection is nearly devoid of limitations. The 2006 regulations provide only four narrow exceptions to the anti-circumvention rule: for teaching or scientific research, for making content accessible to the blind, for state organs’ performance of official duties, and for computer security

290. The United States’ Digital Millennium Copyright Act, 17 U.S.C. §§ 1201(a)(1)(A), (a)(2), (b) (2006).

291. Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 521 (1999).

292. Fred Von Lohmann, *Unintended Consequences: Twelve Years under the DMCA*, ELECTRONIC FRONTIER FOUNDATION, (February 2010), available at <https://www.eff.org/files/eff-unintended-consequences-12-years.pdf>.

293. BOYLE, *supra* note 33, at 87.

294. LESSIG, *supra* note 281, at 160.

295. 2001 PRC Copyright Law art. 47(6).

296. Network Regulations, *supra* note 268 at arts. 4, 26; *cf.* Zhu Jianjun, *Dui Wo Guo Ji Shu Cuo Shi Bao Hu Li Fa de Fan Si* [Thoughts on China’s Legislation Protecting Technological Measures], DIAN ZI ZHI SHI HAN QUAN [ELECTRONICS INTELL. PROP.], no. 6, 2010 at 71, 73 (stating that under Network Regulations, “technical measures” includes access and copy controls).

testing.²⁹⁷ By contrast, the DMCA not only enumerates several exceptions²⁹⁸ (which, incidentally, are broader than those found in the Chinese regulations²⁹⁹), but also empowers the Librarian of Congress to create additional exemptions from the anti-circumvention rule for specific classes of works, on a triennial basis.³⁰⁰ Moreover, U.S. courts have cut back on the DMCA's austerity in practice.³⁰¹ As compared to the DMCA, Chinese law affords stronger protection for TPMs and places less meaningful limitations on it. "Ironically," copyright expert Hong Xue writes, "an ordinary user may be better off under the DMCA [than under China's regime], despite all of its chilling effects on fair use."³⁰²

A number of Chinese commentators have sounded the alarm. Wang Yuhong writes that "the Copyright Law's anti-circumvention provision further shrinks the space for fair use."³⁰³ Another academic fears that legal protection of TPMs "creates an 'empty promise' whereby fair use and other privileges may be avoided."³⁰⁴ According to Li Xuesong and Zhang Liping, the societal costs are clear: "[w]idespread use of technological measures will undoubtedly weaken and even cancel out the limitations set out in the Copyright Law, and seriously hinder the public's freedom to receive and use works."³⁰⁵ China's fair use doctrine already exhibits an ambivalence to speech interests; if circumventing access controls and copy controls is always illegal, subject only to paltry exceptions, then TPMs may spell the end of Chinese fair use in the digital sphere.

297. Network Regulations, *supra* note 268 at art. 12.

298. 17 U.S.C. §§ 1201(c)-(j) (2006).

299. Jia Wang, *Anti-Circumvention Rules in the Information Network Environment in the US, UK, and China: A Comparative Study*, 3 J. INT'L COMM. L. & TECH. 55, 60 (2008) ("Compared with the DMCA, the exceptions in the Network Regulation are more restrictive.").

300. 17 U.S.C. §§ 1201(a)(1)(B)-(E) (2006).

301. *See, e.g., Chamberlain Group, Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004) (stating that to succeed on a claim alleging circumvention of access controls, plaintiff must show that defendant gained unauthorized access "in a manner that . . . infringes or facilitates infringing a right *protected* by the Copyright Act" (emphasis in original)).

302. Hong Xue, *Les Fleurs du Mal: A Critique of the Legal Transplant in Chinese Internet Copyright Protection*, 34 RUTGERS COMPUTER & TECH. L.J. 168, 183 (2007).

303. Wang Yuhong, *Shu Zi Ban Quan Guan Li Yu He Li Shi Yong de Chong Tu Yu Xie Tiao* ([*Conflict and Coordination Between Digital Rights Management and Fair Use*], 22 WUHAN LI GONG DA XUE XUE BAO (SHE HUI KE XUE BAN) [J. WUHAN UNIV. OF SCI. & TECH. (SOC. SCI. ED.)], no. 6, 2009 at 76, 77.

304. Liu Zhigang, *Ban Quan He Li Shi Yong Yuan Ze de Ruo Hua Qu Shi Jie Xi* [*An Analysis of the Weakening of the Copyright Fair Use Principle*], QING BAO ZI LIAO GONG ZUO [INFO. & DOCUMENTATION SERV'S.], no. 4, 2007 at 30, 32.

305. Li & Zhang, *supra* note 279, at 221.

3. *Stretching the Law to Squelch Specific Threats*

Chinese authorities have shown a willingness to further restrict speech-accommodating doctrines when necessary to eliminate specific threats. A few years ago, a trend called *e gao*, or “reckless doings,” took the Internet by storm.³⁰⁶ The phenomenon, which consists of digitally-created video spoofs,³⁰⁷ was popularized in 2006 when a 31-year-old sound engineer named Hu Ge created a 20-minute parody of Chen Kaige’s *The Promise*, a big-budget film that flopped at the box office.³⁰⁸ When Hu posted the video to his blog, it quickly attracted millions of viewers and he became an Internet celebrity in China overnight.³⁰⁹ Although Hu claimed that he had merely intended to poke fun at *The Promise*’s “boredom and unoriginality,”³¹⁰ Chen Kaige accused him of copyright infringement.³¹¹

Chen ultimately dropped the lawsuit, but Hu Ge’s spoof precipitated a debate within the legal world over whether *e gao* and other parodies constitute fair use.³¹² Academics largely agreed that parody fell within the doctrine’s scope,³¹³ pointing to U.S. law³¹⁴ and the statement in Article 22 of the Copyright Law³¹⁵

306. Bingchun Meng, *Regulating e gao: Futile Efforts at Recentralization?*, in CHINA’S INFORMATION AND COMMUNICATIONS TECHNOLOGY REVOLUTION: SOCIAL CHANGES AND STATE RESPONSES, *supra* note 179, at 52, 53.

307. *Id.*

308. *Id.* at 55.

309. *Id.*

310. *Chen Not Amused by Steamed Bun Spoof*, CHINA DAILY, Feb. 20, 2006, http://www.chinadaily.com.cn/china/2006-02/20/content_533848.htm.

311. Meng, *supra* note 306, at 56.

312. *Id.*

313. See Zhong Xiao’an & Liu Hanbo, *You Yi Shu De Fu Zhi Yin Fa de Fa Lü Gan Ga—Cong “Man Tou Xie An” Tan Qi [The Legal Embarrassment That Artistic Copying Precipitates—Speaking from “The Steamed Bun Case”]*, 29 SHAOXING WEN LI XUE YUAN XUE BAO [J. SHAOXING UNIV.], no. 4, 2009, at 108, 109 (“The majority of academics thought that *Steamed Bun* [Hu Ge’s spoof] constituted an ‘imitative satiric work,’ also called ‘parody’; was a normal commentary on *The Promise*; fell within the scope of fair use; and did not infringe the director of *The Promise*’s copyright”).

314. See, e.g., Zhang Jianping & Yang Xiaolin, *Cong “Piao Liang Nü Ren” Dao “Man Tou Xie An” Xi Fang Zuo Pin de He Li Xing Pan Duan [From Pretty Woman to The Steamed Bun Case: A Rational Judgment of Parodies]*, SHE HUI KE XUE LUN TAN [SOC. SCI. FRONT.], no. 6, 2007 at 28, 28 (arguing, on the basis of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and other U.S. cases, that Hu Ge’s spoof constitutes fair use); Zheng, *supra* note 284 (demonstrating that Hu Ge’s spoof would constitute fair use under governing U.S. law).

315. See, e.g., Zhou Yanmin & Song Huixian, *Hua Ji Mo Fang yu Ban Quan Bao Hu—You “Wu Ji” yu “YiGe Man Tou de Xie An” Tan Qi [Parody and Copyright Protection—Speaking From The Promise and Murder Over a Steamed Bun]*, CHU BAN FA XING YAN JIU [PUBLISHING RES.], no. 6, 2006 at 59, 63. While arguing that Hu Ge’s work constituted fair use, scholars often expressed frustration with the Copyright Law’s failure to directly speak to the issue. See, e.g., Zhang & Yang, *supra* note 314, at 33 (stating that it is “difficult within the framework of China’s

that borrowing for the purposes of commenting on a work is fair.³¹⁶ China's National Copyright Administration declined to weigh in on the merits of Hu Ge's case, but conceded that, under Article 22, Hu's copying could be fair if reasonable in scope.³¹⁷ However, once Beijing Olympics-related *e gao* began to surface, the influential Beijing Municipal Copyright Bureau announced that it would specifically target *e gao* in its pre-Olympics campaign against Internet piracy.³¹⁸ In announcing the crackdown, bureau chief Feng Junke categorically declared that Olympics-related *e gao* media constituted a "new type of infringement,"³¹⁹ effectively preempting fair use arguments in favor of it.

The Copyright Law and accompanying regulations do not promote free speech, but restrict it. Article 4 regulates media content, discriminating against works on the basis of whether the state deems them objectionable. Copyright doctrines that could potentially accommodate speech interests, such as fair use and statutory licensing, serve only to dilute authors' rights while reserving maximum freedom for state-owned enterprises. Over the past two decades, these doctrines have only become more restrictive and less amenable to free speech. The trend has been particularly pronounced with respect to digital technology, precisely where expressive freedom would be most valuable to Chinese citizens. As the *e gao* ordeal shows, Chinese authorities may even disregard copyright privileges in order to stop controversial uses.

V. OVERLAP BETWEEN GOVERNMENT CENSORSHIP AND COPYRIGHT ENFORCEMENT

China's intellectual property laws are primarily enforced through administrative measures (public enforcement) rather

current copyright law" to determine whether Hu Ge's spoof is fair). Some even conceded that Hu Ge's work may have infringed under the Copyright Law as understood, while still arguing that Chinese law *ought* to permit the spoof. See, e.g., Liu Junjian, *Wang Luo Ying Shi E Gao de Fa Lü Tan Xi—Cong "Yi Ge Man Tou Yin Fa de Xie An" Tan Qi* [Analysis of Online Video E Gao and the Law—Speaking from Murder Over a Steamed Bun], 7 XINJIANG YI SHU XUE YUAN XUE BAO [J. XINJIANG ARTS UNIV.], no. 2, 2009 at 83, 83 (acknowledging that *Steamed Bun* may infringe under Copyright Law, but arguing that Chinese law ought to learn from U.S. law's treatment of parody).

316. 2001 PRC Copyright Law art. 22(2).

317. *Guo Jia Ban Quan Ju Shou Ci Hui Ying "Man Tou Xie An"* [The National Copyright Administration's First Response to The Steamed Bun Case], REN MIN RI BAO [PEOPLE'S DAILY], Feb. 16, 2006, <http://culture.people.com.cn/GB/22219/4110042.html>.

318. Li Jing, *Beijing Shi Ban Quan Ju Ju Zhang: Wang Zhan E Gao Ao Yun Ke Bei Guan Ting* [Beijing Municipal Copyright Bureau Director: Internet Sites With Olympics E Gao May Be Shut Down], JING HUA SHI BAO [BEIJING TIMES], Jan. 26, 2008, available at <http://finance.cctv.com/20080126/100551.shtml>.

319. *Id.*

than through civil suits initiated in court by private plaintiffs (private enforcement).³²⁰ As Kristie Thomas writes, the centrality of governmental IP enforcement in China exemplifies the regime's tendency to use law "as a mechanism for implementing policy."³²¹ The threat of censorship and oppression therefore looms especially large at the enforcement stage. This danger, as described in this section, is exacerbated by the substantial overlap between copyright agencies and other government units charged with regulating media content. Because copyright authorities are understaffed, underfunded, and subservient to China's larger censorship bureaucracy, copyright protection merges with, and often takes a backseat to, broader censorship efforts.

A. MEDIA REGULATION AND COPYRIGHT ENFORCEMENT

The Chinese regime maintains a "vast and complex interconnected system of control" over the media.³²² Censorship duties are not concentrated in a single entity, but are dispersed among several national institutions and their local affiliates.³²³ National governmental agencies and the Party's Central Propaganda Department may oversee media control and thought work, yet "[t]he overall picture of media regulation in China is one of a miasma of laws, bureaucratic rules, endless official exhortations and vast discretionary zones."³²⁴ Consequently, there is often a lack of clarity as to what is and is not considered acceptable at a given time. This, coupled with the agencies' inadequate monetary and human resources, undermines the effectiveness of public enforcement efforts.³²⁵ Nonetheless, the PRC remains devoted to the philosophy that media is "an instrument for those who control it," and that cultural paternalism is necessary in order to prevent societal chaos.³²⁶ In place of constant and sustained enforcement, Chinese authorities engage in sporadic but harsh campaigns reminiscent of those from the pre-reform era.³²⁷

China's copyright enforcement agencies constitute a subset of the intricate bureaucracy that administers China's media and

320. Kristie Thomas, *The Fight Against Piracy: Working Within the Administrative Enforcement System in China*, in *INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA: CHINESE AND EUROPEAN PERSPECTIVES* 85, 86-87 (Paul Torremans et al. eds., 2007).

321. *Id.* at 96.

322. ANNE-MARIE BRADY, *MARKETING DICTATORSHIP: PROPAGANDA AND THOUGHT WORK IN CONTEMPORARY CHINA* 9 (2008).

323. KRAUS, *supra* note 102, at 109-110.

324. Cullen & Hua, *supra* note 130, at 161.

325. *Id.* at 161.

326. *Id.* at 163.

327. *Id.* at 162; MERTHA, *supra* note 94, at 140.

copyright policies.³²⁸ The most important copyright entity is the National Copyright Administration of China (“NCAC”), which is empowered to interpret the Copyright Law, handle copyright disputes, investigate cases of infringement, and even provide remedies and sanctions in copyright matters.³²⁹ The National Working Group on Intellectual Property Rights Protection serves to promote the implementation of IP laws, coordinate IP enforcement among agencies and law enforcement, supervise major infringement cases, and instruct local government units on IP protection.³³⁰ The State Intellectual Property Office (“SIPO”) likewise assists in organizing and coordinating IP protection and enforcement throughout China.³³¹ Corresponding agencies at provincial and local levels of government perform similar functions under the direction of the national agencies.³³²

Just as the Copyright Law was designed to “echo and link up with” other media controls,³³³ copyright agencies’ efforts are tied to the work of China’s other media regulators. The copyright agencies are “embedded within a [system] that concerns itself with cultural, ideological, and value-laden media.”³³⁴ The objectives of this censorship system frequently overshadow those of the copyright enforcement units, which are especially underfunded.³³⁵ The conflict between the NCAC and the General Administration of Press and Publication (“GAPP”), the agency to which the NCAC is accountable, is especially acute. Even though the GAPP “is concerned mainly with censorship and has no interest in promoting the rights of authors or creating a free market in publishing,”³³⁶ both the NCAC and GAPP rely on the same enforcement personnel to conduct crackdown campaigns.³³⁷ Consequently, efforts to wipe out pirated media double as raids against pornographic, seditious, and otherwise prohibited literature. And because enforcement personnel report directly to the GAPP, but not to the copyright agencies,³³⁸ pur-

328. Andrew Mertha provides an excellent graphical overview of the relationship of China’s various copyright agencies to the Ministry of Culture, the General Administration of Press and Publications, and other agencies. See MERTHA, *supra* note 94, at 146.

329. Shuk Ki Ella Cheong, *Copyright Law and Regulation in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 258, at 47, 50, 52; Xue & Guo, *supra* note 73, at § 5[1].

330. Xue & Guo, *supra* note 73, § 5[2][a].

331. *Id.* § 5[2][b].

332. *Id.* § 5[2][e]; Cheong, *supra* note 329, at 52; MERTHA, *supra* note 94, at 146.

333. Xiao, *supra* note 188, at 65.

334. MERTHA, *supra* note 94, at 133–34.

335. *Id.* at 139–40, 141.

336. *Id.* at 140.

337. *Id.*

338. *Id.*

ported “anti-piracy” campaigns are often oriented toward cleansing Chinese society of “spiritual pollution.”³³⁹

B. FIGHTING PIRACY WHILE CLEANSING CHINA’S CULTURAL MARKET: THE “CLEAN UP PORNOGRAPHY AND DESTROY ILLEGAL PUBLICATIONS” CAMPAIGN

The government’s conflation of copyright enforcement with media control is hardly a secret. The longest-running and most public example of the overlap between copyright enforcement and censorship is the “clean up pornography and destroy illegal publications” (*SHDF*) campaign, which China launched under the leadership of propaganda czar Li Ruihuan in the aftermath of Tiananmen Square.³⁴⁰ As already noted, the Copyright Law itself was intended to “deepen” the nascent *SHDF* campaign, and the Article 4 content restrictions were an outgrowth of the post-Tiananmen media crackdown.³⁴¹ However, the connection between copyright and the *SHDF* campaign is not limited to the substance of the Copyright Law. The *SHDF* campaign has long been used as vehicle to simultaneously fight copyright-infringing goods and other “illegal” media—namely, pornography and works deemed “anti-government” or “anti-Party.”³⁴² The highly visible crusade reveals the extent to which copyright law and censorship are blurred in the PRC.

Once the *SHDF* campaign was formally initiated in 1989, commentators almost immediately drew a connection between these efforts and copyright law. Guo Dengke wrote in late 1989 that in light of China’s “*sao huang*’ [cleaning up pornography] work,” it would not be appropriate to recognize copyright in pornographic works.³⁴³ In mid-1990, prior to the Copyright Law’s passage, another writer implored China to improve its statutory scheme in order to support *SHDF* efforts, specifically calling for a “news law, publications law, and copyright law.”³⁴⁴ As the Copyright Law and other laws, regulations, and policies aimed at controlling media content were promulgated, they were seen as

339. *See id.* at 149 (“Where priorities and scarce resources earmarked for the supervision of the ‘cultural market’ conflict with or supersede those of local copyright enforcement, the latter is often sacrificed to the former”).

340. *See infra* Part III.E.

341. *See supra* notes 183, 184, and 193, and accompanying text.

342. MERTHA, *supra* note 94, at 142. As originally conceived, the *SHDF* campaign focused on “suppressing all types of publications and audio-visual products that are illegal; are reactionary; possess serious political flaws; or that spread pornography, violence, and feudal superstition.” LIU, *supra* note 184, at 61.

343. Guo, *supra* note 124, at 28.

344. Li Manru, “*Sao Huang*” *Fan Si* [*Reflections on the “Sao Huang” Campaign*], NINGXIA SHE HUI KE XUE [NINGXIA J. SOC. SCI.], no. 4, 1990 at 10, 14.

providing the “legal weaponry” necessary to the success of the *SHDF* campaign.³⁴⁵

Beginning in 1989 and continuing on a roughly annual basis over the early 1990s, China conducted harsh campaigns against pornography under the *SHDF* banner.³⁴⁶ Although the government hailed these as huge successes, the proliferation of objectionable media continued largely unabated.³⁴⁷ In 1993, propaganda authorities resolved that a large-scale, comprehensive crackdown would be necessary to adequately police the “cultural market”—a broad new concept that encompassed all types of illegal media and all aspects of the production and dissemination process.³⁴⁸ Copyright enforcement fit well within this new holistic approach.³⁴⁹ By the mid-1990s the *SHDF* campaign had begun to address copyright piracy,³⁵⁰ yet IP protection was still a secondary consideration in the push to cleanse the “cultural market.”³⁵¹

Probably the most significant reason for the increased congruence between copyright and *SHDF* was foreign influence. From 1989 to 1996, the United States exerted concentrated pressure on China to improve its protection of intellectual property, and the two nations were in almost constant dialogue on the subject.³⁵² The heated U.S.–China negotiations eventually produced a June 1996 agreement that imposed strict obligations on China to rein in piracy.³⁵³ In an attempt to pacify the U.S. and prove its commitment to IP protection, the PRC instituted an intense *SHDF* campaign in the winter of 1996–97 that specifically

345. LIU, *supra* note 184, at 61.

346. Lynch, *supra* note 180, at 178–79. The focus on pornography “helped to ameliorate the harshness of the political campaign against government critics.” KRAUS, *supra* note 102, at 97.

347. Lynch, *supra* note 180, at 178–79.

348. *Id.* at 181–82.

349. See Yin Jindi, *Zhongguo Wen Hua Shi Chang de Xian Zhuang Ji Zou Xiang* [The State and Direction of China’s Cultural Market], LIAO WANG [OBSERVATION], no. 47, 1993 at 26, 27 (listing piracy alongside pornography, gambling, and other societal ills as problems in the “cultural market”); Xu Hanyan, *Jia Qiang Zhu Zuo Quan Bao Hu—Cu Jin Liang Ge Wen Ming Jian She* [Strengthening Copyright Protection—Advancing the Construction of the Two Civilizations], QUN ZHONG [MASSES], no. 5, 1995 at 57, 57 (“[C]opyright protection is the foundation for the construction of socialist spiritual civilization”).

350. See, e.g., Xu, *supra* note 349, at 58 (describing 1994 *SHDF* operations in Jiangsu province that included “anti-piracy and IP protection activities”).

351. See Lynch, *supra* note 180, at 183 n.23 (noting that IP protection was a “secondary goal that was not [formally] adopted until early 1995, about 18 months after the [1993 ‘cultural market’] crackdown began”).

352. See MERTHA, *supra* note 94, at 37–52 (describing U.S.–China IP negotiations during 1990s).

353. *Id.* at 52.

targeted reduce piracy.³⁵⁴ A resolution adopted at the Sixth Plenum of the Communist Party's Fourteenth Central Committee meeting in October 1996 recommitted the PRC to preventing the spread of "decayed ideology and culture" through a crackdown on "pornographic publications and . . . illegal publishing practices,"³⁵⁵ including copyright piracy.³⁵⁶

Although the 1996–97 "winter action" was short-lived—like Chinese IP enforcement generally, *SHDF* takes the form of intermittent "waves of coordinated action"³⁵⁷—it appears to have created a permanent link between copyright enforcement and the cleansing of China's cultural market. As Yu Youxian (who has served as both NCAC director and vice-director of the National *SHDF* Working Group) told media authorities in July 1997, *SHDF* work "cleaned up the market and advanced intellectual property protection, creating very favorable conditions for audio-visual publishing."³⁵⁸ In 2000, when national-level *SHDF* authorities orchestrated another major crackdown, Yu similarly wrote that "the scope of what *SHDF* encompasses is extremely broad, and includes 'acts of criminal copyright infringement' in particular."³⁵⁹ Premier Zhu Rongji struck this same chord when outlining China's plans to strengthen the construction of spiritual civilization at the Ninth National People's Congress in 2002. There, he urged national officials to "deeply and lastingly unfold the *SHDF* struggle, [and] severely fight piracy in publishing and

354. *Id.* at 152–53.

355. *Id.* at 153 (quoting *Make Persistent Efforts to "Eliminate Pornography" and "Illegal Publications,"* PEOPLE'S DAILY, Dec. 11, 1996, at 1).

356. See Quan Guo "Sao Huang" Gong Zuo Dian Shi Dian Hua Hui Yi [National "sao huang" Television and Telephone Conference], Zhong Guo Gong Chan Dang Xin Wen [COMMUNIST PARTY OF CHINA NEWS], (Dec. 10, 1996), <http://dangshi.people.com.cn/GB/151935/176588/176597/10556555.html> (including piracy in list of illegal cultural practices that were to be targeted).

357. Thomas, *supra* note 320, at 99 (quoting Duan Ruichun, *China's Intellectual Property Rights Protection Towards the 21st Century*, 9 DUKE J. COMP. & INT'L L. 215, 217 (1998–99)).

358. Guan yu Yin Fa Yu Youxian Tong Zhi "Ren Zhen Guan che zhong Yang Jing Shen, Duo Chu You Xiu Yin Xiang Zho Pin" Jiang Hua de Tong Zhi [Notice on the Distribution of Comrade Yu Youxian's Speech on "Earnestly Implementing the Spirit of the Party Central Committee and Producing More Excellent Audiovisual Works"], <http://www.people.com.cn/electric/flfg/d2/970723.html> (last visited April 7, 2010).

359. Yu Youxian, *Jia Qiang Guan Li Yi Fa Xing Zheng Quan Li Tui Dong Fan Dao Ban Lian Meng Gong Zuo Jia Kuai Jian Li You Zhongguo Te Se de Zhu Zuo Quan Bao Hu Zhi Du* [Strengthen Oversight; Administer According to the Law; Forcefully Advance the Anti-Piracy League's Work; Quickly Establish a Copyright System with Chinese Characteristics], ZHONGGUO CHU BAN [CHINA PUBLISHING J.], no. 4, 2000 at 5, 8.

printing and CD smuggling activities.”³⁶⁰ *SHDF* rhetoric now routinely portrays copyright enforcement as integral to broader efforts to control media content and censor perceived threats.

While the *SHDF* campaign has increasingly focused on copyright enforcement, it remains a tool for ridding society of “objectionable” media. National *SHDF* work brings together a number of agencies—including such censorship authorities as the Central Propaganda Department, the Ministry of Culture, and the State Administration of Radio, Film, and Television.³⁶¹ A National *SHDF* Working Group, which includes representatives from participating agencies, coordinates the campaign,³⁶² but the Group answers to the GAPP, one of China’s foremost censorship authorities.³⁶³ As one might infer from the *SHDF* Working Group’s composition, run-of-the-mill copyright enforcement is a secondary goal (at best) for national and local *SHDF* officials. Whereas most pirated goods in China are neither pornographic nor politically heterodox, *SHDF* teams tend to specifically target those goods deemed “reactionary” or “socially disruptive,” the production or dissemination of which carries strict criminal penalties—including execution.³⁶⁴ The public emphasis on battling the twin evils of pornography and piracy serves as “camouflage for legalizing and legitimizing”³⁶⁵ the campaign’s thought control and political suppression.

The censorial character of *SHDF*-directed anti-piracy campaigns is evident from a national *SHDF* push that occupied the late summer and fall of 2009. At a National *SHDF* Working Group meeting in early August, Jiang Jianguo (deputy director of the GAPP) announced that *SHDF* authorities would be rolling out a nationwide, “concentrated battle against piracy” over

360. Zhu Rongji, Zheng Fu Gong Zuo Bao Gao [Government Work Report] (Mar. 5, 2002) (transcript available at <http://www.fmprc.gov.cn/chn/pds/ziliao/wzzt/lhztzy/2316/2317/t10806.htm>).

361. *Quan Guo “Sao Huang Da fei” ban Gong Shi Cheng Yuan Dan Wei—Lan Biao* [National *SHDF* Office Member Units—Complete List] <http://www.shdf.gov.cn/cms/html/190/1879/List-1.html> (last visited Mar. 31, 2010).

362. MERTHA, *supra* note 94, at 142.

363. See MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 229 (2009) (describing the National *SHDF* Working Group housed at the GAPP); PRC *State Council Websites Overseeing Media*, FEDERATION OF AMERICAN SCIENTISTS, <http://www.fas.org/irp/dni/osc/prc-media-state.html> (last visited Mar. 31, 2010) (detailing how the GAPP coordinates the *SHDF* campaign); see also Isabella Bennett, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS, (Mar. 7, 2011), <http://www.cfr.org/publication/11515/> (stating that GAPP is one of China’s “primary censoring agencies”).

364. MERTHA, *supra* note 94, at 144.

365. Wu, *supra* note 179, at 78.

the ensuing months.³⁶⁶ The timing of this focused campaign was significant; it immediately preceded the 60th anniversary of the founding of the People's Republic of China, which was to be celebrated on October 1. Using fiery rhetoric, Jiang declared that the nation must wage a "war of annihilation" against piracy, so that it might "ring in the 60th anniversary of the founding of the New China with excellent achievements."³⁶⁷ The ultimate goal of this focused anti-piracy campaign was to "create a good cultural environment and atmosphere of public opinion in which to celebrate" the PRC's founding.³⁶⁸

It is difficult to see how confiscating infringing copies of commercially popular but politically uncontroversial DVDs and CDs would ensure an acceptable "cultural environment" or "atmosphere of public opinion" for China National Day. The campaign, of course, did not merely target infringing goods; it aimed to "comprehensively clean up" the publications market through the "large-scale collection and suppression of pirated *and [otherwise] illegal*" media.³⁶⁹ Indeed, while official news reports proudly proclaimed that millions of pirated items had been confiscated,³⁷⁰ it is evident that *SHDF* teams sought out *particular types* of pirated and illegal media. Earlier in the year, the Ministry of Culture had indicated that pre-October 1 *SHDF* activities would target goods "containing prohibited content."³⁷¹ As the campaign unfolded, local *SHDF* units were instructed to confis-

366. Lai Mingfang, *Chu Ban Zong Shu Jiang Jianguo: Guang Fan Fa Dong Qun Zhong Yan Li Da Ji Qin Quan Dao Ban [Jiang Jianguo of the GAPP: Mobilize the Masses to Severely Fight Piracy]*, REN MIN RI BAO [PEOPLE'S DAILY], Aug. 10, 2009, <http://media.people.com.cn/GB/9818142.html>.

367. *Id.*

368. Lai Mingfang, *Wo Guo Qi Dong Jin Nian "Sao Huang Da Fei" Di San Jie Duan Ji Zhong Xing Dong—Qin Quan Dao Ban Jiao Cai Jiao Pu Cheng Zhong Dian Zheng Zhi Mu Biao [China Launches the Third Focused Phase of This Year's Sao Huang Da Fei Campaign—Pirated Textbooks and Reference Materials Becomes the Major Reparative Goal]*, ZHONGGUO XIN WEN CHU BAN BAO [CHINA NEWS PUBL'G J.], (Aug. 31, 2009), <http://www.gapp.gov.cn/cms/html/47/711/200908/465728.html>.

369. *Wo Guo Qi Dong Jin Nian "Sao Huang Da Fei" Di San Jie Duan Ji Zhong Xing Dong [China Launches the Third Focused Phase of This Year's Sao Huang Da Fei Campaign]*, XINHUA, (Aug. 25, 2009), http://news.xinhuanet.com/legal/2009-08/25/content_11942336.htm (emphasis added).

370. See "Sao Huang Da Fei" Di San Jie Duan Guan Bi Yin Shua Qi Ye 182 Jia [Third Phase of Sao Huang Da Fei Closes 182 Printing Houses], REN MIN RI BAO [PEOPLE'S DAILY], Sept. 14, 2009, <http://culture.people.com.cn/GB/87423/10048107.html> (reporting 4.35 million "illegal" publications seized nationwide, of which 3.52 million were allegedly "pirated").

371. *Wen Hua Bu Bu Zhu Wen Hua Shi Chang Ji Zhong Zheng Zhi Xing Dong [Ministry of Culture Deploys Focused Campaign to Repair the Cultural Market]*, REN MIN RI BAO [PEOPLE'S DAILY], July 5, 2009, <http://news.66wz.com/system/2009/07/05/101306783.shtml>.

cate illegal political publications,³⁷² “reactionary” works,³⁷³ and “harmful information that incites the arrangement and organization of mass incidents,”³⁷⁴ as well as pornographic, violent, and otherwise “unhealthy” media.³⁷⁵ By the time October 1 dawned, *SHDF* authorities had seized countless disapproved publications and had succeeded in shutting down a number of illegal newspapers and magazines.³⁷⁶

The 2009 *SHDF* campaign’s anti-piracy emphasis provided a socially palatable veneer to a crackdown on speech in advance of a politically important holiday. This particular example is representative of a trend in China’s copyright regime: copyright enforcement efforts blend with, and are often subjugated to, the government’s media control and censorship activities. This reflects the conception of copyright law as part-and-parcel of China’s scheme for regulating media and speech content—a view that has informed Chinese copyright discourse and lawmaking for the past three decades. As the *SHDF* campaign shows, the concern that copyright may be exploited in the name of political oppression is not an abstract fear; Chinese authorities in fact engage in speech suppression under the color of copyright law, and have done so for years.

VI. CONCLUSION: A NEW WAY FORWARD

Over the past century, each Chinese attempt to implement a copyright regime has been accompanied by censorship. This may not be surprising; China has engaged in literary censorship for thousands of years, but never developed a true appreciation for

372. Jiuquan “*Sao Huang Da Fei*” Gong Zuo Ling Dao Xiao Zu Hui Yi Zhao Kai [The Quanzhou Sao Huang Da Fei Leading Group Conference Opens], XINHUA, (Aug. 17, 2009), http://www.gs.xinhuanet.com/dfpd/2009-08/17/content_17425525.htm.

373. Lu Jie, Pingba Kai Zhan “*Sao Huang Da Fei*” Xing DongJing Hua She Hui Wen Hua Huan Jing [Pingba Unfolds Sao Huang Da Fei Campaign to Clean Up Society’s Cultural Environment], XINHUA, (Sept. 14, 2009), http://www.gz.xinhuanet.com/zfpd/2009-09/14/content_17694887.htm.

374. Wulan County Office, Guan Yu Ren Zhen Zuo Hao 2009 Nian Guo Qing Jie Qian Hou You Guan Gong Zuo de Tong Zhi [Notice on Diligently Performing Work Before and After China National Day 2009], (Sept. 14, 2009).

375. Fang Liming, *Da Zao Wei Cheng Nian Ren Jian Kang Cheng Zhang de She Hui Wen Hua HuanJing* [Creating a Social and Cultural Environment for the Healthy Growth of Young People], REN MIN RI BAO [PEOPLE’S DAILY], Sept. 14, 2009, <http://theory.people.com.cn/GB/10045625.html>.

376. See “*Sao Huang Da Fei*” Di San Jie Duan Guan Bi Yin Shua Qi Ye 182 Jia [Third Phase of Sao Huang Da Fei Closes 182 Printing Houses], *supra* note 372. China keeps tight controls on the news media market through an official licensing system. The government has been known to limit freedom of the press by shutting down publications that, for one reason or another, are deemed “illegal.” CONGRESSIONAL-EXECUTIVE COMM’N ON CHINA, 2006 ANNUAL REPORT 28–29 (2006), available at <http://www.cecc.gov/pages/annualRpt/annualRpt06/Expression.php>.

or theory of proprietary rights in cultural products. When Western powers attempted to impose copyright law on China in the early twentieth century, the Qing empire co-opted it as part of a publication regulation system. The Republican and Nationalist governments followed this same model. As this Article demonstrates, China's censorial copyright philosophy persists to this day. It was manifest in the 1980s copyright debate (especially post-Tiananmen), it influenced the content of the Copyright Law, and it has informed the Copyright Law's development and application over the past two decades. As evidenced by the interconnectedness of China's copyright agencies and censorship authorities, the view of copyright as a means for controlling speech and media is deeply embedded in the country's modern copyright regime.

The United States has been a major player in the construction of China's copyright system. From the 1979 trade agreement to the 2007 WTO dispute, the U.S. has continually sought to mold Chinese copyright law. It has also consistently spoken out against the PRC's harsh censorship policies. In January 2010, for instance, Secretary of State Hillary Clinton criticized China for censoring the Internet, taking particular issue with tactics aimed at restricting access to religious information.³⁷⁷ (Clinton's remarks were met with allegations of "information imperialism."³⁷⁸) The U.S. sees political liberalization as tied to economic liberalization; in the past, it has responded to Chinese human rights abuses with threats of economic sanctions.³⁷⁹ More recently, Senator Byron Dorgan reiterated this policy when he denounced China for "want[ing] to participate in the marketplace of goods [while keeping] the marketplace of ideas outside their country."³⁸⁰

Yet the United States has proven remarkably tone-deaf to the effect of its international IP policy on free speech in China.³⁸¹

377. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom, (Jan. 21, 2010) available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

378. Mark Landler & Edward Wong, *China Rebuffs Clinton on Internet Warning*, N.Y. TIMES, Jan. 22, 2010, at A4, available at <http://www.nytimes.com/2010/01/23/world/asia/23china.html>.

379. Matthew W. Cheney, *Trading with the Dragon: A Critique of the Use of Sanctions by the United States Against China*, 6 J. INT'L L. & PRAC. 1, 2-3 (1997) ("[T]he United States has threatened sanctions against China in disputes over human rights Other than briefly imposing sanctions after the incident at Tiananmen Square, subsequent threats have not been followed up with an actual execution of economic sanctions").

380. Goldman, *supra* note 16.

381. To give a recent example of this phenomenon, at an October 21, 2010 press conference in Beijing, U.S. Attorney General Eric Holder said that he was "heartened to see that, just this week, the Chinese government opened a new campaign

As Robert S. Rogoyski and Kenneth Basin observe, the primary source of exogenous pressure on China's IP laws is the U.S. Trade Representative, who has "been largely captured by the influence of intellectual property trade organizations and, in particular, the lobbying efforts of copyright-intensive industries."³⁸² As a result, U.S. IP policy has been "at best agnostic toward—and probably detrimental to—the Chinese position on intellectual property doctrines that implicate free expression."³⁸³ While economic interests may occasionally line up with speech interests—as in the 2007 WTO dispute, in which the U.S. alleged that that certain classes of U.S. works were subject to non-protection under Article 4³⁸⁴—this is the exception rather than the rule. Rights holders are not likely to support a robust fair use doctrine or liberal statutory licenses in the Internet context and can be expected to welcome concentrated enforcement efforts notwithstanding the baggage that comes with China's "anti-piracy" campaigns.

The discordance between the United States' copyright policy toward China and its outspoken stance against Chinese censorship highlights the need to reconsider the relationship between these two priorities. While protection of rights holders' interests should be a major concern, especially in light of rampant Chinese piracy, U.S. political objectives and Chinese society would be better served through a more holistic approach to copyright policy. The U.S. would do best to keep in mind the philosophy underpinning modern copyright law: that the provision of a "limited monopoly" in creative works is simply a means of achieving a

against intellectual property crimes." Remarks by Attorney General Eric Holder, (Oct. 21, 2010), available at <http://beijing.usembassy-china.org.cn/102110ir.html>. Like previous anti-piracy campaigns, the campaign that Holder referred to encompassed a crackdown on media with prohibited content. See *Wen Hua Bu Kai Zhan Zhuan Xiang Zhi Fa Huo Dong E Zhi Qin Quan Dao Ban Xing Wei* [Ministry of Culture Launches Special Law Enforcement Activities to Contain Piracy], ZHONGGUO XIN WEN WANG [CHINA NEWS NETWORK], (Nov. 12, 2010), <http://ip.people.com.cn/GB/13194059.html>.

382. Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in China*, 16 UCLA ENT. L. REV. 237, 250 (2009).

383. *Id.* at 251.

384. This is not to say that the 2007 WTO dispute had an appreciable impact on free speech in China. As this Article demonstrates, the Panel's disapproval of Article 4's copyright denial did little to mitigate the Copyright Law's unfortunate effects on freedom of expression. Tomer Broude points out that both the parties and the Panel turned a blind eye to the dispute's human rights implications. Tomer Broude, *It's Easily Done: The China-Intellectual Property Rights Enforcement Dispute and the Freedom of Expression* 14–17 (Hebrew Univ., Int'l Law Research Paper No. 22-09), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492222. As a result, Broude concludes, the decision's effect on free speech in China is "nil or even negative." *Id.* at 15.

public benefit—a vibrant culture and active marketplace of ideas. Private rights are only half of the equation; in the absence of appropriately-calibrated limitations on rights (such as fair use), or in the presence of content-based prerequisites for copyright protection, the “promise of copyright”³⁸⁵ will be left unfulfilled. Likewise, the U.S. must consider China’s rate of enforcement together with its manner of enforcement. Dismantling China’s censorship policies is probably an unrealistic goal, at least in the short-term, but the U.S. may pressure China to disentangle copyright authorities from the larger censorship bureaucracy and to devote independent funding and resources to copyright enforcement. Doing so would allow the U.S. and U.S.-based firms to push for increased enforcement without simultaneously promoting censorship crackdowns.

The legacy of copyright law in the People’s Republic of China underscores the extent to which IP policy is shaped by culture, politics, and historical context. Copyright law’s capacity to promote speech and democratic ideals is not a given. Rather, precisely because copyright constitutes a restriction on expression, Western democracies (which, incidentally, are also the most aggressive proponents of international IP harmonization) must give due regard to the manner in which particular nations understand, legislate, and enforce copyright norms. Fixating on enforcement rates or merely pushing for the legislation of comprehensive copyright laws, while neglecting the concrete relationship between copyright and free speech within a given society, is to regard the Yang while overlooking the Yin.

385. BOYLE, *supra* note 33, at 5.