

The Dissonance between Culture and Intellectual Property in China

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In this scholarly note, Jessica Gisclair explores various complexities of culture and jurisprudence with respect to intellectual property rights in China. This piece provides a useful supplement to Howard H. Cochran Jr. and David J. Moser's suggestions for foreign firms breaking in to the Chinese music market (pp. 159–65).

A Changing China

For centuries, China has been a leading civilization steeped in cultural identity and national perseverance. China has always strived to protect its sovereignty from outside influence. John Gannon, former National Intelligence Council chairman, stated that “the Chinese are acutely aware of their history, intensely proud of their ancient civilization, and sometimes wary of the United States with its global reach and infectious popular culture” (1998, 10). The United States and other Western countries have imposed upon non-Western countries and cultures to use the West as a construct of their own identity. Since the nineteenth century, China has adapted to the modern world; and, as a result, it has changed its perception of self, culture, and cultural identity (He 1995). The rapid expansion of globalization into Chinese society poses a tremendous challenge to China.

During the last quarter century, China has changed from a “centrally planned system that was largely closed to international trade to a more market-oriented economy that has a rapidly growing private sector and is a major player in the global economy” (Central Intelligence Agency 2008, 6). This change has made China the second largest economy in the world after the United States (Central Intelligence Agency 2008, 7). Considering that China, with 1.3 billion inhabitants, represents one-fourth of the world's population, no one should be surprised about its global impact. One measurable impact is China's estimated 162 million Internet users (China Internet Network 2008, 10).

The number of Internet users has led to much attention toward China's inadequate protection of intellectual property rights (IPR). For example, China has been placed on the "Priority Watch List" by the Bush administration's Office of the U.S. Trade Representative (USTR). America has been pressuring China to ensure that "American intellectual property rights are protected, . . . that China's trading regime operates transparently, and that promises to grant trading and distribution rights are implemented fully and on time" (Office of the U.S. Trade 2004, 2). The dispute continues as to what to do about China.

Some argue against the United States pressuring other countries about intellectual property rights. According to Robin Gross (2007), IP Justice executive director, the USTR policy "smacks of imperialism by forcing countries to change their laws and social practices to conform to U.S. interests." Gross asserts that the U.S. policy reflects narrow corporate interests of powerful lobbying groups from the movie, recording, and pharmaceutical industries. Rather than argue for more (or fewer) copyright-protection policies, some advocate the need for all foreign governments to "assure access and use rights to keep a balance between the rights of copyright owners and the rights of users" (Loren 2002, 143).

China has an interest in establishing and maintaining itself as a cooperative global power. However, it faces cultural and intellectual dissonance when it comes to IPR. This commentary examines some of the complexities of culture and jurisprudence in relation to IPR along with recent changes made by China to accommodate demands from foreign countries for protection of IPR. It discusses what is realistic with the jurisprudence of intellectual property in China.

China's Philosophical Underpinning

A country's culture is defined as a "collective programming of the mind which distinguishes the members of one group or category of people from [those of] another" (Hofstede 1991, 5). Chinese culture, in particular, has been defined as a set of relationships defined by Confucian doctrine (He 1995). The primary orientation of Chinese culture is toward mutual reliance, which is based on the *yin* 陰 and *yang* 陽 of Chinese philosophy (He 1995). One distinction is the Confucian notion that all forms of creativity are for the collective; any copying or imitating is a high form of flattery, honoring one's ancestors (Sills 2006). For example, a Confucian scholar is expected to engage in the dissemination of knowledge through teaching while not engaging in the unethical behavior of making a profit. Until recently, little regard was given to the Western idea of intellectual property rights, so China lacked effective laws to stop the practice of copyright violations until the 1990s.

Mutual reliance and sharing for the good of all have been most important for centuries in China, quite unlike the American belief of ownership

of copyright and profit protection for the copyright holder. Since the Chinese Communist Party (CCP) took control of the country in 1949, the Confucian tradition of sharing and copying creative works has been followed (Montgomery and Fitzgerald 2006, 408). Thus, a cultural perspective of Confucian doctrine is reflected today in Chinese intellectual property views among CCP members. According to Lehman (2006, 6), “the dim view of private property taken by communism, as well as its view of intellectuals as workers producing a product for the public good, would not lead one to expect respect for private intellectual property among those educated in communist ideology.” Changes in Chinese thinking about intellectual property will be slow, bogged down by centuries of traditional ethical beliefs and political ideology. In addition, the Chinese Ministry of Culture will have a heavy hand in the outcome of many intellectual property disputes, since it supervises the cultural market and related laws and regulations (Mertha 2005, 15, 122).

However, this situation does not mean foreign companies should wait for Chinese thinking to change; rather, they should be proactive in learning about Chinese culture and the significance of Confucian doctrine. Lehman (2006, 8) states that “the basic problem with enforcing intellectual property rights in China is not legal or based on stages in economic development, but arises from intellectual and cultural dissonance.” The Great Firewall of China may not fare well against the Internet, but as CBSNews.com technology analyst Larry Magid has said, “the question U.S. tech companies have to answer is whether business interests combined with the possible positive effect they might have on openness outweigh the risk of being seen collaborating with an oppressive regime” (*CBS News* 2006). Clive Thompson (2006) writes that those who “live and breathe” Chinese culture can understand Chinese government regulations; but these regulations are bewildering to foreign Internet companies, which lack the intuition of Chinese companies.

China’s Judicial System

China is slowly moving toward the American model of intellectual property (Lehman 2006, 1). Economic reform in China has led the way for new laws that protect copyright in traditional media and in digital format (Lu 2006, 64). However, copyright holders face dilution of their work due to the rapid expansion of Internet users, the unauthorized copying and distribution of copyrighted works, and lax enforcement of existing laws (Feng 2002, 161). “Given the traditional Chinese view that ethics trump law, it is not surprising that importing Western views of intellectual property into Chinese law has little effect on daily behavior,” writes Lehman (2006, 8). Illegal downloads and software piracy are as common in China as is checking the weather online (Thompson 2006).

Although some are hopeful about the efficacy of China's emergent intellectual property laws, "bureaucratic, political and social factors, including corruption, continue to play an important role in the way copyright law is experienced and applied" in China (Montgomery and Fitzgerald 2006, 412). A case on point is the Chinese government's announcement that it will train government officials in ethics in an effort to curtail corruption, "improve the supervisory system, strengthen the oversight of the use of power and cooperate more with international anti-graft programs" (*Financial Times* 2007).

Contrary to popular belief, since the early 1990s, China has been moving from a state-controlled system to a rule-of-law system and, in the process, has begun reforming many areas of IPR law, including copyright. Chua (2006, 137) explains that some of the areas include improving the qualifications of judges, introducing a limited form of discovery, and enforcing judgments more systematically. Yet China is burdened with ineffective management and enforcement of copyright law due to personnel and budgetary shortages—and due to other powerful bureaucracies that often pursue different priorities (Mertha 2005, 119). Since its accession to the World Trade Organization in 2001, China has become a member of the Agreement on Trade-Related Aspects of Intellectual Property (TRIP) group. TRIP requires signatories to adopt minimum standards of protection for intellectual property rights (Sills 2006, 6). China also belongs to international conventions concerning intellectual property, such as the Berne Convention for the Protection of Literary and Artistic Works and the Geneva Phonograms Convention. Despite these and other agreements, China fails to correct inconsistencies within its IPR laws, fails to provide transparency of legal decisions, and fails to enforce penalties (Sills 2006, 7). In response to this criticism and foreign government pressures, the Chinese Supreme People's Court has extended penalties for music and movie piracy and has ordered lower courts to begin hearing piracy cases filed by companies and individual citizens (*Associated Press* 2007).

Chinese laws are slowly moving to meet the demands of the international community concerning intellectual property. In China, there is no stigma attached to taking any amount of intellectual content. In fact, Baidu, a Chinese search engine, specifically designed an interface to assist with illegal downloads (Thompson 2006). Until China has its own body of intellectual property that needs protection, it will not move quickly to make substantial changes in its present laws. According to Mertha (2005, 118–19), part of the problem is that "China's first copyright law was shaped by foreign pressure, with the result that foreigners enjoy[ed] greater legal protection under China's Copyright Law than China's own citizens." But, as Chinese enterprises develop their own intellectual property and seek protection, that trend is changing (Chua 2006, 155).

Despite these concerns and philosophical differences, Western businesses are drawn to China's Internet potential because of "growing prosperity, technological advances and a more liberal attitude by the Chinese authorities [which] means the Internet is becoming an easier and more popular place to do business" (Stamp 2005). As an outcome of the delay in legal reform, many foreign-based businesses are relying on alternative methods to avoid copyright violations and to resolve disputes. It is not uncommon to have one high-tech company rat out the competition in the hopes that the competitor will suffer consequences for its violations (Thompson 2006). Other companies, such as Phillips (the Dutch electronic company), focus on educating consumers about how to detect pirated goods (Sills 2006, 7). Creative industries are adopting a Creative Commons license approach that would allow a copyright owner to distribute material online for the world to share, access, and reutilize without fear of prosecution for infringement (Montgomery 2006, 415). Companies like Adobe have developed tracking devices to find counterfeit products on the Internet and relay that information to the authorities for prosecution (Sills 2006, 13). The music industry uses digital rights management systems to protect against unauthorized access and copying (Loren 2002, 134). Finally, the U.S. government has taken a stronger stance against China's copyright piracy. According to U.S. Trade Representative Susan Schwab, in 2007 the United States filed two copyright piracy cases against China with the World Trade Organization (Crutsinger 2007).

Keys to Future Change in China's Intellectual Property Laws

"Whereas Americans tend to think in terms of years or decades, the Chinese think in terms of centuries and dynasties. It is an important distinction," remarked Gannon (1998, 10). Today, with much exposure to outside influence, Chinese cultural identity and national perseverance has been significantly transformed (He 1995). China's laws concerning intellectual property are changing, but it will take some time to see any significant improvements. First, foreign pressure may result in changes in China's intellectual property law, but it will not ensure efficiency or enforcement. Those issues are deeply rooted in China's judicial and bureaucratic structure. Second, the judicial system is not the only interpreter of the laws in China. The Chinese Ministry of Culture will have a heavy hand in the outcome of many legal disputes. Third, not everyone in the world believes protecting intellectual property rights is in the best interests of all. Some Western and Eastern countries see intellectual property rights as an infringement on expression, a threat to critiques, and an obstacle to learning. Fourth, foreign governments must keep the pressure on China to conform to internationally acceptable standards of copyright laws. None of these suggestions is easy for developing countries that lack infrastructure, financing, and political stability or government support; but all are necessary if China and others intend to be cooperative,

global leaders in the digital world. What is realistic is that changes in intellectual property rights in China will take more time.

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