THE CAT AND MOUSE GAME IN CHINA: RETHINKING INSTITUTIONS, PARTICIPATION AND PROCESSES

Peter K. Yu[*]

In the late 1980s and early 1990s, the United States lost about $2 billion of revenues annually due to rampant piracy in China. To protect its businesses, the U.S. government adopted a coercive policy, threatening China repeatedly with economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China's entry into the World Trade Organization.

As a result of these "external pushes," the Chinese government established a new intellectual property regime and the institutional infrastructure needed to protect and enforce intellectual property rights. The Chinese people also acquired a better understanding and heightened awareness of intellectual property rights. Intellectual property began to appear at the forefront of the U.S.-China bilateral trade agenda, and the Chinese leaders had a growing interest in implementing intellectual property law reforms.

Since the mid-1990s, the Chinese authorities have been playing a cat and mouse game with pirates and counterfeiters in China. From time to time, the Chinese authorities have launched large-scale crackdowns on pirated and counterfeit products. For example, the Chinese government launched an anti-counterfeiting campaign in November 2000 and followed it up a few months later with a major crackdown on counterfeit products that pose health and safety risks, such as food, drugs, medical supplies, and agricultural products. In 2002, the Chinese government initiated a new anti-counterfeiting and anti-piracy campaign, which in turn resulted in high numbers of seizures of infringing products. In addition, the Chinese leaders, through speeches and position papers, emphasize the importance of intellectual property as an economic strategy. There also appeared books, television talk shows, media articles, and government and academic reports highlighting the importance of intellectual property protection to China's economic development.

Notwithstanding these efforts, significant problems still exist with enforcement of intellectual property laws, especially at the grassroots level and in rural areas. These problems were further exacerbated by other institutional problems, such as local protectionism and

corruption, reluctance or inability of enforcement officials to impose deterrent level penalties, a low number of criminal prosecutions, and ambiguous statutes and complicated administrative procedures.

Even worse, with the proliferation of peer-to-peer file-sharing networks, the cat and mouse game has become even more difficult to play. Traditionally, piracy and counterfeiting were committed by business people who were motivated by profits and who monitored the market for business opportunities. Very often, piracy and counterfeiting were linked to organized crimes. These days, however, a new brand of pirates has emerged. These newly emerged pirates neither have affiliation with organized crimes nor work in piracy factories. Rather, they sit at home downloading movies and swapping music via peer-to-peer file-sharing networks.

When commentators analyzed China's piracy and counterfeiting problems, they always attributed these problems to the Confucian underpinnings of the Chinese culture. According to these commentators, cultural difference is the *primary* cause of extensive piracy and counterfeiting in China, and intellectual property problems can be seen largely as a cultural phenomenon. Such characterization is misleading and dangerous. It not only confuses the public as to the cause and extent of the problem, but also misleads policymakers into finding solutions that fail to attack the crux of the piracy and counterfeiting problems.

Communitarian philosophy is not unique to the Chinese. It is found in civilizations around the world. Thus, it would be just as misleading to argue that extensive copyright piracy occurs in China by virtue of its cultural roots as to argue that extensive mp3 piracy occurs in Western societies because of the communitarian underpinnings in Judeo-Christian teachings.

Undeniably, cultural barriers might make it difficult for intellectual property laws to emerge or to develop. A culture-based analysis also might provide insight into a community of which the public have limited understanding. However, a different, or even pro-copying, culture does not necessarily result in extensive intellectual property piracy and counterfeiting. As Professor William Alford pointed out in his seminal work, *To Steal a Book Is an Elegant Offense*, the Confucian culture militated against copyright protection in so far as it did not allow intellectual property protection to take root by itself. This non-Western culture, however, had not prevented intellectual property protection from functioning in Chinese society once it was introduced—in this case by the United States. Indeed, there is strong compatibility between intellectual property rights and Confucianism, just as there is between Western human rights and Confucianism.

Piracy and counterfeiting are not unique to the Chinese people. Many developing countries, including those newly emerged industrialized countries (such as Singapore and South Korea), have experienced extensive piracy and counterfeiting before they implemented intellectual property law reforms. Nevertheless, some countries were more successful than others in transforming themselves into intellectual property stakeholders.

Consider, for example, Singapore, which introduced a modern copyright law in the late 1980s. As a result of this new law, local recording artists and studios discovered opportunities that were not available before, and copyright holders overseas became more willing to license

products to Singaporean video dealers. In the first year of protection, sales of records and cassettes in the country almost doubled, and local infringers quickly switched to profitable production of blank cassettes and cassette parts. Music companies noticed the enormous business potential and were willing to spend more on promoting singers. They entered into long-term arrangements with local artists and invested in training local studio engineers (as compared to importing them from abroad).

South Korea had a similar experience. In 1987, the country adopted modern patent and copyright laws. As a result of the new patent law, there was a sharp increase in the number of patent applications filed by domestic inventors. Many Korean scientists who worked abroad also returned home, as they found more remunerative research careers and a more satisfying research environment in their home country.

Today, most less developed countries understand the benefits of intellectual property protection. Unlike what they did in the past, they no longer see intellectual property rights as "Trojan horses" that the West and the North designed to protect their dominant position or exploitative devices that drain their resources and slow down their economies and catch-up processes. Rather, many less developed countries consider intellectual property rights as tools to promote modernization and economic development, attract foreign investment, and create new jobs. They also understand how a strong, robust, and dynamic intellectual property system would facilitate transfer of knowledge and technology, promote indigenous authorship and creation, and generate considerable tax revenues for the country.

To understand why some countries made the transition more quickly than the others, one must notice and recognize the enormous "divide" between stakeholders and nonstakerholders in an intellectual property regime. Obviously, the stakeholders are eager to protect what they have, while the nonstakeholders are eager to enlarge their share and become stakeholders. However, not everybody steals or uses other illegal means to enlarge his or her share. Most people do so only when they do not understand the law or when they do not believe in the system—for example, when they perceive the system as grossly unfair.

To help bridge the "intellectual property divide," this Paper proposes four areas on which policymakers—be they government leaders, intergovernmental agencies, or industry executives—can focus their remedial efforts:

1. *Educating the Local People*. Policymakers must educate the nonstakeholders about the intellectual property system. They need to make the nonstakeholders understand what intellectual property is, how it is protected, and why they need to protect such property. Policymakers also need to show the nonstakeholders the benefits of intellectual property protection—how such protection can help them and how the lack thereof can hurt them.

2. *Creating Stakeholders*. Policymakers need to help local people develop a stake in the system and understand how they can protect their products and receive royalties. For example, they need to help the nonstakeholders develop a local pharmaceutical industry, or a record industry. By doing so, they will be able to transform the nonstakeholders into stakeholders or potential stakeholders.

3. *Strengthening Enforcement Mechanisms*. Policymakers must help develop intellectual property laws and strengthen enforcement mechanisms. Today, most countries have intellectual property laws that comply with international standards. However, very few of these countries provide strong enforcement of intellectual property laws. Thus, policymakers need to work with their counterparts in these countries to strengthen intellectual property laws and develop effective enforcement mechanisms.

4. *Developing Honest Alternatives*. Policymakers, in particular those in the intellectual property industries, must help develop honest alternatives if products are needed, yet unaffordable, by the local people. For example, many movie studios have released bargain-priced audiovisual products dubbed in the local language or with added foreign-language subtitles. On the one hand, these bargain products provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the original products in the local language or including subtitles, the studios successfully make the discounted products unappealing to consumers in the English-speaking world. This strategy therefore successfully prevents the bargain products from entering the country as parallel imports.

Intellectual property piracy and counterfeiting is a major transnational problem today. With the advent of the Internet and the development of new communications technologies, the problem can only get worse. In fact, because of these new technologies, countries that traditionally have strong intellectual property protection are experiencing serious piracy and counterfeiting problems. A case in point is the substantial mp3 piracy committed within the United States in recent years. Such piracy not only forced U.S. copyright holders to play a cat and mouse game similar to the one the Chinese authorities are currently playing, but also demonstrates the futility of the cat and mouse game in China.

In April 2003, the recording industry filed high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute, seeking billions of dollars in damages. A few months later, it followed up with 261 lawsuits against individuals who downloaded and distributed music illegally via peer-to-peer file-sharing networks, such as KaZaA, Grokster, iMesh, and Gnutella.

The recording industry's action is understandable. After all, global CD sales have dropped by nine per cent in 2002. As the International Federation of the Phonographic Industry (IFPI) pointed out recently, music piracy had threatened 600,000 jobs in the European music industry. Unfortunately, the strategy used by the Recording Industry Association of America (RIAA) is ill-advised, hurried, disorganized, costly, and ultimately ineffective. Even worse, it has raised major concerns among legal commentators, consumer advocates, and civil libertarians and threatens to backfire on the constituents the trade group is charged to protect—record companies, musicians, artists, songwriters, and retailers.

Instead of coercing pirates into submission, the industry's lawsuits likely will drive the pirates underground. There already exist plenty of technologies that enable users to cover their identity. Freenet provides a good example. Through this technology, requests to download a file are encrypted and passed from one computer to another in a way that makes it very difficult for others to determine who wants the file and where they got it. As a result, no one knows what files are on a given machine, and Freenet users remain anonymous.

To some extent, the RIAA's recent efforts resemble the ineffective tactics used by the Chinese government to control the dissemination of unwanted information over the Internet. There is no doubt that the Chinese authorities have created a significant deterrent by cracking down repeatedly on cyber cafés, handing out heavy jail sentences to online dissidents, and implementing new and restrictive laws and regulations. However, the heavy-handed tactics used by the Chinese authorities also heightened the cautiousness and sophistication of Chinese netizens. As a result of the ill-advised tactics, anti-monitoring technologies proliferated, and Chinese users increasingly rely on proxy servers, offshore Web sites, and encrypted peer-to-peer file sharing systems to avoid detection.

If piracy were to be eradicated—in China or elsewhere—the cat must be smarter than the mouse. Chasing alone might not be the best and most efficient method. After all, the mouse always plays when the cat goes away.

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