

CAUSES OF PIRACY AND COUNTERFEITING IN CHINA

By Peter K. Yu

Introduction

Every year, the United States was estimated to have suffered from billions of dollars of trade losses due to piracy and counterfeiting in China. While the Chinese undeniably have taken a free ride on the creative efforts of Western authors and inventors, greed alone does not explain the massive piracy and counterfeiting problems in the country. Instead, one needs to develop a better understanding of the Confucian beliefs ingrained in the Chinese culture, the country's socialist economic system, the leader's skepticism toward Western institutions, the xenophobic and nationalist sentiments of the Chinese populace, the government's censorship and information control policy, and the significantly different Chinese legal culture and judicial system.

Confucianism and Cultural Practices

For more than two thousand years, Confucianism had heavily influenced the Chinese, who considered the past not only as a reflection of contemporary society, but also as the embodiment of cultural and social values. By encountering the past, one could understand the "Way of Heaven," obtain guidance to future behavior, and find out the ultimate meaning of human existence. One also could transform oneself and build moral character through self-cultivation. Because intellectual property rights allow a significant few to monopolize important materials about the past, they prevent the vast majority from understanding their life, culture, and society and are therefore contradictory to traditional Chinese moral standards.

Unlike today's Westerners, the Chinese in the imperial past did not consider copying or imitation a moral offense. Rather, they considered it "a noble art," a "time-honored learning process" through which people manifested respect for their ancestors. At a very young age, Chinese children were taught to memorize and copy the classics and histories. As they grew up, they became by training compilers, as compared to composers, and the classics and histories generally constituted their universal language. Although the practice of unacknowledged quotation is likely to be considered plagiarism today, such a practice was an acceptable, legitimate, or even necessary, component of the creative process in the imperial past. Indeed, early Chinese writers saw themselves more as preservers of historical record and cultural heritage than as creators. Even Confucius proudly acknowledged in the *Analects* that he had "transmitted what was taught to [him] without making up anything of [his] own."

Finally, under the Confucian vision of civilization, the family constituted the basic unit of human community, and the world was an outgrowth of that basic unit. Because the Chinese emphasized familial values and collective rights, they did not develop a concept of individual rights. Nor did they regard creativity as individual property. Instead, they considered creativity as a collective benefit to their community and the posterity. If that was not enough, the Confucianists had a strong disdain for commerce and greatly despised the creation of works for sheer profit. It is therefore no surprise that merchants (*shang*) were considered the lowest among the four social classes in a traditional Chinese society, behind scholar-official (*shih*), farmer (*nung*), and artisan (*kung*).

Socialist Economic System

While the Communist government did not emphasize Confucianism until very recently, its view on the function of creative works was similar to that of the Confucianists. Under the socialist economic system, property belonged to the State and the people, rather than private owners. Authors thus created literary and artistic works for the welfare of the State, rather than for the purpose of generating economic benefits for themselves. Indeed, as Susan Tiefenbrun pointed out, “owning property [in a socialist society was] tantamount to a sin. Thus, stealing an object that [wa]s owned by someone else [wa]s less corrupt than owning it outright yourself.”

This aversion of private property was particularly strengthened by the numerous mass campaigns and endless class struggles that took place during the Mao era. During the Cultural Revolution, the government heavily criticized scientists, writers, artists, lawyers, and intellectuals and routinely condemned them to harsh prison terms. Fearing political repercussions, many Chinese became reluctant to acknowledge their roles in creative and inventive activities. Instead, they used pseudonyms and put pure and non-identifying labels, such as “Red Flag,” “East Wind,” and “Worker-Peasant-Soldier,” on their products.

Even worse, many Chinese had developed a contempt for authorship and remuneration from creative efforts. As one comrade would query during the Cultural Revolution, “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?” Even though Deng Xiaoping and other reformist leaders tried to rehabilitate the intelligentsia after the Cultural Revolution by enhancing their positions and facilitating their endeavors, these reforms have yet to cultivate sufficient respect for intellectual property rights.

Self-strengthening Worldview

During the nineteenth and twentieth centuries, China was constantly attacked by Western imperialist powers. The first major attack came in the early 1840s, when Britain defeated China in the Opium War. Since then, China experienced repeat attacks and was forced to sign unequal treaties giving out significant economic and territorial concessions. Such submission eventually led to the “Scramble for Concessions” in 1898, in which foreign imperialist powers reduced China to a semi-colonial state by carving it “into leased territories and spheres of interest.” Desperate to save the country, the Chinese adopted a self-strengthening worldview, under which attaining independence and liberating the nation became the country’s first priority.

This worldview persisted despite the establishment of the People’s Republic of China in 1949. The Communist Chinese therefore believed it was right to freely reproduce or to tolerate the unauthorized reproduction of foreign works that would help strengthen the country. Some of them also believed that copying was needed, or even necessary, for China to catch up with Western developed countries. Thus, in the 1980s, Chinese bookstores often contained “special” rooms selling pirated works from Western publishers. One could also find in *Reference News* (*Cankao Xiaoxi*) translated excerpts from foreign news materials published abroad. As James Cox noted, some Chinese had even referred to pirated computer programs “as ‘patriotic software,’ out of a belief that it speed[ed] the nation’s modernization at little or no cost.”

Xenophobia and Nationalism

Although xenophobia and nationalism were initially a reaction to the humiliation China suffered under imperialist attacks, Mao and other leaders had used those sentiments “to mobilize domestic resources to catch up with advanced Western powers and prevent China’s further victimization.” As Immanuel Hsü pointed out, these leaders, keenly aware of China’s misfortunes in the nineteenth and twentieth centuries, had “a burning desire to restore China’s rightful position under the sun, to achieve the big power status denied it since the Opium War, and to revive the national confidence and self-respect that had lost during a century of foreign humiliation.”

When Deng Xiaoping returned to power in the late 1970s, he adopted a more pragmatic approach. Instead of putting “politics in command” and emphasizing national unity, Deng saw economic wealth as the foundation of China’s power and believed that “national unity depended on whether China could catch up with the developed countries.” Thus, he and other reformist leaders vigorously pushed for the Four Modernizations, the establishment of Special Economic Zones, and the renewal of diplomatic and commercial ties with the United States, Japan, and other Western countries.

With Deng’s death in 1997, some commentators suggested that there might be a resurgence of xenophobic and nationalist sentiments. Evidence cited included the publication in the mid-1990s of bestselling books like *China Can Say No* and *Behind a Demonized China*, the Chinese reaction to the United States’ bombing of their embassy in Belgrade in 1999, and China’s standoff with the United States over the collision of its jet fighter and a U.S. reconnaissance plane in 2001. If these commentators are right, these sentiments eventually may result in what Julia Chang Bloch described as “day-to-day bureaucratic actions that hold back, divert, or delay action on [foreign] companies’ permits, applications, and bids.” The heightened sentiments may also lead to harassment of foreign businesses, the general belief that equates “screwing foreigners” with patriotism, or even boycotts of foreign products and services.

Censorship and Information Control Policy

Since the establishment of the People’s Republic of China, the Communist government has exercised very strict control over the dissemination of information and the distribution of media products. The logic behind such control is that media, as an instrument of political indoctrination and mass mobilization, not only has the ability to create an atmosphere conducive to political development, but also can help mobilize the masses and foster political struggle. Thus, information control and content regulations are needed to ward off those politically sensitive materials that would destabilize the country and the Communist regime.

Today, the media business and the publishing industry remain the most heavily regulated industries in China. While only about twenty foreign motion pictures are approved annually for distribution within China, Chinese authorities continue to place heavy restriction on imported books and audiovisual products. Because many media products are unavailable on the Chinese market despite being in great demand, consumers have no choice but to settle for black market products or pirated goods, which are often inferior to, and are sometimes indistinguishable from, the genuine products. As time passes, the Chinese market becomes saturated with infringing

substitutes, and foreign manufacturers and distributors have great difficulty in capturing the market even when it is finally open.

Laws with Chinese Characteristics

Throughout history, the Chinese have an entrenched tradition of regarding laws as an inefficient, arbitrary, and cumbersome instrument for governance. As Confucius explained in the *Analects*: “Govern the people by regulations, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord.”

Under the Confucian tradition, the Chinese lived by the concept of *li* (rites), rather than the concept of *fa* (law). While *li* covered a whole range of political, social, and familial relationships that encompassed a harmonious Confucian society, *fa* represented penal laws that were associated with punishment and the maintenance of public order. Because people guided by *li* always understood their normative roles, responsibilities, and obligations to others, litigation and promotion of individual rights were unnecessary in a traditional Chinese society. Without coercion, people would adjust their views and demands to accommodate other people’s needs and desires, to avoid confrontation and conflict, and to preserve harmony. The Chinese therefore considered *fa* or laws only as the last resort.

During the Mao era, formal laws were further denounced as “inherently bureaucratic, hampered by legislative formalities and fed on professional interests, slow to come, rigid in procedure, prone to ramifying into technical details and yet unable to cover all the circumstances of the ever-changing social relationships.” As one commentator noted, “[t]hroughout the Cultural Revolution and until Mao’s death in 1976, law was simply a mechanism for implementing Party policy, interpreted and reinterpreted to reflect the direction of the prevailing political winds.”

Even today, laws are still considered a “concrete formulation of the Party’s policy.” As Peter Feng explained, because laws are only “a summary of practical administrative and judicial experience,” they do not “constitute a detailed, comprehensive and self-containing rule system, justifiable on ideological as well as jurisprudential grounds, with coherent principles and well-defined concepts.” At times, they are “incomplete, incoherent, ideologically compromising, as well as broadly and vaguely termed pending further administrative and judicial experience in its implementation.”

Moreover, Chinese laws are intended to be flexible, can be formulated “on an interim or trial use basis,” and are likely to fall behind policies given the rapid social and economic changes. Statutory provisions that are effective in one year therefore may be outdated in the following year had a new policy or a new law been implemented in the relevant or related areas. In addition, as Professor Feng reminded us, Chinese laws “are generally broadly drafted, leaving the detailed rules to be provided by the relevant administrations under the State Council.” Thus, “it is often the detailed administrative implementing rules that provide the concrete information about the definition, limits, and practical implication of legal rights established in the laws.”

Conclusion

In December 2001, China was formally admitted to the World Trade Organization, following fifteen years of exhaustive negotiations. Although the Chinese economy has grown rapidly in the past few decades and there were considerable improvements in intellectual property protection since the WTO accession, piracy and counterfeiting remain rampant. A better understanding of the causes of piracy and counterfeiting in China is therefore badly needed. This Essay not only explains why it is difficult to convert China from a pirating nation to one that is respectful of intellectual property rights, but also offers clues on how to increase the protection of intellectual property rights while taking into account the country's historical, political, social, economic, and cultural conditions.

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