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Sailing Toward a Truly Globalized World: WTO, Media Piracy in China, and Transnational Capital Flows

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I. INTRODUCTION: THE EXPANDING METAPHOR

“You ask me where I am going?

I point to the big big sea.”¹

The Founding Fathers of the Constitution understood American law to include piracy and “felonies committed on the high seas.”² A federal court described piracy as a universal crime such that “all nations [have] surrendered their subjects [if found to be pirates] to the punishment which any government might inflict upon them.”³ By the mid-1800s, the Supreme Court of the United States termed the pirate “hostis humani generis,” or the foe of mankind.⁴ Concerns over piracy at the 1787 Constitutional Convention at Philadelphia led to the inclusion in Article I, Section 8 of the Constitution; the power for Congress to define and punish piracy.⁵ Since that time, Congress has passed a host of statutes that impose sanctions on piracy.⁶

In the late twentieth century, the term “piracy” grew to include the

¹ CUI JIAN, *Flower Room Girl, on ROCK ‘N’ ROLL ON THE NEW LONG MARCH* (1989). This paper opens with this lyrical citation because the sea is a cross-cultural symbol of life and vitality. The image of the sea evoked by Cui’s lyric also anticipates the expanding sea of media with which this paper will end.

² Timothy H. Goodman, “*Leaving the Corsair’s Name to Other Times*”: *How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements*, 31 CASE W. RES. J. INT’L L. 139, 146 (1999).

³ U.S. v. Chapels, 25 F. Cas. 399, 403 (C.C.D. Va. 1819).

⁴ *Harmony v. U.S.*, 43 U.S. 210, 232 (1844).

⁵ U.S. CONST. art. I, § 8, cl. 10. (“The Congress shall have Power ... [[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”).

⁶ Goodman, *supra* note 2, at 146-150.

unauthorized duplication of original commercial products, such as film, music, and computer software.⁷ Over the past ten years, the term has been used by the Recording Industry Association of America to cover a much more expansive array of activities, such as downloading copyrighted work from the Internet, and this growing use of the metaphor mirrors the expanding power of copyright owners.⁸ The expansion of the piracy metaphor is warranted.⁹ Developments in digital technology, while facilitating the growth of a global informational economy, have provided piracy networks with the necessary environment to thrive and prosper.¹⁰ High-speed information networks have enabled the trafficking of media products, both legal and illegal, across borders with unprecedented ease and velocity.¹¹ As a result, activities such as downloading a music file or sharing videos with others now carry the same label of illegality.¹² “Piracy” as an ever-expanding metaphor suggests that these acts are contemporaneously equivalent to crossing the high seas, invading a ship, stealing its treasures, and threatening life.¹³

Piracy on the Internet might trouble copyright holders and artists as much as piracy at sea has haunted the international shipping community.¹⁴ Nevertheless, because of the inherent differences between intellectual property and the kinds of articles taken on the high seas, such as currency or personal property, the expansion of the “piracy” metaphor does not easily carry over to actual laws governing the piracy of copyrighted products.¹⁵ While property concepts hinge on the stability of real commodities, intellectual property attaches itself to evanescent ideas and inventions and involves protecting an intangible, unstable and easily transferable good.¹⁶ A host of limits concerning the access and use of intellectual property serve to complicate intellectual property rights, depending upon the type of intellectual property and

⁷ See Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 263 (2005).

⁸ Sonia K. Katyal, *Filtering, Piracy Surveillance and Disobedience*, 32 COLUM. J.L. & ARTS 401, 412 (2009).

⁹ See SHUJEN WANG, *FRAMING PIRACY: GLOBALIZATION AND FILM DISTRIBUTION* 74 (Rowman & Littlefield 2003).

¹⁰ *Id.*

¹¹ *Id.*

¹² See Katyal, *supra* note 8, at 412

¹³ *Id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ *Id.*

the identity of the interested party.¹⁷ While intellectual property, like physical property, deserves protection, it might be too much to label pirates of copyrighted works the “foe[s] of mankind.”¹⁸

This paper argues that strict enforcement of American-style copyright law in China is bound to be both oppressive and ineffective and that the proposed voluntary collective licensing scheme will reconcile the interests of the United States and China. Part II outlines the development of American copyright law to explain how its various revisions over the past century have formed an oppressive monopoly that privileges the rights of the copyright owner at the expense of public users. It also explores how, even if American copyright law is not oppressive, the 1998 Digital Millennium Copyright Act (“DMCA”) has created an oppressive monopoly by its various provisions that violate the public’s constitutional rights.

Part III studies how the United States has tried to enforce its copyright law in China, along with other member nations of the World Trade Organization (“WTO”), through the Agreement on the Trade Aspects of Intellectual Property Rights (“TRIPS”). It also describes how the United States imposed a DMCA-style Internet copyright law on Chinese soil. American scholars have largely ignored the controversy surrounding American copyright law in their fervent advocacy for enforcing American-style copyright law in China. Owing to their misinformed views of Chinese culture, they have also failed to comprehend the fundamental reasons for China’s piracy problem and why the enforcement of American-style copyright law there has been ineffective. Namely, most have failed to recognize how China’s censorship of film and media, the generally weak buying power of the Chinese people, and a globalizing economy that facilitates the piracy industry have contributed to the problem. This paper thus goes beyond strict enforcement by proposing a voluntary collective licensing scheme, which would serve to reconcile the interests of American media industries and the Chinese public. It also explains why the advantages inherent in this scheme will be accentuated in China, while its shortcomings will be minimized.

Part IV provides further justification for implementing the voluntary collective licensing scheme in China. By focusing on the piracy of the Hollywood blockbuster *BROKEBACK MOUNTAIN*, pop idol Michael Jackson’s music, and many Western romantic comedies, it illuminates how the piracy industry has, quite unexpectedly,

¹⁷ *Id.*

¹⁸ *See id.*

contributed to the flow of capital from China back to the United States. While such capital flows have by no means made up for the losses suffered by media companies due to piracy, they offer good indicators that the licensing system, if implemented correctly, will not only reconcile the interests of the two nations, but also facilitate the flow of capital back to the United States. As a result, such a system will benefit the economies and cultural developments of both nations. In place of an ever-expanding metaphor of piracy, which defies common sense and supports copyright law that oppresses the Chinese public, this approach supports an ever-expanding sea of media, a source of cultural inspiration and economic opportunities for both nations.

II. COPYRIGHT LAW'S OPPRESSIVE MONOPOLY: FROM COPYRIGHT ACT REVISIONS TO THE DMCA

While the public has tended to presuppose that authors have a kind of natural property claim to their creative productions,¹⁹ the Constitution describes copyright as a statutory creation, the primary purpose of which is not so much to reward the labor of authors, as “[t]o promote the Progress of Science and Useful Arts”²⁰ Nevertheless, the historical development of copyright law, which led to the enactment of the DMCA, expanded copyright owner protections and rewarded large corporations at the expense of the general public. Given that the ultimate policy behind the Copyright Clause of the United States Constitution is public benefit, the logic behind a copyright statute that privileges the interests of the authors, their heirs, and/or major corporations over those of the public remains disputable.²¹

A. *Historical Development of Copyright Law in the United States*

The Copyright Act of 1790, which President George Washington signed into law in May of that year, applied only to books, maps, charts, and other original materials and offered a protection of fourteen

¹⁹ Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 24 (2002); see, e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1469 (1989).

²⁰ U.S. CONST. art. I, § 8, cl. 8; Rubenfeld, *supra* note 19; see, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994); *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

²¹ See Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547, 586 (2009).

years with an optional right of renewal by the author for another fourteen years.²² Congress next approved the Copyright Act of 1831, which covered not only books but also “music and cuts,” extended the initial term of coverage to twenty-eight years and gave the author the right to renew his copyright for another fourteen years.²³

The subsequent revisions of the Copyright Act saw a continuous expansion of the copyright owner’s power, until it arguably exceeded the “limited time” provision in the Constitution.²⁴ The 1909 revision significantly broadened the scope of the Copyright Act to include all works of authorship, as opposed to material that had been published or printed, and extended the time of protection to twenty-eight years with a right of renewal for another twenty-eight years.²⁵ The 1976 revision automatically took creative works out of the public domain at their creation and extended the term of protection to the life of the author plus fifty years.²⁶ The Copyright Renewal Act of 1992 amended the 1976 Act by automatically renewing copyrighted works, further delaying their entry into the public domain.²⁷ The Sonny Bono Copyright Term Extension Act of 1998 extended protection for most works to the life of the author plus another seventy years.²⁸ While such an extension arguably encourages the creation of novel works and thereby promotes the public good it also tends to reward the heirs of the authors and/or large corporations at the expense of the consumers. One might even argue that current copyright law encourages the formation of oppressive monopolies because the extension of copyright protection, which might not actually offer extra incentives for creative endeavors, has prevented the public from appropriating copyrighted products.²⁹

B. *DMCA, Constitutionality, and Piracy/Privacy*

Even if the revisions of American copyright law, as described above, did not make the law oppressive, the 1998 Digital Millennium Copyright Act (DMCA), by its various provisions that violate the public’s constitutional rights, does create an oppressive monopoly.

²² *Id.* at 563.

²³ *Id.*

²⁴ *See id.* at 568.

²⁵ *Id.* at 564.

²⁶ *Id.* at 564-65.

²⁷ *Id.*

²⁸ *Id.* at 565-66.

²⁹ *See id.* at 568.

The DMCA, adopted in 1998, was Congress' answer to the prevailing concern that copyright holders and creators would stop producing music for fear that their product could be easily pirated on the Internet and to the fear of technological innovators that they would be sued for the conduct of their users.³⁰ In a new section, "Limitations on liability relating to material online," in chapter five of the Copyright Act, the DMCA contains a number of safe harbors that limit the infringement liability of Internet service providers that play a key but essentially passive role in the transmission, reproduction, and storage of illegal files online.³¹ At the same time, it authorizes copyright owners to troll and investigate websites, peer-to-peer networks, and other forms of plural networks to detect piracy. Moreover, the new section provides Internet service providers with a swift mechanism for dealing with suspected infringement.³²

The DMCA's subpoena clause in section 512(h), which empowers the copyright owner to compel a service provider to divulge the personal information of an infringing customer, has raised significant privacy concerns.³³ Scholars contend that such expedited disclosure that does not require judicial review violates the Due Process Clause of the Fifth Amendment, because it allows a pre-judgment seizure of confidential business property.³⁴ Scholars assert that the subpoena clause also violates the Fourth Amendment, because it allows a private party, without any substantial and particular evidentiary support, to conduct a search and seizure of the subpoenaed party's information, thus violating their right to privacy.³⁵ Scholars believe that, by requesting information that discloses the customer's identity, the

³⁰ Jordana Boag, *The Battle of Piracy versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act (DMCA) as Its Weapon Against Internet Users' Privacy Rights*, 41 CAL. W.L. REV. 241, 245-46 (2004).

³¹ 17 U.S.C. § 512 (2010); Lisa Peets & Mark Young, *Internet Piracy 10 Years On: Online Enforcement and the DMCA*, 1 No. 4 LANDSLIDE 40, 40 (2009).

³² E.g., Katyal, *supra* note 8, at 405.

³³ 17 U.S.C. § 512(h) (2010); see, e.g., Boag, *supra* note 30, at 242-43, 247; Matthew Amedeo, *Shifting the Burden: The Unconstitutionality of Section 512(h) of the Digital Millennium Copyright Act and Its Impact on Internet Service Providers*, 11 COMMLAW CONSPICUOUS 311, 315 (2003). Section 512(h) states that a copyright owner or a person authorized to act on the owner's behalf may request the clerk of any U.S. District Court to issue a subpoena to an ISP for identification of an alleged infringer. 17 U.S.C. § 512(h) (2010). 512(h)(5) further provides that upon receipt of the issued subpoena, the ISP shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required. *Id.*

³⁴ E.g., Amedeo, *supra* note 33, 317-20.

³⁵ E.g., *id.* at 320-22.

subpoena clause further strips users of their online anonymity and violates their First Amendment right to free speech.³⁶

Scholars go further to argue that the DMCA's anti-circumvention provision under section 1201, which prohibits tools that circumvent access to copyrighted works,³⁷ also raises legitimate First Amendment concerns.³⁸ Assuming that computer code and programs are "free speech," the provision not only hinders the provider's right to convey and the receiver's right to access information and ideas,³⁹ but also prohibits creative expression through the development of certain software that has both expressive and useful purposes.⁴⁰ Scholars contend that the provision is also unconstitutionally vague, because a reasonable computer programmer cannot look at the Act to decide precisely what falls within its scope.⁴¹ Moreover, scholars contend that the Act is substantially overbroad, because it could penalize non-infringing actions, such as the use of these technologies for purposes other than accessing protected works, along with infringing ones.⁴² The provision not only fails to be the least restrictive approach narrowly tailored to combat piracy, it is also rather useless, because skilled individuals usually possess the technological know-how to circumvent an anti-circumvention device without using circumvention programs available over the Internet, which would make their illegal conduct difficult to trace and proscribe.⁴³

III. CHINA, WTO, AND COPYRIGHT: TOWARD A STRATEGIC LEGAL TRANSPLANT

Piracy of films and music has a long history in China. Originally, film piracy occurred by using a hand-held video camera to record the film directly from the screen or by traditional duplication, distribution

³⁶ *E.g., id.* at 322.

³⁷ 17 U.S.C. § 1201 (2010); *see also* Norvell, *supra* note 21. Section 1201(a)(1) states that no person shall circumvent a technological measure that effectively controls access to a work protected under this title. 17 U.S.C. § 1201 (2010). Sections 1201(a)(2) and 1201(b), known respectively as the access control provision and the rights control provision, prohibit the distribution of tools that enable a user to circumvent access controls or controls that protect a right of the copyright holder. *Id.*

³⁸ *See* Norvell, *supra* note 21, at 547.

³⁹ *Id.* at 577-78.

⁴⁰ *Id.* at 569.

⁴¹ *Id.* at 580-81.

⁴² *Id.* at 582.

⁴³ *Id.* at 583-84.

and rental or sale of copyrighted videocassettes.⁴⁴ In this new technological age, pirates manufacture and distribute counterfeit laser discs, video compact discs and digital versatile discs, all of such high quality that the average person cannot ascertain their authenticity.⁴⁵ Much of piracy now also occurs through illegal file transfers on the Internet, through the File Transfer Protocol, a network of private servers accessible only by invitation, and the Internet Relay Chats, an Internet protocol based upon real-time communications and popular among programmers and hackers.⁴⁶ Because of the growth of Internet access in China, Internet piracy represents the greatest, growing catastrophe for the motion picture and music industries.⁴⁷

A. *An Unfortunate Transplant: American Copyright Law on Chinese Soil*

The United States, which has always been keen on harnessing China's tremendous trade potential, forged its first copyright agreement with China in 1979, although it was not until 1990 that China created a copyright law explicitly protecting the rights of the authors of literary, artistic and scientific works.⁴⁸ In July, 1986, China applied for admission to the WTO's predecessor, the General Agreement on Tariffs and Trade, which, in 1994, promulgated the TRIPS Agreement later adopted by the WTO.⁴⁹ TRIPS seeks to narrow the gaps in the way intellectual property rights are protected around the world by establishing minimum levels of protection that each government must afford to the intellectual properties of fellow WTO members.⁵⁰ TRIPS also imposes minimum standards for how those rights should be enforced domestically and instructs how disputes between countries should be resolved.⁵¹ When China joined

⁴⁴ E.g., Jordana Cornish, *Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within Its Borders*, 9 VAND. J. ENT. & TECH. L. 405, 411 (2006); Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and the Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 392, 394 (2002).

⁴⁵ Cornish, *supra* note 44, at 410; Yonehara, *supra* note 44, at 393.

⁴⁶ Cornish, *supra* note 44, at 410; Yonehara, *supra* note 44, at 393.

⁴⁷ See Yonehara, *supra* note 44, at 393. Scholars have also identified other means of piracy, including public performance piracy, which is the public performance of a film in "mini-theaters," to paying customers without permission from the copyright holder. *Id.* at 394.

⁴⁸ E.g., Cornish, *supra* note 44, at 414-15.

⁴⁹ E.g., *id.* at 415

⁵⁰ E.g., *id.*

⁵¹ E.g., *id.* at 416; see also Oliver Ting, *Pirates of the Orient: China, Film Piracy, and*

the WTO on December 11, 2001, it became bound to the TRIPS standards of regulation and enforcement.⁵²

Pursuant to Section 1, Article 9 of the TRIPS, which governs copyright and other related rights, WTO members must comply with Articles 1 through 21 of the 1971 Berne Convention.⁵³ Article 2 of the Berne Convention stipulates that “literary and artistic works” shall include every production in the literary, scientific and artistic domain, thus covering not only books and dramatic works, but also musical compositions and movies.⁵⁴ Article 7 defines the term of protection to be the life of the author and fifty years after his death, although, in the case of cinematographic works, the countries may provide that the term of protection shall expire fifty years after the work has been made available to the public with the author’s consent, or, in the absence of such consent, fifty years after its making.⁵⁵ Article 9 states that authors shall have the exclusive right to authorize the reproduction of these works, in any manner or form.⁵⁶ Article 14 states that authors shall have the exclusive right to authorize the cinematographic adaptation and reproduction of these works, as well as the distribution, public performance, and communication of the adapted and reproduced works.⁵⁷ Pursuant to Article 61 of the TRIPS, WTO members must provide criminal procedures and punishments for willful copyright piracy cases.⁵⁸

Since 2003, the U.S. Trade Representative started to urge China to ratify and implement the two Internet treaties which China participated in negotiating at the World Intellectual Property Organization in 1996.⁵⁹ Thus, on May 18, 2006, the State Council of China enacted the “Regulations on the Protection of Copyright over Information

Hollywood, 14 VILL. SPORTS & ENT. L.J. 399 (2007).

⁵² Cornish, *supra* note 44, at 420.

⁵³ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, sec. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

⁵⁴ See Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 9, 1886, *bis*, reprinted in WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) 177 (1978).

⁵⁵ *Id.* at art. 7.

⁵⁶ *Id.* at art. 9.

⁵⁷ *Id.* at art. 14.

⁵⁸ TRIPS Agreement, *supra* note 53, at art. 61.

⁵⁹ Hong Xue, *Les Fleurs Du Mal: A Critique of the Legal Transplant in Chinese Internet Copyright Protection*, 34 RUTGERS COMPUTER & TECH. L.J. 168, 205 (2007).

Networks” (“Internet Copyright Regulations”) primarily for the implementation of these two Internet treaties.⁶⁰ The provisions of the Internet Copyright Regulations stipulating the liabilities of network service providers are almost the same as the DMCA’s except for a few Chinese ingredients.⁶¹ They permit a copyright owner to request the service provider to disclose the identity of a subscriber allegedly engaging in infringing activities.⁶² If the service provider refuses the request, the owner may apply for a court order to force the service provider to comply, a procedure highly similar to subpoenas available under the DMCA.⁶³ The Internet Copyright Regulations also entitle copyright holders to information about subscribers merely suspected of infringements, to issue warnings, and even to confiscate equipment used to provide network services in cases of refusal or delay.⁶⁴

The Internet Copyright Regulations follow closely the DMCA’s anti-circumvention provision in their prohibition of intentional bypassing or circumvention of technological measures as well as the offering of bypassing or circumventing devices or services.⁶⁵ The Regulations do not merely subject infringers to administrative and civil penalties; like the DMCA, they also have stipulations on criminal offenses and penalties.⁶⁶ In the Chinese legal hierarchy, only the state legislature – the National People’s Congress and its Standing Committee – has the power to enact legislation dealing with crimes and penalties.⁶⁷ Nevertheless, the Regulations serve to enforce the relevant existing criminal laws, and, because circumventing acts may constitute computer crimes, they may subject the perpetrator to criminal penalties.⁶⁸

⁶⁰ *Id.* at 170-71.

⁶¹ See XIN XI WANG LUO CHUAN BO QUAN BAO HU TIAO LI [Regulation on the Protection of Copyright over Information Networks] (promulgated by the State Council, May 18, 2006, effective July 1, 2006), http://www.jetro-pkip.org/upload_file/2007032877960394.pdf (P.R.C.) [hereinafter Internet Copyright Regulations], translation available at China IT Law, <http://www.chinaitlaw.org/?p1=regulations&p2=051006180113> (last visited Mar. 1, 2010) at art. 9, 13-17, 20-25; see also Hong, *supra* note 59, at 195.

⁶² Hong, *supra* note 59, at 203.

⁶³ *Id.* at 203-04.

⁶⁴ *Id.* at 204.

⁶⁵ Internet Copyright Regulations, *supra* note 61, at art. 4; Hong, *supra* note 59, at 176.

⁶⁶ Internet Copyright Regulations, *supra* note 61, at art. 18-19; Hong, *supra* note 59, at 178.

⁶⁷ Hong, *supra* note 59, at 178.

⁶⁸ *Id.* at 179.

B. *Rebutting Western Views: Key Reasons for Transplant Failure*

The shortcomings of the DMCA and, to a lesser extent, American copyright law in general have been noted in the United States.⁶⁹ It is therefore surprising that the U.S. Government urged China to adopt these laws and that numerous American scholars have advocated for the strong enforcement of the DMCA-type law on Chinese soil.⁷⁰ Such strong advocacy is even more surprising in view of the provisions of the Internet Copyright Regulations, which are even more restrictive,⁷¹ more expansive,⁷² and less reflective than the DMCA.⁷³ While these scholars fervently seek methods to enforce copyright law in China, they typically fail to comprehend the main reasons for China's piracy problem, and to appreciate the fact that a strict enforcement of American-style copyright law in China is both oppressive and ineffective, due to the Chinese Government's information censorship and the weak buying power of Chinese people.⁷⁴ Hence the strong backlash that occurred, in the form of piracy, is both natural and inevitable.⁷⁵

1. Information Censorship, Weak Buying Power, and a Globalizing Economy

American scholars have rightly attributed the piracy problem in China to its lack of access to foreign films.⁷⁶ Film in China has always

⁶⁹ See *supra* notes 22-43 and accompanying text.

⁷⁰ See *supra* notes 48-52, 59-64, and accompanying text; see also *infra* notes 169-187 and accompanying text.

⁷¹ The Internet Copyright Regulations, unlike the DMCA, make no distinction between measures for access control and measures for copy control. Lawmakers might not have contemplated that this non-distinction, hence a blanket ban on accessing copyrighted materials, would seriously impair the public's ability to make fair use of the works or other subject matters. Hong, *supra* note 59, at 177.

⁷² Compared with the DMCA, Article 12 of the Internet Copyright Regulations provides a much shorter list of exceptional circumstances where technological measures may be circumvented. Without an exception made for non-profit libraries and archives, such institutions would be severely impaired in their ability to collect, process and disseminate information. *Id.* at 180-81.

⁷³ Despite the controversial stipulations on technological measures and other issues, the Internet Copyright Regulations do not contain any periodical review or built-in adjustment mechanism. In contrast, DMCA § 1201(a)(1)(B)-(E) provides the Librarian of Congress with limited power to review whether protection of technological measures adversely affects the users of a copyrighted work. *Id.* at n.164.

⁷⁴ See *infra* notes 76-127 and accompanying text.

⁷⁵ See *id.*

⁷⁶ See, e.g., Ting, *supra* note 51, at 412, 414-15.

been deemed a product of the political, economic, military, and cultural invasions by the West.⁷⁷ Therefore, it has always been the government's mission to indigenize and nationalize its own film industry.⁷⁸ After the Communist Revolution in 1949, China started building its own independent national film system and banned American films entirely in 1950.⁷⁹ Its open-door market reforms since the late 1970s have not been extended to cultural arenas, and the import of foreign films has always been subject to strict review.⁸⁰ The China Film Corporation, founded in 1979, regulates film distribution and import and export operations.⁸¹ With the import of Warner Brothers' *The Fugitive* in November, 1994, China adopted the revenue-sharing system for the first time, under which its State Administration of Radio, Film, and Television permitted the import of ten revenue-sharing foreign films per year, which represent world cultural achievements and contemporary film art and technologies.⁸² With China's entry into the WTO, it increased this number to twenty.⁸³ While a limited number of foreign films are legally shown in Chinese theatres every year, these foreign films are barred from cinemas during holidays and other peak periods ("black out periods").⁸⁴ Each of the twenty foreign films must also undergo a lengthy review and censorship process, meaning that the film often will not be released until months after its debut in other countries.⁸⁵

China's import of home video (including VCDs and DVDS) is controlled through a different channel, the Ministry of Culture.⁸⁶ Starting in 1997, China allowed American home video imports. The procedures and regulations for approving home videos for domestic distribution are far more lenient.⁸⁷ Thus, between 1997 and 2000, the Cultural Ministry approved the import of over 800 home video titles. Nevertheless, the review process, while faster than that of theatrical

⁷⁷ Wang, *supra* note 9, at 61.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 62.

⁸² *Id.* at 62-63.

⁸³ *Id.* at 65.

⁸⁴ *E.g.*, Ting, *supra* note 51, at 412.

⁸⁵ *E.g.*, *id.* at 413.

⁸⁶ *See* Wang, *supra* note 9, at 63.

⁸⁷ *Id.*

releases, is still lengthy.⁸⁸

The lack of access to foreign films, as well as a lengthy home video review process, has stimulated the growth of a huge black market of pirated videos for sale and available for illegal downloading on the Internet.⁸⁹ Because governmental policies ignore the public's appetite for entertaining movies, the masses who are determined to see the videos have no choice but to turn to the black market for films that have not been chosen for import and uncensored versions of those that have.⁹⁰

Scholars have also rightly attributed China's piracy problem to the weak buying power of its population.⁹¹ The average Chinese worker would prefer a cheap pirated video to a costly legitimate one.⁹² Even those who can afford the legitimate videos still prefer cheaper alternatives because the quality of pirated videos in recent years has increased substantially.⁹³ The pirated videos are not only indistinguishable from the real ones, but are often available very soon after the film's theatrical release and long before the home video release.⁹⁴ Given that means of illegally accessing movies at even cheaper prices, such as downloading through the Internet, continue to flourish in China, the cost calculus easily favors illegal means over going to the theatre.⁹⁵

Studies conducted by Taiwanese-American scholar, Shujen Wang, covering not only the poor, but also well-educated and wealthy urban-dwellers, cited the weak buying power of the Chinese people and censorship in China as the two major reasons for the rampant piracy in the nation.⁹⁶ In Wang's study, Beijing's college students, and even one professor, found movie tickets too expensive and therefore opted for pirated videos.⁹⁷ Likewise, an engineer preferred the price and speed of pirated videos.⁹⁸ A wealthy businessman in Shanghai did not find the price difference between pirated videos and cinema tickets an issue, yet bought pirated non-mainstream films that were not imported by the

⁸⁸ *Id.*

⁸⁹ *See, e.g.,* Ting, *supra* note 51, at 412-13.

⁹⁰ *See, e.g.,* Cornish, *supra* note 44, 424-25.

⁹¹ *See, e.g.,* Ting, *supra* note 66, at 414-15.

⁹² *E.g., id.* at 414.

⁹³ *E.g., id.*

⁹⁴ *E.g., id.* at 415.

⁹⁵ *See, e.g.,* Cornish, *supra* note 44, at 409-10.

⁹⁶ *See* Wang, *supra* note 9, at 89-92.

⁹⁷ *Id.* at 89-90.

⁹⁸ *Id.* at 90.

government or available in video stores.⁹⁹ As Wang insightfully pointed out, greed alone by no means accounts for the piracy problem; the Chinese people's purchase of pirated products was a conscious decision to make sense of the world around them within the tight restrictions imposed by their government.¹⁰⁰

While attributing the rampant piracy in China to the weak buying power of the Chinese people and to its national censorship of film and media, Wang also took a more global view of the piracy problem by seeing it as a by-product of the nation's globalizing economy.¹⁰¹ Some of the factors of piracy are: China's continued economic liberalization, despite its cultural conservatism, that permits domestic companies to produce and distribute goods in places of their choice; the establishment of Hong Kong and Taiwan manufacturing facilities in China, including those of the counterfeiters; global manufacturing trends of cheap, simplified production techniques, which create easily copied products; a better-trained skill base and more sophisticated machinery; and the Asian economic crisis that compels otherwise legitimate manufacturers to turn to counterfeiting in order to remain viable.¹⁰² Hence, the free market economy facilitates the production, distribution, and sale of legitimate products worldwide, while helping the circulation of illegitimate ones.¹⁰³ Since piracy, by virtue of its illegality, operates independently of China's formal restructuring directives, it has the flexibility to accommodate large numbers of dispossessed population in a transitional economy, while relieving the nation's increasing social unrest.¹⁰⁴

2. Misinformed American Views of Chinese Culture and Its Piracy Problem

A number of American scholars have also looked to traditional Chinese culture to account for its rampant piracy, which they attribute to what they believe are the cultural and historical predispositions of its people. Their reasoning, however, is based upon stereotypical, often distorted, views of Chinese culture.¹⁰⁵ Many American scholars' failure

⁹⁹ *Id.* at 91.

¹⁰⁰ *Id.* at 92.

¹⁰¹ *See id.* at 83.

¹⁰² *See id.* at 83.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See infra* 107-126 and accompanying notes.

to draw a holistic picture inclusive of their own society and culture not only tends to perpetuate biased views of China and its piracy problem, but has also inhibited the finding of a solution that goes beyond a strict enforcement of copyright law.¹⁰⁶

Some American scholars have mistakenly attributed the rampant piracy in China to the “tradition of imitation” in Confucianism and its reverence for past wisdom as the ultimate guiding tool for understanding the future.¹⁰⁷ They argue that the idea of intellectual property rights runs contrary to the Chinese moral standard and its espousal of free sharing of ideas.¹⁰⁸ The two copyright laws developed in early twentieth-century China, moreover, were abolished by the Communist takeover in 1949, and the Cultural Revolution that followed led to a strong xenophobic attitude toward Western institutions and to a view of intellectual property as a foreign concept that benefits only Western interests.¹⁰⁹ Guided by the same cultural framework, these American scholars also attribute China’s piracy problem to the concept of “li” in Confucianism, which functions as a moral code or customary law and defines proper etiquette.¹¹⁰ Under a society of “li,” individuals fulfill their normative roles and subordinate their interests for social good for the sake of a harmonious society.¹¹¹ These scholars pitch “li” against “fa,” a rigid, unyielding penal concept, which uses punishment to maintain order and which is viewed unfavorably and carries far less weight in Confucian China.¹¹² A society built upon “li,” they argue, inhibits prosecution of copyright infringement, because the Chinese view litigation as a last resort contrary to the spirit of social harmony.¹¹³

These arguments are problematic because they rest upon the erroneous assumption that the majority of Chinese people today are still heavily indoctrinated with Confucianism and that its moral tenets have continued to serve as their guiding posts.¹¹⁴ Even if these assumptions are valid, it is important both to distinguish between pure imitation and affirmative acts of theft and to recognize the power of the

¹⁰⁶ *See id.*

¹⁰⁷ *See, e.g.,* Yonehara, *supra* note 44, at 401; Cornish, *supra* note 44, at 422-23.

¹⁰⁸ *E.g.,* Cornish, *supra* note 44, at 423.

¹⁰⁹ Yonehara, *supra* note 44, at 401-02.

¹¹⁰ *See, e.g.,* Yonehara, *supra* note 44, at 398; Cornish, *supra* note 44, at 423.

¹¹¹ *E.g.,* Yonehara, *supra* note 44, at 399-400; Cornish, *supra* note 44, at 423.

¹¹² *See, e.g.,* Yonehara, *supra* note 44, at 398; Cornish, *supra* note 44, at 423.

¹¹³ *E.g.,* Yonehara, *supra* note 44, at 398, 400; Cornish, *supra* note 44, at 423.

¹¹⁴ *See supra* notes 123-129 and accompanying text.

moral code.¹¹⁵ The reverence for old wisdom and the espousal of imitation as an educational tool have admittedly led many Chinese students to develop the habit of copying, which in turn inhibits their creativity.¹¹⁶ Worse still, it has led some students to believe that copying without referring to sources is acceptable and to treat “plagiarism” as a foreign concept.¹¹⁷ It is, nevertheless, a bold leap of logic to argue that reverence for the old, or even a lack of creativity, predispose Chinese people affirmatively to set up illegal businesses, to encourage those businesses by serving as consumers, or to steal online media files despite their conscious knowledge of the law.¹¹⁸ After all, it is human weakness that has predisposed them to illegally obtain copyrighted materials, and it is the nature of piracy, especially online piracy, that has made them feel like they are not breaking the law. Likewise, even assuming that Chinese people still rely on “li” but not “fa,” these scholars fail to explain why they have not developed a moral code against trading pirated goods or stealing these goods on the Internet.¹¹⁹ After all, the curb on piracy need not rely upon litigation, and the aversion toward litigation, even if true, could not adequately account for piracy.¹²⁰

Interpreting Chinese behavior according to this warped framework tends to dilute the real reasons for rampant piracy in the nation.¹²¹ As it is arguably easier to change a nation’s cultural beliefs than to improve its economy, such a biased cultural analysis suggests that Chinese people only need to look within themselves to help combat this problem, and, therefore, places an unfair burden upon them.¹²² In addition, these American scholars have overlooked their own culture and, therefore, lost sight of the fact that piracy is not as culture-bound as it seems.¹²³ They cannot explain why in the United States piracy

¹¹⁵ See *supra* notes 126-129 and accompanying text.

¹¹⁶ See, e.g., Jing-Jyi Wu, *Recognizing and Nurturing Creativity in Chinese Students*, in *CREATIVITY: WHEN EAST MEETS WEST* (Sing Lau et al. eds., World Scientific Publ’g 2004).

¹¹⁷ See, e.g., Paul Mooney, *Yale Professor at Peking U. Assails Widespread Plagiarism in China*, *THE CHRONICLE OF HIGHER EDUCATION* (Dec. 21, 2007), <http://chronicle.com/article/Yale-Professor-at-Peking-U/40188>.

¹¹⁸ See *supra* notes 123-125 and accompanying text.

¹¹⁹ See *supra* notes 126-129 and accompanying text.

¹²⁰ See *supra* notes 130 and accompanying text.

¹²¹ See *supra* notes 126-129 and accompanying text.

¹²² See *id.*

¹²³ See Carl Erik Heiberg, *American Films in China: An Analysis of China’s Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*,

exists both online and offline and is also of great concern to the film and music industry despite its longer history of copyright laws and a greater appreciation of their importance.¹²⁴ Indeed, aside from simple economics, there is an additional factor to account for the piracy problem in both China and the United States.¹²⁵ While theft is universally frowned upon, technological advances have created a perception among web surfers, whether Chinese or American, that freely downloading copyrighted works is something other than theft by consumers.¹²⁶

3. Critique of China's Legal System: What to Do Until Then?

American scholars have reasonably attributed the rampant piracy in China to nascent judicial and administrative systems.¹²⁷ By contrasting it with the American systems, they criticize the Supreme People's Court of China for not being entirely independent.¹²⁸ At the highest level, it reports to the Chinese legislature and is therefore not immune from the highest state power; at the lower levels, it is not free from the entanglement of lower-level party politics.¹²⁹ Because just a few decades have passed since the Cultural Revolution, formally trained attorneys are lacking in China, and most existing legal personnel have not received appropriate training.¹³⁰ Moreover, the Chinese Court lacks power to make local authorities enforce its judgments.¹³¹ Local protectionism, resulting from Beijing's decentralization of the federal government in 1979, has been an additional factor that has enabled piracy to continue.¹³² Given that piracy accounts for a considerable portion of the rural commerce and provides jobs to local residents and revenue to local governments, local officials are reluctant to

15 MINN. J. INT'L L. 219, 246 (2006).

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*; Tom Zeller, Jr., *As Piracy Battle Nears Supreme Court, the Messages Grow Manic*, N.Y. TIMES (Feb. 7, 2005), <http://www.nytimes.com/2005/02/07/technology/07sharing.html>.

¹²⁷ See, e.g., Yonehara, *supra* note 44, at 407-12.

¹²⁸ *Id.* at 408-10; Cornish, *supra* note 44, at 427-28.

¹²⁹ Yonehara, *supra* note 44, at 408-10; Cornish, *supra* note 44, at 427-28.

¹³⁰ Yonehara, *supra* note 44, at 411-12; Cornish, *supra* note 44, at 425-26.

¹³¹ Yonehara, *supra* note 44, at 408.

¹³² *Id.* at 408, 414-16. While local officials do report to Beijing, they are directly accountable to the local jurisdiction and are tempted to place local interests over state policies in making political judgments. Ting, *supra* note 51, at 418.

intervene.¹³³ These same officials can ignore Beijing's enforcement orders and not risk political repercussions so long as their areas achieve impressive economic growth with minimal social unrest.¹³⁴ Indeed, such local protectionism, or corruption, with its benefits to some of China's dispossessed populations, forms part of Wang's globalizing account of piracy discussed previously.¹³⁵

While China's nascent judiciary and inadequate administrative system are reasons the enforcement of copyright law in China has been ineffective, they do not explain how the black market came into existence in the first place. What remains disputable is whether an improvement in the judiciary can curb the appetite of the Chinese people for foreign films that are not available to them through legal means because of media censorship and their weak buying power. While these scholars' attack of the Chinese judicial system holds some truth, their honest assertions only reinforce the argument that the best way to combat piracy in China is not through a strict enforcement of the American copyright laws through the Chinese judiciary. It will take years for China to formally train a new generation of capable lawyers and retrain its current legal personnel.¹³⁶ Similarly, China cannot be expected to reform its judiciary, revamp its copyright enforcement process, and increase its import of foreign films overnight.¹³⁷ Hence, China must look to other methods to combat piracy—methods that ideally could mitigate damages to the American media industry while satisfying the appetites of the Chinese people.¹³⁸

C. *When Two Winds Produce Rain: An Integrative Legal Transplant System*

Mainland Chinese scholar Hong Xue bemoans China's lack of bargaining power over intellectual property issues, counting the Internet Copyright Regulation as one of its concessions to foreign trade

¹³³ Ting, *supra* note 51, at 419.

¹³⁴ *Id.*

¹³⁵ See *supra* notes 96-104 and accompanying text.

¹³⁶ See, e.g., Cornish, *supra* note 44, at 426, 432. Cornish contends that China has much work to do before it reaches the level of education needed to effectively curb piracy because it is so common. *Id.*

¹³⁷ Yonehara, for example, concedes that copyright enforcement process, which requires the Beijing directing and coordinating its local governments, which may be antithetical to its efforts at democratization, and such reform will not take place instantaneously. Yonehara, *supra* note 44, at 417-18.

¹³⁸ See *id.*

pressure.¹³⁹ Hong asserts that a comprehensive study of the legal context of the transplanted law, as well as a deep understanding of China's domestic need, are both necessary to a thoughtful, creative, and strategic legal transplanting.¹⁴⁰ Nevertheless, she does not offer any such solution.¹⁴¹ Moreover, she conceptualizes an "East Wind," which is driven by Chinese academics, educational institutions, civil society and ordinary users, and expresses her hope that this "East Wind" will prevail over the "West Wind" of international law and politics.¹⁴² In doing so, she pitches the East and the West against each other.¹⁴³ This impliedly hostile attitude no doubt underlies the proposals of a fair number of American scholars on how to combat piracy in China.¹⁴⁴ Such a confrontational stance is not only unproductive, but also contradicts and obfuscates the creative and integrative solution that she expressly hopes for.¹⁴⁵

Globalization scholar Ngaire Woods believes that global institutions must become more representative of and more accountable to the world community.¹⁴⁶ Hence, she perceives a real necessity for reform without which the prospects for the globalization project are under threat.¹⁴⁷ On the piracy problem in China, such a reform can take the form of implementing a new, promising program, which, as this section explains, will serve to reconcile the interests of the two nations.¹⁴⁸ To borrow Hong's metaphors, the cold West Wind and the warm East Wind do not have to prevail over each other: as they meet, they produce rain that nourishes the two nations.

1. The Rough West Wind of Aggressive Enforcement

If Western copyright law that does not readily apply to Chinese society can be compared to a West wind, then aggressive approaches in enforcing such law on Chinese soil is like blowing a rough West wind

¹³⁹ Hong, *supra* note 59, at 206.

¹⁴⁰ *Id.* at 210.

¹⁴¹ *See id.*

¹⁴² *See id.* at 208-09.

¹⁴³ *See id.*

¹⁴⁴ *See infra* notes 146-160 and accompanying text.

¹⁴⁵ Hong, *supra* note 59, at 208-10.

¹⁴⁶ Ngaire Woods, *Order, Globalization and Inequality in World Politics*, in THE GLOBAL TRANSFORMATIONS READER 463, 472 (David Held et al eds., 3rd ed. 2003).

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*

over the nation.¹⁴⁹ While some people have suggested that the U.S. film industry should look for assistance from the WTO or pursue individual lawsuits in Chinese courts against the piracy industry,¹⁵⁰ scholars have rightly pointed out that these options may prove ineffective or even backfire.¹⁵¹ A formal WTO complaint will likely strain China's relationship with the United States, and a poorly-argued WTO case against China could ultimately backfire on the entire international community.¹⁵² Filing lawsuits in Chinese courts is not likely to be effective either.¹⁵³ While a judgment against Chinese pirates would enable American film companies to claim damages and increase Chinese people's awareness of copyright law, it would be inconsequential to the thriving film piracy industry.¹⁵⁴ The primary suppliers of film piracy are typically located in rural communities, and targeting the urban retailers therefore will not eliminate the actual sources of film piracy.¹⁵⁵ These suppliers are also extremely innovative at avoiding detection and, despite numerous crackdowns in the past, have managed to relocate their production sites to more remote and inaccessible locations.¹⁵⁶

Similarly, scholars have wisely pointed out that threats of trade sanctions are not conducive to a productive relationship between China and the United States and will defeat the cooperative style of the WTO.¹⁵⁷ They speculate that repetitive threats of trade sanctions might cause China to lose patience with the United States and switch to

¹⁴⁹ Hong, *supra* note 59, at 208-09.

¹⁵⁰ *E.g.*, Ting, *supra* note 51, at 420-21. Dan Blickman, CEO of the MPAA, has argued that the "best leverage" for getting China to combat film piracy is the WTO, and a U.S. case before the WTO would likely allege inadequate Chinese enforcement before the WTO's Dispute Settlement Body. *Id.*

¹⁵¹ *See, e.g., id.* at 420.

¹⁵² *E.g., id.* at 424. Ting also identifies other reasons why taking cases to the WTO will be both ineffective and unwise. The WTO's lack of transparent enforcement standards may limit a U.S. case against China, and a failed case might even lead China to get emboldened and ease its pressure on pirates. While the WTO requires each member state to provide effective intellectual property enforcement, it does not properly define those terms; even if the Dispute Settlement Body panel created an empirical standard for effective enforcement, the U.S. may still lack sufficient evidence. Second, even if the U.S. could collect the necessary data, most previous WTO cases involve deficiencies in a WTO member's laws, rather than deficiencies in their enforcement. Third, the U.S. is not invincible in the WTO dispute settlement process, for instance, in Antigua's and Barbuda's recent challenges to the its gambling laws. *Id.* at 421-23.

¹⁵³ *See id.* at 425-26.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 425.

¹⁵⁶ *Id.* at 426.

¹⁵⁷ *E.g.*, Yonehara, *supra* note 44, at 420.

reliance on trade with Europe, Japan and Russia.¹⁵⁸ Because the Chinese Government has been most vigilant about intellectual property protection when the United States government and American businesses have backed away from coercive tactics, trade sanctions, including litigation, would be counter-productive.¹⁵⁹

2. The Light West Breeze of Softer Enforcement Approaches

These scholars, nonetheless, have advocated softer approaches in enforcing Western copyright law in China, but without thoughtful consideration of its domestic needs or supplementary measures that would facilitate the implementation of the law.¹⁶⁰ As such, their advocacy is comparable to blowing a west breeze, an effect that is soothing but nonetheless oppressive.¹⁶¹ These scholars suggest that, rather than relying on the WTO or litigation, the American media industry should try less provocative approaches like persuading the Chinese Government to enforce its law rigorously and allowing American media companies to take a more proactive stance.¹⁶² One such approach is to convince the Chinese Government that confronting film piracy would be in its best interests, because film piracy is detrimental both to its emerging local film industry and to China's overall economy.¹⁶³ According to proponents of this approach, it is detrimental to China's local film industry because Chinese people tend to spend their money on pirated films and not on local films, thus taking away a significant market share of the latter.¹⁶⁴ Moreover, it causes great harm to the nation's economy because piracy, by producing illegal employment, reduces the government's tax revenues while increasing its anti-piracy enforcement costs and damaging the country's international reputation.¹⁶⁵ Scholars contend that China is capable of curbing piracy, one of them even alluding to the

¹⁵⁸ *E.g.*, Cornish, *supra* note 44, at 431.

¹⁵⁹ *See id.*

¹⁶⁰ *See, e.g.*, Ting, *supra* note 44, at 428-40.

¹⁶¹ *E.g., id.* at 428-33.

¹⁶² *E.g., id.*

¹⁶³ *Id.* at 429.

¹⁶⁴ According to the Study of the Impact of Movie Piracy on China's Economy, a joint 2006 report on the impact of film piracy on China's economy, fifty percent of Chinese film industry respondents believe that the larger the market for pirated movies, the worse their own operating results. Seventy-five percent of respondents believe that piracy has reduced both their box office revenues and royalties. Those that reported the most damages are private film companies that employ the majority of elite Chinese directors and famous actors. *Id.* at 429-30.

¹⁶⁵ *Id.* at 431-33.

government's quick and efficient crackdown on the Falun Gong movement in 1999 and its more recent campaign against bribery and embezzlement by its local officials.¹⁶⁶ In addition, some scholars believe that the American media companies should mobilize their latest technological resources to prevent piracy both on and off the Internet.¹⁶⁷

These scholars nevertheless rely upon the unfair assumption that local Chinese films will serve as good substitutes for the pirated ones, so that a forced reduction in the consumption of American films will cause Chinese people to switch to local films.¹⁶⁸ This assumption has not only remained unverified, but is also unjustified, considering the Chinese Government's censorship of its media, which has stifled the creativity of its filmmakers and led to a meager number of interesting films. Even if their assumption is correct and their approach is practical, it lacks both creativity and runs against the basic tenet of the WTO in the same way China's restriction on the import of foreign films does.¹⁶⁹ The safeguarding and promotion of the interests of the local industry, these scholars argue, can only be attained by forgoing the interests of Chinese consumers.¹⁷⁰ In other words, these scholars overlook or refuse to explore an alternative that would bolster the local film industry as well as satisfy the desires of the Chinese populace for foreign films.

Moreover, the Chinese Government, relying upon a simple cost calculus, has reason not to put as much effort into curbing piracy as on its campaigns against Falun Gong and corruption.¹⁷¹ While its crackdown on Falun Gong was a highly controversial act, it was based upon the government's firm, if unjustified, belief that the Falun Gong practitioners would have threatened the stability of the entire nation.¹⁷² Moreover, in its campaign against bribery and embezzlement, it needed to target only a few individuals to serve the interests of many Chinese citizens.¹⁷³ Although such reasoning is admittedly not in the interests of the United States and even China's own media industries, the Chinese Government would be unlikely to put the interests of

¹⁶⁶ *Id.* at 433, 436-40.

¹⁶⁷ *E.g.*, Yonehara, *supra* note 44, at 422.

¹⁶⁸ *See supra* notes 163-165 and accompanying text.

¹⁶⁹ *See supra* note 157 and accompanying text.

¹⁷⁰ *See supra* note 162 and accompanying text.

¹⁷¹ *See supra* note 166 and accompanying text.

¹⁷² *See id.*

¹⁷³ *See id.*

American media industries before its own and to mobilize its scarce resources to crack down on the piracy industry, a task which, as these scholars have confirmed, is very difficult.¹⁷⁴

3. The Nourishing Rain of a Voluntary Collective Licensing System

The voluntary collective licensing system, proposed by the Electronic Frontier Foundation (EFF) of the United States, serves as a viable option to combat the piracy problem in China.¹⁷⁵ Calling the fight against online piracy a misguided campaign, EFF advocated an online file sharing system that applies not only to the music industry, which they targeted, but the media industry as a whole.¹⁷⁶ The system requires the formation of a “collecting society,” an association made up of copyright holders, which would offer consumers unlimited legal downloading opportunities in return for small, regular payments made to the society.¹⁷⁷ Hence, the system also requires the development of a method to fairly distribute the collected funds to producers.¹⁷⁸ One possible way to accomplish this would be to closely monitor the frequency of downloads and allocate payments on the basis of product popularity.¹⁷⁹ The system would be quick and easy to implement, since the necessary small fees could be obtained by increasing the price of broadband services through an Internet service provider or a college network, or by charging a fee to download file-sharing software.¹⁸⁰ Thus, there would be no need for Congress to become involved or for copyright law to undergo a drastic overhaul.¹⁸¹ In addition to the profits gained from the blanket licensing fees, the media industry would benefit by avoiding high costs that are involved in conventional commercial distribution of products.¹⁸² Not only would the media

¹⁷⁴ *See id.*

¹⁷⁵ *See A Better Way Forward: Voluntary Collective Licensing of Music File Sharing: “Let the Music Play” White Paper*, ELECTRONIC FRONTIER FOUNDATION (Apr. 2008), www.eff.org/share/collective_lic_wp.php [hereinafter EFF].

¹⁷⁶ They proposed this licensing system in response to needs of the public who are tired of the entertainment industry as a whole treating them like criminals for wanting to share music and movies online, while threatening innovation of file sharing systems that help customers to get more from the media. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

industry save its money on costly lawsuits, it would also see an improvement in its overall reputation.¹⁸³

EFF and skeptics have identified potential problems with this system, although most of these problems are by no means insurmountable.¹⁸⁴ First, EFF points out that the system could only be truly effective if almost all copyright owners put aside lawsuits and agreed to participate.¹⁸⁵ While scholars indicate that the lack of participation by consumers might pose a problem,¹⁸⁶ the proposal is likely to attract both parties because the scheme ensures royalty payments, low-cost promotion to copyrights holders, and the freedom to share files without fear of infringement to individual users.¹⁸⁷ Second, EFF points out that a single collecting society could leave room for corruption and deceit, and skeptics agree that there will likely be logistical problems in managing the huge number of consumers.¹⁸⁸ The latter nonetheless believe that media companies could issue blanket licenses to the file sharing services, which would in turn handle individual memberships, thus preserving competition between file sharing services by allowing consumers to choose their own service companies.¹⁸⁹ There is also the problem of cross-subsidization, that is, the requirement that low-volume users subsidize copyright holders and high-volume users.¹⁹⁰ This problem, however, is only of marginal concern. If consumers believe that the system is not worth their money, they are free to opt out.¹⁹¹ Moreover, this system, though not the fairest, is attractive, because it provides consumers with the convenience of a flat fee, instead of requiring them to pay each time or

¹⁸³ According to EFF, this proposal is not entirely new. Songwriters originally viewed the radio exactly the way the music industry today views consumers. After trying to sue radio out of existence, the songwriters ultimately got together to form ASCAP, and later BMI and SESAC. Radio stations interested in broadcasting music paid a fee to the societies and in return got to play whatever music they liked. Today, the performing-rights societies ASCAP and BMI collect money and pay out millions annually to their artists. Copyright lawyers call this voluntary collective licensing – it is voluntary for artists because the government does not force them to join a collecting society, and even after they join a collecting society, they remain free to license their songs directly. It is also voluntary for broadcasters. *Id.*

¹⁸⁴ *E.g.*, Meghan Dougherty, *Voluntary Collective Licensing: The Solution to the Music Industry's File Sharing Crisis?* 13 J. INTELL. PROP. L. 405, 428 (2006); EFF, *supra* note 175.

¹⁸⁵ EFF, *supra* note 175.

¹⁸⁶ *E.g.*, Dougherty, *supra* note 184, at 428.

¹⁸⁷ *Id.* at 428-29.

¹⁸⁸ *Id.* at 429; EFF, *supra* note 175.

¹⁸⁹ Dougherty, *supra* note 184, at 429.

¹⁹⁰ *Id.* at 431.

¹⁹¹ *Id.* at 431-32.

to commit to a certain number of files.¹⁹²

Skeptics, however, are generally less optimistic than EFF and have more or less agreed that it would be difficult to motivate users to pay a small membership fee for convenient access to media files so as to avoid liability.¹⁹³ First, the probability of being pursued by the copyright owner may be low enough that most people will ignore the threat of a lawsuit,¹⁹⁴ and some users simply do not care about breaking the law for their personal benefit.¹⁹⁵ Second, “free riding” will also be a problem.¹⁹⁶ Many end-users may choose to stay outside of the system, borrowing songs from their friends and from strangers they meet on the Internet.¹⁹⁷ If too many users become free riders, reduced royalty collections will discourage rights holders from joining; if fewer rights holders join, fewer individual users will join, and the system will eventually collapse.¹⁹⁸

The EFF foresaw that file-sharers in other countries would follow the American example should its voluntary collective licensing system prove successful in the United States.¹⁹⁹ Nevertheless, the fact that such a system has not really been tried in the United States does not preclude its potential for success in other countries, especially given that similar systems have proven successful in mitigating piracy in the United States.²⁰⁰ Therefore, it is surprising that no American scholars,

¹⁹² *Id.* at 432.

¹⁹³ *E.g., id.* at 429-30.

¹⁹⁴ *Id.* at 430.

¹⁹⁵ Lawrence Solum, *The Problem(s) with Collective Voluntary Licensing*, COPYFUTURES: THE FUTURE OF COPYRIGHT (Sept. 30, 2004), http://lsolum.typepad.com/copyfutures/2004/09/the_problems_wi.html.

¹⁹⁶ Dougherty, *supra* note 184, at 432.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ EFF, *supra* note 175.

²⁰⁰ *See id.* EFF’s model has not really been followed and it is hard to gauge its potential success in the United States. Nevertheless, an analogy can be detected in iTunes, an online digital media store started by the Apple Company in April, 2003, about the same time as EFF proposed the licensing scheme. iTunes, who now accounts for seventy percent of worldwide online digital music sales, sells individual songs at the same price with no subscription fee. In October 2005, Apple introduced an iPod for playing video files sold online through the iTunes Store in the U.S. In March 2009, Apple allowed iTunes customers to purchase and rent selected movie titles from their computers. WIKIPEDIA, *iTunes Store*, http://en.wikipedia.org/wiki/iTunes_Store (last visited May 13, 2010). iTunes has, to a certain extent, helped to mitigate the piracy problem. *E.g.*, Glenn Wolsey, *iTunes Claims to be Stopping Teen Music Piracy*, GADGETELL (Apr. 24, 2007), <http://www.gadgetell.com/tech/comment/itunes-claims-to-be-stopping-teen-music-piracy/>. The success of iTunes reinforces that EFF’s licensing system would likely succeed in not only the United States, but especially in China.

in their eagerness to enforce copyright law in China, have mentioned the possibility of implementing EFF's proposal there.²⁰¹ Indeed, with the joint effort of China and the United States, such a system could be implemented in China by taking into account the living standards of different places and thereby setting a flat fee that is affordable to its consumers.²⁰² This system, instead of pitching two nations against each other, serves to promote a win-win situation by reconciling the interests of the American media industry and Chinese consumers.²⁰³ To borrow Hong's analogy, the meeting of the East and the West Winds produces rain, which in turn nurtures the trade relationship between the two nations.

If a voluntary collective licensing system is implemented in China, the potential shortcomings will become less severe, while its inherent advantages will only be accentuated. While media companies might not be willing to put aside lawsuits in the United States, the companies have a stronger motivation to join a voluntary collective licensing scheme abroad because bringing copyright infringement cases to the WTO or to Chinese courts is neither desirable nor effective. Although an uncertain percentage of consumers will likely refuse to pay the flat fee, the size of the Chinese market alone will guarantee a great number of potential law-abiding participants, hence substantial revenues for American companies. Likewise, the free-riding concern should not deter American companies from joining the system, because getting any payment at all, even if rights-holders are not compensated fairly, will improve the current situation. In addition, charging users a flat fee will be far more desirable than other proposed methods of combating piracy. It is more cost-effective than marking down the video prices, because it eliminates the cost incurred in producing and distributing hard copies of videos altogether. It is also preferable to shortening the review process of home videos, a method that would require involvement of the Chinese national government.

One must note that, if this voluntary collective licensing system is implemented in China, part of the revenues should be properly allocated to the Chinese film industry.²⁰⁴ Under its current revenue-sharing system, China has used revenues earned from foreign film import, distribution, and exhibition indirectly to subsidize its local film

²⁰¹ See EFF, *supra* note 175.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See Wang, *supra* note 9, at 63.

distribution.²⁰⁵ If the licensing system is implemented, some of its users, who would have gone to the theater to see the foreign films, instead choose to download the films legally.²⁰⁶ Hence, it is only fair that part of the revenues generated should be allocated to China to subsidize its film industry.²⁰⁷

4. The Nourishing Rain of Education

The Chinese often use the rain metaphor to describe the nourishing effects of education upon young minds.²⁰⁸ American scholars have not ignored the role that education can play in combating piracy in China, as they argue that it is critical to educate both legal professionals and the public about copyright law.²⁰⁹ Some believe that the common citizens, who are the main culprits in infringement, should be educated with the same intensity as government officials and the legal community.²¹⁰ One scholar even advocates an aggressive campaign against piracy, using the success of the anti-smoking campaign in the United States as a guiding post.²¹¹ Hence, in the same way that the American public did not believe smoking was unhealthy until aggressive educational and advertising campaigns assaulted the nation with images of black lungs and mute patients in hospital beds, the Chinese Government should bombard its people with images about how film piracy can wreck the careers of individual artists and cripple the movie industry.²¹² Moreover, these educational campaigns should target children in elementary and middle schools so that they will learn that buying pirated videos is no less severe in the eyes of the law than stealing from a store.²¹³

These aggressive campaigns, aimed at instilling fear in the Chinese populace, including young children, diverge from China's long-standing educational tradition, which aims to guide and nurture, but not

²⁰⁵ While the annual quota of foreign films screened in China is thirty percent to thirty-five percent of the total films distributed, they normally take sixty percent of the total box office income. Thus, China's film industry has relied on foreign film distribution profits to cover domestic film distribution losses. *Id.*

²⁰⁶ See EFF, *supra* note 175.

²⁰⁷ See Wang, *supra* note 9, at 63.

²⁰⁸ See the Chinese proverb, *Chunfeng fayu* [spring breeze turns into rain].

²⁰⁹ See, e.g., Cornish, *supra* note 44, at 432-33.

²¹⁰ E.g., Yonehara, *supra* note 44, at 417.

²¹¹ See Cornish, *supra* note 44, at 433.

²¹² *Id.*

²¹³ *Id.*

to threaten and punish.²¹⁴ With the implementation of the collective licensing system, education on copyright law, while still important, would nevertheless restore the status of education as a nurturing tool. As Chinese consumers would need only pay a small, affordable fee to enjoy foreign films and music, far fewer would have to resort to illegal means. The Chinese people would no longer be forced to choose between inexpensive piracy and either expensive movie tickets or an unsatiated appetite for foreign films and music. Thus, the government, instead of using aggressive strategies to threaten and deter the Chinese from violating copyright law and supporting the piracy industry, would have a relatively easy task. The government need only teach children good ethics and motivate them to pay for affordable copyrighted products.

IV. PIRACY, IDENTITY EXPRESSIONS, AND CAPITAL FLOW: PROMISING FUTURE OF A LICENSING SYSTEM

Quentin Tarantino, the director of American blockbuster *KILL BILL*,²¹⁵ said at an anti-piracy conference that he was glad that the Chinese people pirated his film, because in a “closed Communist country” where his film was not shown, he would “rather be seen than not be seen.”²¹⁶ Moreover, he admitted to purchasing pirated copies of old, hard-to-get films in New York, so that he could recreate some of the scenes in *KILL BILL*.²¹⁷ While Tarantino’s labeling of China as a “closed Communist country” would no doubt offend some of its citizens, his remark offered a fair critique of piracy, which did justice to the nation’s unique piracy phenomenon.²¹⁸ Moreover, it is a well-known fact that pirated videos serve to build up the market for film entertainment.²¹⁹ The most successful video in China to date, *ROBOCOP 3*, was released legitimately in the nation before *ROBOCOP 1* and *2* had even had a chance to be released legitimately.²²⁰ Yet, because *ROBOCOP 1* and *2* had already established a market through

²¹⁴ *See id.*

²¹⁵ *KILL BILL: VOL. 1* (Miramax Films 2003); *KILL BILL: VOL. 2* (Miramax Films 2004).

²¹⁶ Tarantino Says Film Piracy “Not 100% Black and White,” *Miami Herald* (May 14, 2004), <http://www.everythingtarantino.com/2004/05/tarantino-talks-piracy/>.

²¹⁷ *Id.*

²¹⁸ *See id.*

²¹⁹ *See Wang, supra note 9, at 87.*

²²⁰ *Id.*

piracy, there was a built-in demand for ROBOCOP 3 when it came out.²²¹ Given that the Chinese people have been enjoying pirated copies of KILL BILL 1 and 2, should a KILL BILL 3 be legitimately released in China, it will no doubt generate millions in profits for the American media industry.²²²

A. *When Rain Falls into the Sea: Cultural Appropriation and Economic Advantages*

In recent years, the United States trade deficit with China has been a cause for concern.²²³ The United States is widely criticized for having a trade deficit that mirrors, to a large extent, China's surplus and for its dependence upon large capital inflows, including inflows from China.²²⁴ Hence, there is political pressure for protectionism and for China to implement economic policies to reduce the surplus.²²⁵ Lawmakers have blamed the rampant piracy in China as a major reason for the United States trade deficit.²²⁶ Combating piracy would seem an effective method of reducing the deficit and restoring the China-United States trade balance.²²⁷

This section of the paper focuses on three case studies to argue that, contrary to popular belief, China's piracy industries have not only brought short-term benefits to its local economy but have enabled capital to flow back to the United States, although such capital flows have been indirect and by no means made up for the losses that Americans claim to have suffered due to China's piracy problem. Such unexpected flows of capital from China to the United States in turn confirms the likelihood that a voluntary collective licensing system will be highly beneficial, because the system will both resolve the piracy problem and facilitate a continuous flow of capital.

Moreover, the voluntary collective licensing system will facilitate the mutual sharing of cultures, enabling Chinese to tap into the sea of media, to appropriate Western cultural images, and to articulate their

²²¹ *Id.*

²²² *See id.*

²²³ *See, e.g.,* John A. Tatom, *Imbalances in China and U.S. Capital Flows*, Munich Personal Repec Archive No. 11706 (Sept. 2008), http://mpra.ub.uni-muenchen.de/11706/1/MPRA_paper_11706.pdf.

²²⁴ *E.g., id.* at 14.

²²⁵ *E.g., id.*

²²⁶ *E.g.,* Ben Blanchard, *China Warns U.S. Piracy Cases Will Harm Trade Ties*, REUTERS (Apr. 24, 2007), <http://www.reuters.com/article/idUSPEK947820070424>.

²²⁷ *See, e.g., id.*

own identities.²²⁸ According to Roland Robertson's 1987 concept of a "world culture," nations should be able to learn from one another without endangering their capacity for self-preservation.²²⁹ At the same time, globalization scholar John Tomlinson contends that globalization is the most significant force in creating and proliferating cultural identity, and the intensification of globalization has coincided with a dramatic rise of social movements based around identity, gender, sexuality, religion, ethnicity and nationality.²³⁰ The licensing system will therefore enable Chinese and Americans to learn from each other's culture without abandoning their own sense of nationalism; indeed, such learning should facilitate a better understanding of their own cultures.²³¹

1. Pirating BROKEBACK MOUNTAIN and Exporting SPRING FEVER

Although China decriminalized homosexuality in 1997, a Beijing court handed down the first ruling on homosexuality in 1999, calling it abnormal and unacceptable to the public.²³² China's State Administration of Radio, Film and Television has prohibited gay-themed movies from being released in China, including BROKEBACK MOUNTAIN, an Oscar-winning gay-themed romantic drama about two cowboys.²³³ The government-controlled English-language daily newspaper called *Ang Lee*, the first filmmaker born in China to win the Oscar Award for best director, the "pride of Chinese people all over the world" and the "glory of Chinese cinematic talent."²³⁴ Nevertheless, such a great honor did not stop the Government from banning the film

²²⁸ See, e.g., DIRK MESSNER, *WORLD SOCIETY – STRUCTURES AND TRENDS, GLOBAL TRENDS AND GLOBAL GOVERNANCE* 47 (Paul Kennedy et al. eds., 2001).

²²⁹ E.g., *id.*

²³⁰ JOHN TOMLINSON, *GLOBALIZATION AND CULTURAL IDENTITY, THE GLOBAL TRANSFORMATIONS READER* 269-70 (David Held & Andrew McGrew eds., 2000)

²³¹ See, e.g., *id.*

²³² CHINA NEWS DIGEST (Oct. 14, 1999) <http://cnd-c.cnd.org/CND-Global/CND-Global.99.4th/CND-Global.99-10-14.html>. Plaintiff brought a lawsuit against the author of *Homosexuals in China* as well as his publishing company in Jilin province for psychological damage and financial losses. Although defendant never expressly mentioned plaintiff's name in the book, the Court found that his reference to plaintiff and his description of him a gay man was explicit enough. The judge ordered the publishing company to compensate plaintiff for his financial losses and legal costs, as well as to make a public apology. *Id.*

²³³ BROKEBACK MOUNTAIN (Paramount Pictures 2005); David Barboza, *The Oscar for Best Banned Picture*, N.Y. TIMES, (Mar. 12, 2006), <http://www.nytimes.com/2006/03/12/weekinreview/12barboza.html>

²³⁴ Barboza *supra* note 233.

because of its subject matter and from heavily censoring his award acceptance speech by omitting his references to homosexuality and Taiwan.²³⁵ While the film might never be legally shown in Chinese theaters, Internet surfers downloaded and shared online high-quality bootleg copies.²³⁶

The success of *BROKEBACK MOUNTAIN* and its popularity in China made possible by an underground market did not explain why Chinese filmmakers made their first gay-themed movie.²³⁷ However, the circulation of a successful Hollywood gay movie with a China-born director has certainly made these filmmakers feel more emboldened to break the social taboo by articulating their own identities and/or to create outlets for the gay population.²³⁸ Knowing that their films would be banned in China, many Chinese filmmakers have nonetheless continued to work with their own budgets and show their works at major international festivals.²³⁹ Against all odds, people have held “queer film festivals,” one example being the Beijing Queer Film Festival that premiered in 2006.²⁴⁰ The Chinese police, along with banning gay websites and related publications, disrupted the first gay festival in Shanghai in 2009, which indicated the Government’s continued lack of tolerance.²⁴¹ The Fourth Beijing Queer Film Festival, held in the same year, faced little governmental intervention and turned out to be a great success.²⁴²

The pirating of *BROKEBACK MOUNTAIN* not only inspired gay people to articulate their identities, but also started to pay back the media industry.²⁴³ In 2008, Lou Ye, a Chinese director banned by Beijing from making movies, defied the ban by secretly shooting

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ A number of gay films appeared before *BROKEBACK MOUNTAIN*, one example Hong Kong-Chinese director Stanley Kwan’s award-winning 2001 gay film *LAN YU*. *LAN YU* (2001).

²³⁸ See, e.g., Min Lee, *Banned Director Brings Romance Film to Hong Kong*, *THE ASSOCIATED PRESS* (Nov. 20, 2009), <http://www.daytondailynews.com/entertainment/banned-director-brings-romance-film-to-hong-kong-412267.html>.

²³⁹ *E.g., id.*

²⁴⁰ See Gan Tian, *Crowds Throng to Gay Film Festival*, *CHINA DAILY* (June 23, 2009), http://www.chinadaily.com.cn/world/samesex/2009-06/23/content_8323833.htm.

²⁴¹ Andrew Jacobs, *Gay Festival in China Pushes Official Boundaries*, *N.Y. TIMES* (June 14, 2009), <http://www.nytimes.com/2009/06/15/world/asia/15shanghai.html>.

²⁴² Tian, *supra* note 239.

²⁴³ See, e.g., Sukhdev Sandhu, *Spring Fever at Cannes 2009, Review*, *TELEGRAPH* (May 14, 2009), <http://www.telegraph.co.uk/culture/film/cannes-film-festival/5324658/Spring-Fever-at-Cannes-2009-review.html>.

SPRING FEVER, which later earned him the best screenplay award at the 2009 Cannes Film Festival.²⁴⁴ The film is about a private investigator hired by a woman to spy on her husband whom she suspects of having a gay affair.²⁴⁵ The investigator later falls into a love triangle with his own girlfriend and the husband's boyfriend.²⁴⁶ Film critics applauded Lou not only for the gay messages in his work, but also for capturing the identity crises suffered by urbanites in modern-day China, regardless of their sexual orientations.²⁴⁷ While the film has been banned in China, commercial distributors from all over the world have purchased it for release in their countries. Notably, this includes Strand Releasing, a distributor headquartered in California that specializes in quality art films, hence leading to a flow of capital back to the United States.²⁴⁸

2. Pirating Michael Jackson and Embracing THIS IS IT²⁴⁹

When longtime American pop idol Michael Jackson passed away on June 25, 2009, his fans from all over China mourned his death.²⁵⁰ His fans in Beijing held a huge gathering, and some imitated his dance at a bar in the capital.²⁵¹ Developers in Shanghai immediately planned to build a scaled-down replica of his Neverland Ranch on an island off the city to commemorate Jackson and offer his fans an outlet to express their love for him.²⁵² The fervent reactions to Jackson's death by his Chinese fans were surprising to many Americans, especially because Jackson never held a single concert in China during his lifetime.²⁵³

²⁴⁴ SPRING FEVER (Dream Factory 2009). In 2006, China banned Lou Ye from shooting movies for five years after he screened SUMMER PALACE (Dream Factory 2006) and showed it at the Cannes Film Festival without government approval. In this film, Lou tackled the Chinese military's brutal crackdown on the student protesters on the Tiananmen Square in June 1989. Lee, *supra* note 237.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *E.g.*, Sandhu, *supra* note 243.

²⁴⁸ *See id.*

²⁴⁹ THIS IS IT (Columbia Pictures 2009).

²⁵⁰ *E.g.*, Lisa Chiu, *Chinese Mourn Michael Jackson*, ABOUT.COM (June 29, 2009), <http://chineseeculture.about.com/b/2009/06/29/chinese-mourn-michael-jackson.htm>.

²⁵¹ *Id.*

²⁵² *China to Build Its Own Neverland as Michael Jackson Tribute*, REUTERS (July 10, 2009), <http://www.reuters.com/article/2009/07/10/us-jackson-shanghai-idUSTRE5690XI20090710?feedType=RSS>.

²⁵³ *See, e.g.*, *Michael Jackson's One-Day Trip in Chinese Mainland*, THE OFFICIAL MICHAEL JACKSON SITE (Jan. 10, 2010), <http://www.michaeljackson.com/za/blog/michael-jacksons-one->

Indeed, it was only after his death that many of his Chinese fans learned about his one-day trip to Guangdong, Southern China, in 1987.²⁵⁴

Some Chinese in their late thirties to early forties reported that they first heard Jackson's music when they were in college in the mid to late 1980s.²⁵⁵ At a time when China had just adopted its open-door policy, these people knew little about Western society in general.²⁵⁶ Although there was no official Jackson publicity in China and the radio did not play his songs, Chinese fans immediately found his music uplifting and were dazzled by his dress, long hair, and dance, which inspired them to challenge the orthodox principles of their own society.²⁵⁷ Some of Jackson's younger fans, those in their early twenties, appreciated his opinions about the world in his songs and largely turned a blind eye to negative stories about his personal life.²⁵⁸

It would be unreasonable to assume that most of Jackson's fans in Mainland China obtained copies of his songs by legitimate means, such as purchasing them at music stores or through their relatives in Hong Kong or Taiwan.²⁵⁹ One measure by which American record companies have accessed the Chinese market has been to license directly to Chinese record companies.²⁶⁰ In 1988, Columbia Records, then Michael Jackson's record label, licensed China Records to sell his new release "Bad."²⁶¹ China Records subsequently sold between 200,000 and 300,000 copies of Jackson's album.²⁶² Nevertheless, newspapers reported about pirated copies of his music videos,²⁶³ and the sale of his albums, among the works of other artists, has been the

day-trip-chinese-mainland.

²⁵⁴ *Id.*

²⁵⁵ *Michael Jackson and China*, CHINA.ORG.CN (June 29, 2009), http://www.china.org.cn/culture/2009-06/29/content_18029652.htm.

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ Wang Wei, Li Xiao & Chen Boyuan, *Beijing Fans Mourn Michael Jackson*, CHINA.ORG.CN (June 26, 2009), http://www.china.org.cn/culture/2009-06/26/content_18022535.htm.

²⁵⁹ *See Michael Jackson and China*, *supra* note 255.

²⁶⁰ Seth Goldberg, *Internal and External Forces: Why and How the Major Record Companies Will Successfully Access the Chinese Market*, 7 N.Y. INT'L L. REV. 45, 58-59 (1994).

²⁶¹ *Id.* at 59.

²⁶² *Id.*

²⁶³ Robert B. Frost, *Intellectual Property Rights Disputes in the 1990s between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119, 128 n.77 (1995); Geoffrey Crothell, *China: Beijing's Pirates Still Playing Trade*, S. CHINA MORNING POST, Dec. 29, 1991, at 3.

source of tension over intellectual property rights between China and the United States.²⁶⁴ Thus, it would be reasonable to assume that many people accessed Jackson's music through piracy.²⁶⁵

While the pirating of Jackson's music has cost his companies millions of dollars, it started to benefit the United States after his death.²⁶⁶ Recognizing the popularity of this American idol, the Chinese Government approved the showing of *THIS IS IT*, a documentary film about Jackson, in October, 2009, as the last of its twenty foreign films to be legally shown that year.²⁶⁷ This film not only became the box-office champion in the United States, but it also sold \$3.2 million worth of tickets in China.²⁶⁸ Its box office record in China is far below those made by hugely popular Hollywood films, including *TITANIC* and *TRANSFORMERS: REVENGE OF THE FALLEN*, as well as the most recent *AVATAR*.²⁶⁹ Nevertheless, it was an impressive record, because it did not fall far behind records in Japan and Great Britain, affluent countries whose people in general could afford to see the film.²⁷⁰

3. Pirating Romantic Comedies and Coproducing More Comedies

China's piracy of romantic comedies from Hollywood and, to a lesser extent, Great Britain, has also resulted in a payback to the American media industry.²⁷¹ China's film industry, which has

²⁶⁴ In April 1991, the USTR named China and other countries as the first countries placed on the "priority foreign country" list under Special 301. China did not believe that its IP enforcement history warranted such a designation; after being threatened with import tariffs, China tried to avoid sanctions and concluded a Memorandum of Understanding in 1992 with the U.S. which was committed to providing improved protection for U.S. holders of intellectual property rights. In return, the U.S. agreed to terminate its Special 301 investigation of China. Nevertheless, China's reluctance to fulfill its obligations under the 1992 provisions was a cause of dispute between the two nations. Frost, *supra* note 263, at 128-29.

²⁶⁵ *See id.*

²⁶⁶ *See, e.g.,* Gil Kaufman, "Michael Jackson's *This Is It*" Banks \$100 Million Around the Globe, MTV.COM (Nov. 2, 2009), <http://www.mtv.com/news/articles/1625274/michael-jacksons-this-it-has-strong-international-debut.jhtml>.

²⁶⁷ *E.g.,* Ben Child, *China Welcomes Michael Jackson's This Is It*, THE GUARDIAN (Oct. 6, 2009), <http://www.guardian.co.uk/film/2009/oct/06/this-is-it-michael-jackson>.

²⁶⁸ Kaufman, *supra* note 266.

²⁶⁹ *TITANIC* (Twentieth Century Fox Film Corp. 1997); *TRANSFORMERS: REVENGE OF THE FALLEN* (Dreamworks SKG 2009); *AVATAR* (Twentieth Century Fox Film Corp. 2009); *See* Kaufman, *supra* note 266.

²⁷⁰ *See id.*

²⁷¹ *See, e.g.,* *Fox Invests in First Chinese Film*, N.Y. TIMES, (Sept. 30, 2009), <http://dealbook.blogs.nytimes.com/2009/09/30/fox-invests-in-1st-chinese-film-a-romantic-comedy/>.

undergone reform since the 1990s and broke loose from state control at the turn of the 21st century, is in its infancy.²⁷² While local drama films and slapstick comedies have become the most popular genres in China, Western romantic comedies have had an even larger share of supporters.²⁷³ These films, which have almost never made the import list of foreign films, are available only in the form of home and pirated videos.²⁷⁴ Hugely popular films, including *SLEEPLESS IN SEATTLE*, *BRIDGET JONES' DIARY*, *MY BEST FRIEND'S WEDDING*, and *LOVE ACTUALLY*,²⁷⁵ which never made the import list, are very familiar among the Chinese people and have shaped their tastes in romantic comedies.²⁷⁶ The same also applies to popular television dramas like *Sex and the City*.²⁷⁷

The popularity of Hollywood's romantic comedies among Chinese audiences in turn led Chinese film studios, like Huayi Brothers, to start producing Hollywood-style romantic comedies to cater to the appetites of audiences in China and worldwide.²⁷⁸ *SOPHIE'S REVENGE*, of which world-famous Chinese actress Zhiyi Zhang served as the producer and Huayi Brothers as the distributor, is a good example.²⁷⁹ Although, as critics remark, it would rarely have been shown in Chinese cinemas, it nevertheless was screened and well received in 2009.²⁸⁰ Seen as

²⁷² Prior to the Communist takeover in 1949, Shanghai was the center of a vibrant private film industry. After the takeover, the heart of the film industry moved to Beijing, where it remained under the conservative eye of the government. The world caught a glimpse of the global potential of Chinese film in the late 1980s and early 1990s, when films by Zhang Yimou and Chen Kaige found an international audience. Nevertheless, it was with China's entry into the WTO that the industry opened its door to foreign investment, as well as gave Chinese domestic companies an opportunity to acquire knowledge and capital needed to compete with the Hollywood companies. China opened up its film industry by ending the production monopoly of the large state-owned studios in 2002, and allowing licensed private film companies to apply directly to the government for approval to produce and distribute a movie. William Brent, *China's Film Industry Steps Out of the Shadows*, CHINA BUS. REV. (Nov./Dec., 2003), <http://www.chinabusinessreview.com/public/0311/08.html>.

²⁷³ E.g., Jeffrey Hays, *Chinese Film Industry*, FACTS AND DETAILS, <http://factsanddetails.com/china.php?itemid=245&catid=7&subcatid=42> (last visited Apr. 1, 2010).

²⁷⁴ See *id.*

²⁷⁵ *SLEEPLESS IN SEATTLE* (TriStar Pictures 1993); *BRIDGET JONES' DIARY* (Little Bird 2001), *MY BEST FRIEND'S WEDDING* (TriStar Pictures 1997); *LOVE ACTUALLY* (Universal Pictures 2003).

²⁷⁶ See Hays, *supra* note 273.

²⁷⁷ *Sex and the City* (HBO). See Hays, *supra* note 273.

²⁷⁸ See Kozo, *Sophie's Revenge*, LOVE HK FILM.COM, http://www.lovehkfilm.com/panasia/sophies_revenge.html (last visited Apr. 1, 2010).

²⁷⁹ *SOPHIE'S REVENGE* (Beijing Perfect World Co. 2009). See Kozo, *supra* note 278.

²⁸⁰ *Chinese Films in 2009*, REALFILMCAREER.COM (Jan. 2, 2010), <http://realfilmcareer.com/?p=2846>.

China's approximation of the commercial Hollywood romantic comedy, the film tells of a successful comic artist trying to win her former boyfriend back from his new love by teaming up with a photographer, who is the new love's former boyfriend.²⁸¹ The film's highly predictable plotline is reminiscent of many Hollywood comedies, such as *MY BEST FRIEND'S WEDDING*, while Sophie's chronicling of her love life in *THE HANDBOOK OF LOVE* makes the film resemble *BRIDGET JONES' DIARY*.²⁸² Moreover, with its upscale settings, dressed-up characters, and luxurious cars, the film shows nothing of the vast range of people, places and issues that make up modern China.²⁸³ Hence, it is like a Shanghai version of *Sex and the City*, which is confined to the affluent sectors of New York City.²⁸⁴

Huayi Brothers' other romantic comedies have also proven successful, including *IF YOU ARE THE ONE*, a 2008 film directed by Feng Xiaogang.²⁸⁵ At a press conference, Feng remarked, rather confidently, that, because China has a huge market on its own, quality Chinese-language films need not reclaim their Chinese audience that has been taken over by Hollywood.²⁸⁶ Given that film critics have regarded his works as superior to the average Hollywood romantic comedy, his confidence is not unwarranted.²⁸⁷ Nevertheless, Feng's remark also bespeaks a slight defensiveness, if one is to consider the influences of Hollywood films on his own works, although his remark tends to detract his audiences from such influences.²⁸⁸ If the subtle influences of *SLEEPLESS IN SEATTLE* and its portrayal of more mature couples can be found in his earlier work *BE THERE OR BE SQUARE*²⁸⁹ and, to a lesser extent, in *IF YOU ARE THE ONE*, he is perhaps more

²⁸¹ Kozo, *supra* note 278.

²⁸² See, e.g., G. Allen Johnson, *Review: "Sophie's Revenge" is Infectious Fun*, SFGATE.COM, (Nov. 27, 2009), http://articles.sfgate.com/2009-11-27/movies/17181526_1_suits-revenge-star.

²⁸³ *IF YOU ARE THE ONE* (Huayi Brothers 2008). E.g., Kozo, *supra* note 275.

²⁸⁴ See *id.*

²⁸⁵ Karen Chu, *China Takes on Hollywood in B.O. Battle*, THE HOLLYWOOD REPORTER (March 25, 2009), <http://www.hollywoodreporter.com/news/china-takes-hollywood-bo-battle-81311>.

²⁸⁶ See *id.*

²⁸⁷ See, e.g., *If You Are the One*, 20/20 FILMSIGHT (Jan. 9, 2009, 7:11), <http://www.moviecritic.com.au/if-you-are-the-one-fei-cheng-wu-rao-film-movie-review/>.

²⁸⁸ See Chu, *supra* note 285.

²⁸⁹ *BE THERE OR BE SQUARE* (1998).

dependent upon Hollywood than he may have realized.²⁹⁰

The successes of Huayi Brothers, as well as the promises of a huge Chinese market, prompted Fox International Productions, headquartered in Los Angeles, to collaborate with a Chinese studio company to coproduce its first Chinese-language film, *HOT SUMMER DAYS*.²⁹¹ Filmed in Beijing, Hong Kong, and Shenzhen, and combining six intertwined love stories, it is regarded as a Chinese-language version of *LOVE ACTUALLY*.²⁹² While Fox has yet to release the film in the United States, ever since its release in China in February 2010, *HOT SUMMER DAYS* has proven a great success and has already broken China's box office record for *Avatar*.²⁹³

B. *Collective Licensing and A Sea of Media*

The above case studies illuminate that the United States need not wait for official approval of a KILL BILL 3 in China to reap the benefits of piracy similar to the *ROBOCOP 3* story. China's piracy of music, its banned films, and its romantic comedies have led to unexpected financial gains for American media industries. Such unexpected gains by no means create a quid pro quo situation; needless to say, American media industries would have made more money had their products not been pirated. Nevertheless, such capital flows offer a strong reason for implementing a voluntary collective licensing system, which will both resolve the tension arising from the piracy problem and facilitate the flow of capital back to the United States.

The licensing system will also make foreign film and music affordable to Chinese people, providing them not only entertainment but also tools to articulate their identities. While it is too early to gauge the successes of *SOPHIE'S REVENGE* or *HOT SUMMER DAYS* in the United States and other Western countries, these films, which are derivative of Western productions, might actually inspire the Western audiences and motivate them to learn about Chinese cultures. The enjoyment of American, or Western cultural products in general, therefore does not lead to cultural colonization. It empowers Chinese people to appropriate Western media for their own purposes and will

²⁹⁰ See, e.g., Sandra J. Bean, *Cherry Lane's Chinese Movie Picks*, BEIJING SCENE 6.4 (Nov. 5-11, 1999), available at <http://www.beijingscene.com/v06i004/culture/culture.html>.

²⁹¹ *HOT SUMMER DAYS* (Fox International Productions 2010). *Fox Invests in First Chinese Film*, *supra* note 271.

²⁹² *Hot Summer Days Blowout Over Avatar*, (Feb. 23, 2010) <http://english.cri.cn/6666/2010/02/23/2482s551904.htm>.

²⁹³ *Id.*

likely facilitate intercultural exchange and understanding. In short, the licensing system will help to realize Robertson's idea of "world culture."²⁹⁴

V. CONCLUSION: AN EVER EXPANDING SEA OF MEDIA

The expanding metaphor of piracy has prompted legislators, policy makers, and law enforcement to neglect the fact that media piracy is not piracy on the high seas. While China should deter piracy, there are better alternatives than a blind, aggressive enforcement of American-style copyright law. The voluntary collective licensing system is a promising approach to reconciling the interests of China and the United States. It would effectively resolve the piracy problem, facilitate transnational capital flows, and encourage intercultural communication. Instead of an expanding metaphor of piracy, there would be an ever expanding sea of media that would be available to people from the United States, China, and all over the world, providing affordable entertainment as well as tools for identity expression. Such a system, instead of turning net surfers and media users into law-breaking pirates, would empower them to express their identities, and sail smoothly and safely toward a truly globalized world.

²⁹⁴ See Messner, *supra* note 228.