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Property Right or Development Strategy?: Protection of Foreign Copyright in 19th Century America and Contemporary China

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Property Right or Development Strategy?: Protection of Foreign Copyright in 19th Century America and Contemporary China

Bingchun Meng

ABSTRACT

This paper offers a critical view of the current international copyright regime through a comparative analysis of the protection of foreign copyrights in the 19th century United States and that in contemporary China. The first part of this paper is a retrospective analysis of how the early US copyright statute dealt with the copyright of foreign works and what the rationales were behind the discrimination against foreign authors' rights. The treatment of foreign works in Chinese copyright law is then discussed, demonstrating that such treatment was strongly influenced by the hegemonic power that the US and other developed countries had established in the arena of international copyright. In the conclusion the two historical accounts are drawn together to highlight the impracticability and injustice of the current trend toward the harmonisation of international copyright law.

1. INTRODUCTION

In 1842, more than fifty years after the United States enacted its first copyright statute, Charles Dickens toured this country and pleaded at many stops for the acceptance of international copyright so that his books would no longer be pirated by American publishers. The story goes that Dickens' disillusionment manifested itself in the *American Notes* of 1842; the novel *Martin Chuzzlewit* of 1843-44 was largely devoted to his failure of convincing the Americans of the necessity of protecting foreign authors' copyrights (Vaidhyanathan, 2001; Joseph, 1992; Sandison, 1986).

Before giving a more contextualised analysis of this story, let us turn our attention first to 20th century China which can be considered as the historical equivalent of the 19th century US in terms of developmental status. In 1994, three years after the People's Republic of China put into effect the first copyright law¹, the Walt Disney Company sued Beijing Publisher for copyright infringement for reproducing and distributing its copyrighted works without authorisation. The court ruled that the defendant should be liable for copyright infringement and ordered Beijing Publisher to stop the infringing acts, make a public apology to Disney and compensate Disney's economic loss (Beijing High Court, Dec.1995).

Interestingly enough, the images of both the US and China that we see in the preceding stories seem to contradict the currently popular perception of these two countries concerning the copyright issue. What we see in today's media coverage is that the US is the predominant power advocating strong intellectual property protection around the world. And from time to time, the US threatens to sanction developing countries for rampant copyright infringement, among which China might be the most notorious.

So what shall we make of the inconsistency between historical facts and contemporary perceptions? The first part of this paper deals with questions such as: What was the historical context for the unscrupulous US publishers to pirate Charles Dickens' and other British authors' works and what led to the dramatic attitude change in the US toward the protection of foreign works? To what extent is the piracy in 19th century America comparable to that in contemporary China? To what extent is the first US copyright statute different from or similar to its historical equivalent in China on the issue of protecting foreigners' copyrights? These questions are addressed through a comparative analysis. The relevance of these questions lies in the fact that the current Sino-American copyright dispute actually embodies the tension between developed countries and developing countries with respect to protecting international copyrights (Alford, 1994; Yu, 2000; Yu, 2003). Thus, a comparative analysis of copyright legislation in 19th century US and that in 20th century China provides an historical context that is indispensable for evaluating the current trend in harmonisation and universalisation of copyright law. Furthermore, the contextualisation of legal decisions will also illuminate the ways in which developing countries remain marginalised in a global

¹ The first *Copyright Law of People's Republic of China* was adopted at the 15th Meeting of the Standing Committee of the Seventh National People's Congress on 7 September 1990, promulgated by Order No. 31 of the President of the People's Republic of China on 7 September 1990, and effective as of 1 June 1991.

economy and the ways that these countries experience the social and economic costs associated with international copyright law, but not the perceived benefits.

The second part of this paper is a retrospective analysis of how the early US copyright statute dealt with the copyright of foreign works and what the rationales were for the discrimination against foreign authors' rights. It took the US a century to recognise the copyright of foreign authors. It was only after pirated British works had stimulated growth in the American book trade that copyright protection of foreign works was acknowledged to be of benefit to domestic authors. An historical account of 19th century US copyright law indicates that copyright has never been a natural-law property right but a statutory right aimed at balancing the interests of authors, publishers and of a reading public.

Part three discusses the treatment of foreign works in Chinese copyright law and the underlying reasons for such treatment. While the double standard of copyright protection was meant to privilege domestic works in 19th century America, the very same expression initially indicated the reverse meaning in the Chinese legal context. Gramscian hegemony theory is very helpful in explaining why discrimination against foreign authors was not an option for China from the very beginning even though it might be beneficial to China's development.

The final part draws together the two cases to explore what might be a rational approach for developing countries to take when tackling the issue of international copyright. It is argued that copyright should be more about policy than about property. As a policy issue, copyright law is contingent upon the specific historical, political, and socio-economic context and cannot be shaped into a standard model. Thus the argument made by the US and other developed countries that a universalised protection of international copyright serves as the stimulus of economic development is highly problematic. In fact, much has been written about how important it is for developing countries to imitate the intellectual property (IP) system in developed countries due to 'the increasing interdependence of virtually all economies' (Allison & Lin, 1999: 737; also see Beier, 1980; WIPO, 1997). As Endeshaw (2002) points out, however, those commentators arguing for a strong IP protection in developing countries often fail to acknowledge the historical contingency of IP law. In other words, IP and the problems of piracy are subject to time and other general factors such as economic, technological and cultural conditions.

2. THE FRUSTRATION OF CHARLES DICKENS

Copyright was not protected by law in colonial America, but it became the subject of widespread legislation soon after the new nation was founded (Patterson, 1968). It is commonly believed that Noah Webster – the author of *A Grammatical Institute of the English Language* (1783) – was the key figure in advancing the early copyright legislation in America (Bender & Sampliner, 1997; Vaidhyanathan, 2001; Nachbar, 2002). A resident of Connecticut, Webster succeeded in convincing his state legislature to pass the first American copyright statute in January 1783 which was entitled '*Act for the Encouragement of Literature and Genius*'. The law granted any author who was a resident of the US 'sole liberty of printing, publishing and vending' any new books, pamphlets, maps, or charts within the State of Connecticut for a term of fourteen years, renewable for another fourteen years (Soldberg, 1906: 11). Soon after the Connecticut law was enacted, Webster petitioned other states to adopt similar laws. By the time the Constitutional Convention assembled in Philadelphia in the summer of 1787, all but Delaware had passed copyright legislation (Patterson, 1968).

The legislative model for these state copyright statutes was the *Statute of Anne*, enacted in England in 1710 for the purpose of breaking down the monopoly in the printed press and encouraging learning (Patterson, 1968; Kaplan, 1967; Leaffer, 1999). The Statute of Anne tried to achieve a balance between authors' rights and the public interest by limiting copyright protection (1) to printed works; (2) to authors (and their assignees) of new works; (3) to the right to print and sell copies of the work; and (4) to a limited term. All four limitations were adhered to by the state copyright statutes of the 1780s (Patterson & Joyce, 2003). The rationale for the implementation of these limitations is quite clear. On the one hand, by securing for the author the profit from the sale of his or her book, copyright provides the essential economic incentive for people to write and publish more books, which eventually could encourage the 'progress of civilization' (US Copyright Office, 1962). On the other hand, the monopoly power being granted to the author would be limited both in scope and duration, so that the author's pursuit of his or her economic interest would not sacrifice the public interest. Not surprisingly, this English model, widely adopted by the state legislators, was carried through to the national copyright law. In 1790, the First Congress passed national copyright legislation in line with the state legislation promoted by Webster and the resolution of the Confederation Congress. While the Statute of Anne declared itself as '*An Act for the Encouragement of Learning*', the 1790 Copyright Act was titled '*An Act for*

the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.' Also following the Statute of Anne, the Act recognised 'the sole right and liberty of printing, reprinting, publishing, and vending' books, maps, and charts for a minimum (initial) term of fourteen years with a possible renewal for a second term of fourteen years if the author lived out the first term (US Congress, 1790, S. 124).

Despite all the resemblances discussed above, the 1790 Copyright Act included a crucial clause that the Statute of Anne did not provide and to a large extent this clause became the cornerstone of the American intellectual property law in the 19th century. The Act restricted copyright protection to 'a citizen or citizens of these United States, or resident therein'. Section 5 of the 1790 Act explicitly stated:

[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States (US Congress, 1790, S. 124).

This established a legal base for unrestricted reprints of works by foreign authors, in this case, mostly British authors. Notwithstanding the injustice to non-Americans, the citizenship requirements for copyright protection ensured maximum learning for United States citizens and residents at the ultimate affordable cost: nothing. Such a double standard in copyright protection was a strategic choice which a then underdeveloped country made in order to exploit the latest development of arts and science. The legislators reached the consensus during the Constitutional Convention of 1787 that Congress should have the power to enact a copyright and patent statute 'To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries' (US Const. art. I, § 8, cl. 8). This statement makes clear that the ultimate goal of copyright and patent law was to benefit the public by developing 'Science and useful Arts'. As Patterson and Joyce (2003: 940) point out, 'what is protected is not so much the right of the copyright holder to exploit the work as the right of the people of the United States to learn from it'.

In early 19th century America, no large group of authors had yet developed in this newly founded country. In the meantime, the book trade kept growing in accordance with the country's territorial expansion, population growth, and economic transition from an

agricultural to a progressively industrialised nation (Clark, 1960). Furthermore, some historians believe that the 'transportation revolution' accelerated the expansion of the national literary market after 1825 (Bender & Sampliner, 1997). The total number of persons and firms involved in the book trade in four major American cities (Boston, New York, Philadelphia, Baltimore) increased from 204 to 722 in the first half of the 19th century. For the US ever-increasing reading public, books written by British authors were their primary choice due to the absence of language and cultural barriers. Sir Walter Scott first enjoyed great popularity in America and an estimated 500,000 volumes of his works were printed (Clark, 1960). Soon after the Scott craze, Charles Dickens emerged as the American readers' next favourite author. By 1843, when Dickens' *American Notes* was published, 50,000 copies were sold in three days. In the absence of a restrictive law, American publishers seized this opportunity to exploit the English literary works by offering pirated versions at a very low price. Between 1800 and 1860, almost half of the bestsellers in the US were pirated, mostly from English novels. While a London reader would have to pay the equivalent of \$2.50 for a copy of Charles Dickens' *Christmas Carol* in 1843, an American Dickens fan would only have to pay six cents for each copy (Yu, 2003). As Bender and Sampliner (1997) summarised, the piracy of British works benefited America, which at that time was a developing country, in two major ways. First, the growing national market for books provided work and better wages for printers, binders, and others engaged in the printing industry and related trades. Moreover, the lack of an international copyright agreement made it possible for average American citizens to afford high quality books, which further improved literacy in this post-colonial country.

It is in this context that the story, mentioned at the beginning of this paper, commands our attention. For the frustration experienced by Charles Dickens reflected the tension between the developed countries' need to protect their intellectual property rights and the developing countries' concern to promote local development. Before Dickens made his American trip with the mission of promoting international copyright, several European countries already had begun to codify the protection of foreign works. Denmark issued a Decree in 1828 extending the provision of its 1741 copyright law to foreign works, on the condition of reciprocity. Prussia entered into treaties for the reciprocal protection of authors' rights with thirty-two German States from 1827-1829 (Ladas, 1938). Nevertheless, most of the early bilateral copyright treaties were between net copyright importing countries due to the emphasis on reciprocity. Being two major copyright exporters, France and the United Kingdom enjoyed little success in securing foreign protection for works of their citizens

through bilateral agreements (Goldstein, 2001). For example, Belgium and Holland were still the two 'hotbeds' of French piracies until 1852. In order to make a breakthrough in this situation, France decided to take a seemingly altruistic approach. In 1852, France extended copyright protection to all foreign works regardless of whether reciprocal protection was offered by the country in which those works originated. Within a decade after the 1852 Decree, France was able to conclude twenty-three treaties for the reciprocal protection of copyright, including Belgium and Holland (Ladas, 1938).

It was a futile attempt to reconcile the rights of authors and the vested interests of the book industry. The impossibility of doing this to the satisfaction of both parties was, and is, the chief obstacle to the international copyright movement. To the great disappointment of the United Kingdom, it took much longer for the US, which was the major market for pirated British works in the 19th century, to codify the protection of international intellectual property copyrights. In January 1837, a group of fifty-five British writers and poets petitioned the US Congress to approve a bilateral copyright agreement, but their effort did not lead to success (Vaidhyathan, 2001). Dickens' bitter account of his experience in America best represents the frustration of British authors:

I spoke, as you know, of international copyright, at Boston; and I spoke of it again at Hartford. My friends were paralysed with wonder at such audacious daring. The notion that I, a man alone by himself, in America, should venture to suggest to the Americans that there was one point on which they were neither just to their own countrymen nor to us, actually struck the boldest dumb! It is nothing that of all men living I am the greatest loser by it. It is nothing that I have to claim to speak and be heard. The wonder is that a breathing man can be found with temerity enough to suggest to the Americans the possibility of their having done wrong. I wish you could have seen the faces that I saw, down both sides of the table at Hartford, when I began to talk about Scott. I wish you could have heard how I gave it out. My blood so boiled as I thought of the monstrous injustice that I felt as if I were twelve feet high when I thrust it down their throats (Letters from Dickens to John Foster, reprinted in Sandison, 1986: 11).

In his outrage toward this 'monstrous injustice', Dickens actually made an overly sweeping statement about Americans' resentment against the idea of international copyright. The push for recognising foreign authors' rights also came from the American side. One development that the legislators of the 1790 Act may not have anticipated is that by granting exclusive copyright protection to American citizens, they actually created an unfavourable environment for the newly emerging group of American authors. The competition among publishers kept driving down the price of pirated English books, on the one hand, while, on the other, the royalties that the publishers had to pay to American authors made it difficult to produce

cheap American books. As the distinguished historian William Prescott complained, 'Who will give two dollars a volume for Prescott, when one can buy Macaulay for seventy-five cents?' (Quoted in Bender & Sampliner, 1997: 262). Noticing that the citizenship requirement in the Copyright Act undercut the sales of books written by Americans, several political leaders and American authors supported the British writers' petition. The advocates of international copyright made their arguments based on two major themes. First, based on the assumption that copyright is essentially a private property right, they argued that anybody who creates a literary work should be granted copyright regardless of their nationality. Only by doing that, they insisted, can 'justice' for authors be assured. Second, proponents of international copyright contended that only by protecting the copyright of English works, could the US create a favourable environment for its own authors in which the native talents would not have to compete with cheaper books pirated from England. Opponents of international copyright, which included publishers, booksellers, printers, binders, paper-makers, and those who made a living on piracy, sought to refute these points. The opponents pointed out that copyright was essentially a statutory right as opposed to natural-law property right. Thus, the granting and extension of this right are matters of expediency rather than of justice. They also emphasised that a law protecting foreign authors' rights could have dire consequences for the American publishing industry and for the general reading public (Clark, 1960). Congress was on the side of opponents. On 7 February 1873, the Senate once again rejected several bills advocating the protection of foreign authors. The Committee report said:

While it may be conceded that the tendency of the law of copyright is to stimulate the production of literary and scientific works, it is believed to be equally true that one of its effects is to repress the popular circulation of such works (Clark, 1960: 105).

They then concluded:

In view of the whole case, your committee are satisfied that no form of international copyright can fairly be urged upon Congress upon reasons of general equity or of constitutional law: that the adoption of any plan for the purpose which has been laid before us would be of very doubtful advantage to American authors as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hindrance to the diffusion of knowledge among the people and to the cause of universal education; that no plan for the protection of foreign authors has yet been devised which can unite the support of all or nearly all who profess to be favorable to the general object in view; and that, in the opinion of your committee, any project for an international copyright will be found upon mature deliberation to be inexpedient (Clark, 1960: 105).

Here we can see very clearly that law makers at that time were not ready to trade away the interest of a learning public and the overall social welfare associated with a flourishing book trade to protect the rights of foreign authors.

The discrimination against foreign works remained in US copyright law for another half-century after European countries started to grant each other copyright protection through bilateral agreements. A stronger incentive for the US to recognise international copyright did not emerge until the late 1880s when publishers became more confident about the competitiveness of domestic works. At this time the increasingly fierce competition among pirated book publishers was squeezing the profits of established firms. In the last two decades of the 19th century, publishers began to argue that the extremely low price of pirated books had severely affected the market share of books written by American authors and that an international copyright law would bring stability to the industry. In 1891, under pressure from both British and American publishers, the US Congress passed the Chace Act, authorising protection in the US of works of citizens or subjects of a foreign state or nation 'when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the term of which agreement the United States of America may, at its pleasure, become a party to such agreement' (US Congress, 1891, S. 1106). At the same time, however, several restrictive conditions were attached to this protection. First, the authors would have to follow the procedure of registration and deposit in order to obtain the copyright. Second, it was required that books, photographs, chromos or lithographs should be 'printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom' (US Congress, 1891, S. 1106). These restrictions confirmed the notion that copyright is not recognised as a natural-law property right that can be taken for granted, but rather is a statutory right with attached limitations (Vaidhyathan, 2001; Nachbar, 2002; Kaplan, 1967; Patterson, 1968). Moreover, the early history of American copyright indicates that those limits are defined by balancing the interests of authors, publishers and of a reading public.

The reason that the US failed to keep pace with the European nations in the matter of international copyright arguably had to do with the developmental stages this nation experienced in 19th century. When the US first became independent and lacked a developed literature of its own, it took advantage of the literature of its main mother country. The free access to foreign works brought great economic and cultural benefits to the country. It was

only a century later, when the domestic publishing industry reached a point where protection of foreign authors' copyright would be helpful for restoring the order of the book trade that Congress passed the new copyright act which still included a protectionist manufacturing clause. Nevertheless, this episode of American history is rarely mentioned in any contemporary forum on international copyright where US representatives try to convince the developing countries that an 'advanced' intellectual property law should always come *before* the further development of the intellectual property industry.

3. THE SECURITY OF MICKEY MOUSE

Although China is a country with more than five-thousand years of history and its printing culture dates back to as early as 700 B.C., the history of Chinese copyright law has been much shorter than that of the US. In his book *To Steal a Book Is an Elegant Offense* (1995), William Alford traced the history of China's intellectual property law and attributed the underdevelopment of such a legal system to the unique political culture of the Chinese society. Alford (1995) contended that there was no indigenous concept of intellectual property in imperial China before the introduction of such a notion from the Western world in the late 19th century. The major reason for this is that the Confucian tradition emphasises the need to interact with a shared past which makes it almost impossible for individuals to claim exclusive ownership of certain expressions. Any regime can only acquire legitimacy through establishing its connections with the past. That past should be shared through the communal knowledge that is accessible to everyone. Beginning in the late 19th century, efforts were made by both the United Kingdom and the US to impose intellectual property law on China through commercial treaties. But none of them led to the creation of a Chinese copyright law.² After the Communist Party took power in 1949, traditional Confucian political culture and the Marxist ideological orthodoxy of public ownership worked together to create a continuously inhospitable environment for privatising and commodifying knowledge (Alford, 1995).

In 1978, the Chinese Communist Party reopened the country to the world after carrying out Mao Zedong's seclusion policy for almost thirty years. One year later, China and the US

² Although China's 1902 Mackay Treaty with Britain and the 1903 treaty with the United States premised copyright protection on registration, the sketchy and vague provisions of these agreements left a lot of vital questions unanswered. Thus none of these early treaties can be considered as an equivalent to copyright law. For more detailed discussion, see Alford (1995), Ch.2.

signed the Agreement on Trade Relations between the United States and the People's Republic of China. This was considered a major step for China to rejoin the world economy given the dominant position of the US in international politics and the world economy. The Agreement provided that 'each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party' (US-P.R.C., 1979, S. 31).

As noted by Xue Hong and Zheng Chengsi (1999), unlike most Western countries, China assumed an international legal obligation for intellectual property protection even before it had established a domestic intellectual property right protection system. This somewhat unusual path was largely due to the hegemony which functions in the form of both consensus and coercion that Western industrialised countries had established in the arena of intellectual property rights. In order to understand this unusual path, the Gramscian theory of hegemony offers an alternative approach to interpreting the international copyright regime. As much as Marx emphasised the dialectical relationship between the base of material production and the superstructure of political, legal and cultural sphere, traditional Marxism is often deemed weak when it comes to analysing the concrete relations between social classes and the cultural and ideological forms in which social antagonism is played out or contained. One of the major theoretical contributions Gramsci made was that by developing the concept of hegemony, he offered an integral and non-deterministic framework for analysing the totality of economic, political and ideological forces. According to Gramsci, hegemony exists when the development of one particular group is 'conceived of, and presented, as being the motor force of a universal expansion' (Gramsci, 1971: 181). That is to say, when there is 'equilibria in which the interests of the dominant social group prevail, but only up to a certain point, i.e., stopping short of narrowly corporate economic interests' (Gramsci, 1971: 181). A hegemonic apparatus in the Gramscian sense is realised through establishing moral and intellectual leadership, which relies more on consensus than on coercion. Therefore, instead of reducing everything to economics, Gramsci emphasises 'the importance of facts of culture and thought in the development of history' and 'the function of great intellectuals in the organic life of civil society and the state' (Forgacs, 2000: 195). Cox (1993) stresses that the Gramscian term hegemony should not be confused with the dominance of one country over others or what is commonly understood as imperialism. Rather, particular states are hegemonic insofar as they are able to found and protect a world order that is considered universal. The hegemonic state is able to 'project its culture,

institutions, technology, and social relations abroad so that they become models to be emulated even by those nations that have not achieved the same level of development of the material forces and conditions of production' (Richards, 2004: 119).

We should bear in mind that by the time China started drafting its intellectual property law, 'norms' of international copyright were already institutionalised. The Paris Convention for the Protection of Intellectual Property was signed in 1883 to provide protection to holders of patents, trademarks, industrial designs, and marks of origin. The Berne Convention for the Protection of Literary and Artistic Works was signed in 1886 and amended over the years to provide copyright protection for published works. The World Intellectual Property Organisation (WIPO), operated informally as the combined secretariat of the Paris and Berne Conventions, was formally established in 1967. Despite the different scope of their agreements, they all require that a nation's IP law be applied on an equal basis to foreign and domestic right holders. Since China did not have a tradition of sanctifying property rights, lawmakers in China had to use the existing models in developed countries as references for them to conceive their legal frameworks. Needless to say, this gave the developed countries a very good opportunity to recommend 'advanced' copyright legislation that would meet the *international standards*. Therefore, for Chinese lawmakers the discrimination against foreign works was not even an option regardless of the benefits it might have brought to the newly open country. Promising to protect foreign copyrights was the prerequisite for China to enter trade relations with developed countries.

Although Gramscian theory emphasises how beliefs that are actually grounded in historically specific socio-political conditions are universalised, the use of coercive power is also considered an important strategy to maintain hegemony (Cox, 1993). The 1980s saw increasing American business based on intellectual property, on the one hand, and the trade deficit of the US which kept growing, on the other. In response to that, businesses started to argue that the unlawful appropriation by others of American intellectual property was a major reason for the burgeoning trade deficit and they mobilised to institutionalise modern intellectual property rights in developing countries (Alford, 1994; Landes & Posner, 2004; Correa, 2000). In 1984 Congress amended section 301 of the 1974 Trade Act to require the US Trade Representatives (USTR) to defend US intellectual property rights in the world economy. The 1988 Omnibus Trade and Competitiveness Act further mandated that the USTR provide an annual report to Congress on unfair trade practices abroad, the so-called

Special provision. Within thirty days of releasing the national trade estimates at the end of April each year, the USTR must

identify those foreign countries that deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to United States persons that rely upon intellectual property protection, and those foreign countries...that are determined by the Trade Representative to be priority foreign countries that have the most onerous or egregious acts, policies, or practices (Quoted in Ryan, 1998: 80).

For 1989 the priority offenders included Brazil, India, South Korea, Mexico, Saudi Arabia, Taiwan, and Thailand, among which China was considered the worst case. The USTR stated, 'China is our only major trading partner to offer neither product patent protection ... nor copyright protection for US works ... Piracy of all forms of intellectual property is widespread in China, accounting for significant losses to US industries' (Office of the United States Trade Representative, 1991: 2). American producers of books, films, music, and software were claiming that they lost \$400 million a year because of the lack of copyright protection in China. Although this estimation is premised on the faulty assumption that with the enforcement of copyright, all the alleged infringers would purchase the legal copy at its full price, the USTR was ready to become aggressive about using a trade sanction when China appeared on the priority offenders list again in 1991. In June, 1991 a new copyright law took effect. In January 1992 China agreed to sign both Berne Convention and the Geneva Phonogram Convention under the threat of retaliatory sanctions.

For a regime that declares itself to be socialist, it is a very challenging task to justify the protection of a private property right in intellectual products. In fact, during the long and complicated drafting process that produced more than 20 drafts of a copyright law, 'commentators and officials were fully occupied with justifying each particular use and immediate purpose of an IPR' (Feng, 2003: 4). Domestically, copyright was proposed as an essential policy to rehabilitate the intelligentsia by recognising their rights as authors through legal protection (Alford, 1995; Feng, 2003). Article 22 of the Constitution provides that: 'The state promotes the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, culture centers, and other cultural undertakings, that serve the people and socialism...' (Zhang, 1997: 7). This is the basic policy for the protection of copyright. Article 1 of the Copyright Law therefore provides that:

This law is formulated in accordance with the Constitution to protect the copyright of authors of literary, artistic and scientific works, as well as to safeguard their copyright-related rights and interests, to encourage the creation and publication of works which contribute to the development of the socialist material and spiritual culture and to promote the development and prosperity of socialism's culture and scientific institutions (Zhang, 1997: 7).

Internationally, copyright was perceived to be a critical step that had to be made in order for China to be reintegrated into the world economy. Proponents of a copyright law recognising foreign authors' rights were hoping that this law could be a device for fostering a more general openness which could further create a beneficial environment for foreign trade and investment. Article 2 of the 1991 Copyright Law of the People's Republic of China states that:

Works of foreigners first published in the territory of the People's Republic of China shall enjoy copyright in accordance with this Law. Any work of a foreigner published outside the territory of the People's Republic of China which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs and China, or under an international treaty to which both countries are parties, shall be protected in accordance with this Law.

Here, the explicit recognition of international copyright stands in sharp contrast to the granting of protection only to domestic works in the first US copyright statute. While China joined the Berne Convention right after the codification of domestic copyright law, the US did not become a member of that agreement until 1989, almost two centuries after its first copyright legislation. As a result of the Sino-American Intellectual Property Negotiation of 1992, the Chinese State Council enacted the International Copyright Treaties Implementing Rules in September of that year. The US government insisted that China enact the rules to clarify that, wherever the protection level provided by the Chinese Copyright Law was lower than that of those treaties, foreign copyright works would be protected according to the international copyright treaties to which China had acceded. The rules only apply to foreign works (Xue & Zheng, 2002). While the double standard of copyright protection was meant to privilege domestic works in 19th century America, the very same expression has the reverse meaning in the Chinese legal context.

Now we can return to the lawsuit between Disney and Beijing Publisher which was mentioned in the first part of this paper. Although the economic compensation the court ordered in that case was not at all satisfactory to Disney, it is worth noting that this was only three years after the first Copyright Law was enacted in China and the idea of intellectual property had yet to be accepted by the Chinese people. Compared with the frustration of

Charles Dickens, Mickey Mouse actually had better luck in his first encounter with Chinese piracy. One major factor that contributes to the difference in their destiny is that in today's globally integrated economy, developing countries are facing much more pressure toward harmonisation of international copyright than their historical predecessors did (Cate, 1994; Aoki, 1998; Jackson, 2003). When IP-based businesses and the US representatives called for universalisation of international copyright laws, the developing countries realised this was not in their interest. Nevertheless, the mechanism of multilateral negotiations is such that 'the key to getting agreement is getting the right mix of issues on the table so that previously unrelated issues can be linked' (Ryan, 1998: 12). Thus, through linkage and bargaining, diplomatic treaties in politically difficult areas can be achieved where agreement would otherwise be elusive. The Sino-US intellectual property rights dispute was a good example of this diplomacy, as China's commitments to join the Berne Convention did not come until the USTR threatened to raise tariffs on \$1.5 billion of Chinese export goods, including beer, footwear, clothing, leather goods, televisions, watches, and nuts and bolts (Jayakar, 1997). While the US was able to design a copyright law that sanctifies the free use of foreign works which propelled the 'progress of civilization' in the newly-founded country, such a blatant discrimination against foreign authors in copyright legislation is not an alternative for developing countries in the era of globalisation.

To be sure, the *Disney vs. Beijing Publisher* case is by no means an indication that foreign authors' copyright has been well-respected since the promulgation of the China Copyright Law. Notwithstanding the recognition of international copyright in the law on paper, the enforcement of copyright protection in reality was at a much lower level than foreign copyright owners expected. During the Sino-US trade negotiations in early 1990s, Chinese officials defended book piracy by claiming that people were too poor to pay for Western books, 'yet we must obtain this knowledge so that we can develop our economy. Furthermore, our printers give Chinese people jobs. Your companies are rich and your country is rich, yet always you want more' (Ryan, 1998: 80). This argument followed the same logic put forward by opponents of international copyright in 19th century America as well as in the 1873 Congress report that rejected the bill advocating the protection of foreign authors. In addition to book piracy, software piracy remained rampant in China. Spokespersons for the software industry might be exaggerating when they claimed that 99% of computer software in China was pirated in the late 1990s. But according to a market survey conducted by *China Computer World* in April 1998, '63 per cent of CD-ROMS used by

users with college degrees were pirated, though the piracy rate was lower for users from other education backgrounds' (Xue & Zheng, 1999: 15).

Just as pirated foreign books benefited the US in the 19th century, the pirate software industry in today's China also has positive effects on local development. First, it serves as an important revenue source. As Tiefenbrun (1998: 37) observed, 'pirating in China is too profitable a business, and if stopped, may even detract from the growth of the booming Chinese economy. Chinese citizens stand to lose money and jobs if their government were to enforce and comply with its agreements with the US regarding copyright and trade'. This is the major reason that local governments lack the incentive to enforce the copyright law. Second, the low price of pirated software made the new information technology available and affordable to more people. When representatives of the US software industry claim that they lose billions of dollars every year because of piracy, they seem to forget they are talking about a country where average monthly income is less than \$100. The US copyright owners calculate their loss based on the assumption that once the piracy is stopped, Chinese people will be willing to spend two months' salary on a legal copy of Windows XP, for example.

4. CONCLUSIONS

It is hardly surprising that a global trend towards harmonising copyright legislation emerged within the hegemonic order of neoliberalism. As knowledge and information are becoming increasingly important resources, it is crucial to integrate them into the global economic system. Neo-liberalism's faith in the free market leads to its strong support for the institution of property rights and its re-emphasis on private economic activity over the public interest.

Based on the two historical accounts, I offer the following critique of the current trend of harmonisation of international copyright. First, as Vaidhyanathan (2001) emphasises, copyright should be more about policy than about property. As a policy issue, any country's copyright law is contingent upon the specific historical, political, and socio-economic context and cannot be framed as a universal model. Second, the lack of copyright enforcement in today's China is a symptom of the discrepancy between the obligations the country undertook and the developmental stage it is experiencing. Those who charge China with lax enforcement in the area of growing dependence on intellectual property tend to forget the impracticability of the requirement in the first place. Third, in their attempt to establish a

global consensus on international copyright, the US and other Western developed countries' argument that a strong protection of international copyright should come before any further development of the domestic copyright industry is not only self-serving, but also ahistorical.

The discourse used in both the US Copyright Act and China Copyright Law indicates that the primary goal of copyright protection is to foster the creation and dissemination of intellectual works for the public welfare. Yet as James Boyle (1996: 123) has depicted vividly, the current debate on international copyright is presented like a play between evil and justice:

For a long time, the evil pirates of the East and South have been freeloading on the original genius of Western inventors and authors. Finally, tired of seeing pirated copies of Presumed Innocent or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries - led by the United States - have decided to take a stand...It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo.

This historical analysis, however, shows that the US has a weak claim to moral superiority. This is not just because piracy used to be rampant in 19th century America, but also because copyright was not construed as a moral right in the US legal framework. Instead of treating copyright as a right that should be justly and naturally granted to the author, the framers of the first US Copyright Act conceived copyright as a utilitarian bargain among authors, publishers and the public. Copyright is supposed to provide an economic incentive for encouraging the creation of intellectual works which will ultimately contribute to 'the progress of science and useful arts' in America. After all, it is 'not primarily for the benefit of the author, but primarily for the benefit of the public such rights are given.' (US Congress, 1986: 3) Such a pragmatic approach allowed the US to design a copyright law that is favourable to its own economic development without worrying too much about the justice accorded to foreign authors. Now being among the most developed nations as well as the largest content exporter in the world, the US seeks to indoctrinate the rest of the world about the importance of universalised copyright law by mobilising its hegemonic power.

The China case study demonstrates that the incompatibility between a copyright law on paper and the country's developmental stage leads to the lack of enforcement of copyright protection. The international environment for copyright negotiations in the 19th century allowed the US to keep its legal discrimination against foreign works for more than a century, but China had to recognise international copyright at the initial stage of its

legislative effort to promulgate copyright law. Gadbow (1989: 233) asserted that 'The United States economy has moved steadily into areas where the value of its products is tied to intellectual and artistic creativity. If these assets are as vulnerable to plunder as the slow-moving merchant ships of the 1700s were to the Barbary pirates, the United States' ability to trade with countries that harbor such pirates could be seriously hampered'. With such high stakes involved, industry lobbies exerted enormous pressures on the US government 'to use its domestic law to assure protection in foreign markets' (Steward, 1993: 2253; also see Alford, 1994).

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) passed in 1994 is another case indicating the unbalanced trade relationship between developed and developing countries in the negotiations on intellectual property protection. Although the TRIPS has been hailed by some as 'a landmark in the evolution of an international consensus on intellectual property protection and is the most significant advance in the international protection of intellectual property since the adoption of the Berne and Paris Conventions in the late 19th century' (Hicks & Holbein, 1997: 780); others consider it 'coercive' and 'imperialistic' for the following reasons (Hamilton, 1996; Patel, 1996). First, bringing less developed countries into the TRIPS allows developed countries to impose economic sanctions on infringing countries. Second, by providing developed countries with universal minimum standards of intellectual property protection, the TRIPS agreement refuses to take into consideration the diversity of the economic, cultural and political conditions in developing countries (Yu, 2000). As a result, developing countries are being deprived of the opportunity of making use of advanced science and technology at an affordable cost.

This paper highlights the historical episode that is often omitted by the US representatives in contemporary forums for intellectual property protection debate where the dominant view is that a stronger and harmonised international regime of rights will result in the growth of an intellectual property industry in developing countries. The US experience, however, seems to suggest the causality might be in the reverse direction. As Chang (2002) points out in his historical reinterpretation of development strategy, the intellectual property rights regimes of the Now-Developed Countries (NDC) were (when they were themselves developing countries) quite deficient by the standard of our time. There were widespread and serious violations by even the most advanced NDCs until the late 19th century, especially when it comes to the intellectual property rights of foreigners. With the 'copyright industry' playing an increasingly important role in the global economy, copyright exporters in developed

countries are trying to promulgate the universal norms and rules of behaviour that both embody, as well as facilitate, the expansion of hegemonic world orders. By re-examining copyright law in an historical context and by reemphasising the historical contingency of copyright as policy, we gain critical insights into the factors contributing to this significant issue.

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