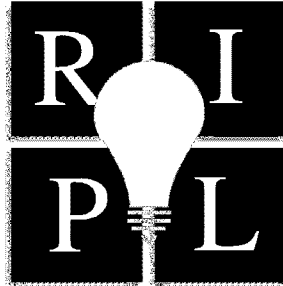


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



COPYRIGHT PIRACY IN CHINA

RALPH OMAN

ABSTRACT

Copyrights play a major role in promoting economic development and creating a national identity, and they have a tremendous impact on the social and economic well-being of nations. Within the past fifteen years, China has passed a strong copyright law, upgraded enforcement, and joined the Berne Convention. However, since then, the forward momentum has subsided and piracy has grown deep roots in China. If protecting their own citizens' rights was not important enough, the threat of international trade sanctions for having inadequate intellectual property protection may force China to reevaluate their current situation and step up international protection.

Copyright © 2006 The John Marshall Law School



Cite as Ralph Oman, *Copyright Piracy in China*, 5 J. MARSHALL REV.
INTELL. PROP. L. 583 (2006)

COPYRIGHT PIRACY IN CHINA

RALPH OMAN*

INTRODUCTION

My involvement with Chinese IP goes back to 1985, when I became Register of Copyrights, and we welcomed all of the senior people from the National Copyright Administration of China (NCAC) to Washington and to the U.S. Copyright Office. That delegation had an awesome assignment — to write a new copyright law from scratch, implement it within five years, and do this in a country with a 5,000 year history without a tradition of authors' rights. We had a close working relationship for the next five years. The NCAC did its job, and the law was adopted right on schedule. It was a happy day in 1992 when I flew to Beijing to join my fellow participant Mihaly Ficsor and other IP experts from around the world to celebrate China's accession to the Berne Convention.¹

China's accession was a major advance for authors' rights. I remember attending the celebration of the 100th anniversary of the Berne Convention in the Swiss Parliament Building in 1986. I was sitting in the front row with Shen Ren'gan of the NCAC on my right, and Mr. Tchvetverikov of the Soviet Union on my left. At the climax of his speech on the Berne Convention, Dr. Arpad Bogsch, the imposing Director General of the World Intellectual Property Organization (WIPO), pointed his finger at the three of us, and roared "There they are, the three bad boys of copyright — China, the United States, and the Soviet Union — all not members of the Berne Convention sitting next to each other in the front row!" Well, the story had a happy ending. The United States joined Berne in 1989, China joined in 1992, and Russia joined a short time later. However, it has not all been sweetness and light going forward since the three "bad boys" of copyright joined the Union.

The United States was the first country to be sanctioned by the World Trade Organization ("WTO") for failing to live up to its Berne obligations, because of our so-called "Fairness in Music Licensing Act."² Today, the United States faces enforcement problems in China. International protection for artistic and literary

* Ralph Oman is counsel in the intellectual property group in the Washington office of Dechert LLP. This article is based on his presentation given on May 25, 2006, at The John Marshall Center for Intellectual Property Law's Special 65th Anniversary Conference on The Role of the United States in World Intellectual Property Law. Mr. Oman is a graduate of Hamilton College (A.B., 1962) and Georgetown University Law Center (J.D., 1973). Mr. Oman served as U.S. Register of Copyrights (1985-93) and as Chief Counsel for the U.S. Senate Subcommittee on Patents, Copyrights, and Trademarks. Mr. Oman has taught copyright law for thirteen years at George Washington Law School.

¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

² See Panel Report, *United States – Section 110(5) Copyright Act*, WT/DS160/R (June 15, 2000), see also Dispute Settlement Summary, *United States – Section 110(5) Copyright Act*, WT/DS160, Summary of the dispute to date at June 2, 2006 at http://www.wto.org/english/tratop_e/disput_e/cases_e/ds160_e.htm (last visited on July 18, 2006) [hereinafter 110(5) Dispute Summary].

works has never been more important, because the world is growing smaller and people are becoming interdependent. Yet, copyright piracy continues to thrive in China, despite the fact that China is now an important creator of books, motion pictures, music, and software.

One of the sources of this problem is the Berne convention itself. It imposes no detailed requirements on legal remedies, and it permits countries to impose such mild penalties that piracy flourishes. Recognizing this limitation, the United States, along with its trade partners, included Intellectual Property in the Uruguay Round General Agreements on Tariffs and Trade (“GATT”) negotiations for the first time.³

Using trade leverage to further a nation’s IP protection goals is not a new wrinkle. In the 1850s, France refused to renew a trade agreement with Belgium until Belgium agreed to respect French copyrights. If countries want access to the U.S. market, to benefit from U.S. private sector investment, access to U.S. government financial assistance, or even state-of-the-art technology, U.S. trade negotiators argued that these countries should adopt minimal standards of IP protection. The United States began this effort on a bilateral basis in the Caribbean Basin Initiative in 1982. In that measure, Congress conditioned technical assistance for Caribbean countries on the acceptance by those countries of minimum levels of copyright protection.

In the 1980s, the copyright industries had many reasons for dissatisfaction with the international *status quo*. In the view of the United States and many other countries, the system of IP protection worldwide, especially on the copyright side, had grown seriously out of control, and drastic action was needed to restore it to an even keel. Rampant piracy was undermining key industries that relied on copyright protection, such as the music industry, the computer software industry, the publishing industry, and the motion picture industry. Time was recognized to be of the essence, because the emerging digital technologies promised to make copyright piracy even worse, especially for sound recordings and computer software. Piracy was also hurting the economic, political, and cultural growth of the developing countries themselves, and stifling the democratic spirit and the exchange of ideas. Moreover, the market for the products protected by copyright had become global, rather than national, and these new international markets had to be brought within the rule of law. In response to this rampant piracy, the WIPO began a series of meetings intended to modernize the Berne Convention to accommodate these new technologies.

This revision began in 1985, when I became the U.S. Register of Copyrights, and continued until 1996, when two new treaties were adopted. Even so, from the outset, we recognized that the lack of a real dispute resolution procedure in Berne greatly hampered its effectiveness. GATT would give the international IP community the power to enforce its standards. In fact, Berne and WIPO could rely only on gentle moral persuasion, while the GATT, now the WTO, had a real army with heavy artillery. It could impose economic sanctions. So the WIPO revision continued at a slow simmer on the back burner, while full attention turned to GATT.

³ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

In the end, GATT was able to negotiate an all-encompassing IP agreement. GATT succeeded because it had a much bigger pie to slice up, and it could give a generous slice of benefits to all countries. GATT could offer a comprehensive package on trade benefits, tariffs cuts, and market access in exchange for upgraded levels of protection for patents, trademarks, and copyrights. Eventually, the developing countries opted to join GATT and won a handsome settlement. So, GATT broke the logjam, and the United States began the effort to restore some balance to the international copyright system.

Of special importance are the enforcement and dispute settlement provisions of both GATT and the Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁴ The new procedures encompassed in these two agreements give teeth, for the first time, to the settlement of IP disputes between member countries. The WTO now oversees these procedures. It adjudicates disputes between its members when one member nation claims that the level of protection in another member nation falls short of treaty standards. The WIPO provides technical assistance as required.

China is now in the United States government’s crosshairs because of rampant copyright piracy. As a country with a long and rich tradition of culture and intellectual achievement, that should not be the case. For its first 100 years, the United States was a developing country, and it did not protect foreign copyrights. Some people say the international community should not bring pressure on countries like China; however, I think the opposite is true. If Great Britain had given the United States an economic incentive to protect the works of Charles Dickens and Oscar Wilde in the 19th century, and had the United States extended protection to foreign authors, the biggest beneficiaries would have been American authors.

PROPOSAL

Copyrights play a major role in promoting economic development and creating a national identity. In addition, copyrights have a tremendous impact on the social and economic well-being of nations. Therefore, I make no excuses for supporting strong global copyright protection. Eight years ago in Paris, the representative of Algeria warned us to guard against a one-world culture, a culture in which all men sing the same songs, watch the same movies, and read the same books. I cannot imagine a more sterile place, and we should heed that warning. Copyright protection allows national cultures to survive in the global marketplace. All people have a major contribution to make to global diversity. The best way to encourage that cultural vitality, in fact, the only way to encourage it, is to give strong copyright protection to all authors, both foreign and domestic.

I will explain using China as an example. Within the past fifteen years, China has passed a strong copyright law, upgraded enforcement, and joined the Berne Convention. However, since then the forward momentum has slowed a bit. Piracy has put down deep roots in China. If the Chinese government were to shut down the

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994).

pirates, the big winners would be the Chinese themselves, and also their composers, writers, artists, and computer programmers. It is true, of course, that foreign record companies, software companies, and motion picture studios lose money to piracy in China; however, at least they have access to other markets. Chinese creators have fewer alternatives, and piracy destroys their livelihood. A Chinese computer programmer faces a double hardship. First, she has trouble competing against a cheap or free pirated version of an American software package. Second, even if she could get her program published, she could not stop her own countrymen from ripping her off. Just as bad money chases good money out of the marketplace, pirated products destroy the market for legitimate products and are blind to nationality. As a result, hard-working Chinese creators cannot pay the rent and feed their children. This situation is bad for them, and bad for China.

Copyrights give creative men and women, along with the companies that hire them, strong incentives to invest time and money in the creation of books, software, movies, art, and music. A copyright expert from Ghana put it this way: "Why plant the field if someone else can harvest the crop?" China's new copyright law recognizes the need for a strong copyright law to spur domestic creativity. There is no future in piracy; pirates are low-tech parasites. A Chinese software development company that targets the needs and culture and language of its own country will give Microsoft a run for its money, but only if its works are protected. This local enterprise will employ far more people in better-paying and technologically advanced jobs, than will a back-alley copy shop, whose stock in trade is pirated computer diskettes.

A good way to keep China's sons and daughters happy and productive is to give them rewards and recognition. Give them strong incentives. Give them copyright and patent protection, and shut down the pirates. Then they will stay in China and work hard to build their country. It makes no sense to sacrifice the interests of these highly motivated, creative, and well-educated people, the best and the brightest, in order to keep in business those pirates who operate in the shadows and who will never contribute to China's solid, long-term economic and cultural growth.

China has other reasons to enforce copyrights as well. Copyright is a very modern, humane doctrine. At its core are ideals about the worth of authorship, about the dignity of human labor, and about how property is created and protected. Copyright is also about respect for men and women everywhere. Creators are working people who need copyright protection to earn a living, whether they are Chinese or American. Nevertheless, some Chinese government officials complain that licensing fees paid to foreign companies hurt the balance of payments. They also seem to lack faith in the creativity and competitiveness of their own people. A senior Chinese copyright official recently told the United States Register of Copyrights, Marybeth Peters, "China will begin to enforce copyright when it is in China's national interest to enforce copyright." What we have to do is convince the Chinese leadership that it is in their national interest to enforce copyright right now, and this will involve an appeal to reason, an appeal to their sense of honor, and a credible threat of economic retaliation.

Some say the United States is leaning too heavily on China. However, another way to look at it is that the United States is allying itself with the most productive people in China. The United States should encourage these people, so that they ultimately prevail over the misguided policies of a few short-sighted government

bureaucrats. The United States makes no apologies. The United States is right and those bureaucrats are wrong, and the United States government will continue to press for change. Of course, it must be done with finesse and in a non-confrontational way. The United States should not precipitate a public scene, which would set back the copyright enforcement effort. China is a great power, and should be treated with respect. However, that respect is a two-way street. China should respect its obligations to the international community. China should be worthy of the world's respect.

I have traveled in many desperately poor developing countries, and those countries have many other pressing needs. They face overwhelming problems of disease, malnutrition, and illiteracy. However, that is not China. China is an economic miracle, and the Chinese should respect IP, such as copyrights. I remember the uneasy relationship between China and the British Crown Colony of Hong Kong that existed for fifty years. It has some relevance here. British diplomats stationed in Hong Kong used to say, "China could take Hong Kong with a telephone call." The same is true about copyright piracy. China could end piracy with a telephone call. All that is needed is the political willpower.

In January, the United States copyright industries, through the International Intellectual Property Alliance ("IIPA"), urged the United States Trade Representative to keep China on the Priority Watch List, in view of the serious piracy problems. To try to avoid the dispute from ripening into a formal dispute resolution action in the WTO, China and the United States convened a meeting of the United States-China Joint Commission on Commerce and Trade ("JCCT") to discuss the copyright piracy problem. Primarily, the meeting aimed to discuss business software, CDs, and DVDs. Interestingly enough, this may sound familiar because the JCCT held identical meetings in 2004 and 2005 to discuss remedies for the piracy problem. Even more interesting is that at each of these two previous meetings, ambitious promises were made and press releases issued, but nothing happened. Maybe the third try will succeed.

CONCLUSION

The United States will keep the pressure on. By doing so, it will strengthen the bargaining position of those Chinese officials who argue for higher IP protection by showing that there is a downside to rampant piracy. Last month, the United States Trade Representative ("USTR") issued its annual evaluation of IP protection worldwide, its "Special 301" review.⁵ In it, USTR expressed its dissatisfaction with copyright enforcement in China, and noted that Chinese piracy rates continue in the eighty-five to ninety percent range, which USTR says is unacceptable.

For the first time, USTR politely put China on official notice that it was at risk. In the report, USTR announced that it would "step up consideration of its WTO

⁵ Office of the United States Trade Representative, 2006 Special 301 Report, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file473_9336.pdf.

dispute settlement options.” It would also announce, dramatically, that it would conduct a province-by-province evaluation of copyright enforcement in China. By turning the glare of publicity on individual provinces, like the notorious Guangdong Province and Fujian Province, USTR might be able to influence the investment decisions of foreign companies. In that way, USTR might be able to create an environment of competition among the various Chinese provinces to clean up their act or face serious economic consequences. USTR’s provincial review would also serve to reward those provinces that have made strong progress in copyright enforcement. Foreign companies want to know which provinces have a positive business climate, a functioning court system, and a respect for the law, and which are legal and moral black holes. These provincial rankings might help.

The central government in Beijing often hides behind the excuse that China is a big country, and that they have little control over what is happening on the ground in provincial China. The Beijing officials quote an old Chinese proverb in describing traditional provincial behavior: “The gods are forgiving and the Emperor is very far away.” Nevertheless, the sanctions that the WTO can impose are truly amazing, and they should get the attention of the Chinese trade officials.

When combined with our appeals to justice and honor, the threat of trade sanctions may finally get the attention of the Chinese leadership and get it to recognize that now is the time to begin to enforce copyright. All it would take is a telephone call.