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## Introduction

Copyright is said to be designed as an “engine of free expression,”<sup>1</sup> which promotes the production and dissemination of knowledge by giving economic incentives to creators. Copyright protection also spurs further creative production and dissemination of knowledge by allowing access to previously produced and circulated information. In both cases, copyright is seen as an important legal instrument, which aims at regulating a country’s economic and social policies. Arguably, such economic and social mandates of copyright may well underpin free speech and facilitate the free flow of information, which are the two most fundamental cornerstones of free expression. These economic and social regulatory objectives, however, may often clash and come into conflict with each other. This conflict used to be termed a “largely ignored paradox,”<sup>2</sup> but is now becoming increasingly palpable in the industrialised world due to the exponential manner in which knowledge is produced and disseminated.

Whereas the development of such regulatory goals in copyright might contain and trigger potential conflicts with free expression in different forms, the outcome in the People’s Republic of China (PRC/China) can be particularly interesting. Today, China maintains a copyright system that is playing an important role in facilitating its economic, cultural, and creative industries, such that the software industry has turned into a stunning success. No doubt China also abounds in creative talent that has invigorated its emerging knowledge economies. All this has, however, occurred only recently, because the local infrastructure of cultural industries has been established and social policies have been adjusted after more than three decades of economic reforms – a historical process of unprecedented repercussion between China and the world.

<sup>1</sup> *Harper & Row v. Nation Enterprises*, 471 US 539, 558 (1985).

<sup>2</sup> M. B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press? (1970) 17 UCLA L Rev 1180.

As a matter of fact, China is still wielding an old and rigorous censorship regime that clamps down on free expression, despite a modern system of copyright rules, which should, presumably, function as an engine of free expression. The most notorious example is Article 4 of China's former Copyright Act (the major statutory copyright law in China) prior to its recent amendment in 2010, which denies copyright protection to works that are barred from publication and distribution. In fact, that provision might have had less of a negative impact on copyright protection than on free expression. When a World Trade Organisation (WTO) Panel decided in 2009 against that controversial provision, the dispute manifested the potential conflict between copyright protection and the censorship regime in China. Although China replaced the former provision with a seemingly acceptable clause, the State's will to exercise control of free expression still overshadows copyright protection in China, which is one of the fundamental factors that render China's copyright protection distinct and somewhat isolated from copyright protection in most countries of the world.

This may explain why, in conducting a policy analysis of the intellectual property (IP) law in China years ago, Alford posed a serious question to the Chinese copyright system. He asserted that the real focus of any regulatory policies concerning publication in China was not the protection of individual rights, but the control of the flow of ideas for the purpose of maintaining the political legitimacy of the government.<sup>3</sup> If this argument still holds true, what are its precise legal implications under Chinese copyright law? Considering the manifold recent legal developments, should this point of view be refined in one aspect or another? Are there any other factors in copyright law that may neutralise or counterbalance the Chinese government's efforts, say, to exercise censorship? These are questions this book seeks to answer.

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Indeed, copyright law in China is not only concerned with the economic interests of authors, publishers, readers, and Internet users, but it also assumes a significant role in regulating China's sociopolitical policies, especially in its cultural domains. In fact, besides being an engine of free expression, copyright in China is treated as one of the fundamental

<sup>3</sup> W. P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford, CA: Stanford University Press, 1995).

means to carry out the government's underlying policy of the control of free expression. It is perhaps for this reason that copyright protection in China remains a perplexing and embarrassing issue. Although authors and publishers who enjoy copyright protection may have a potential conflict of interest with the general public, a more fundamental understanding is that national copyright policies in China tend to be defined by more diverse and complicated contours of historical, social, and political priorities, especially the entrenched censorship regime.

Since the international copyright system came into being in the nineteenth century, China has been perceived (and may still be perceived) as a country where activities of piracy are rampant. Such rampant piracy has been attributed to the traditionally inward-looking Chinese culture, an overall backward (planned) economy, misconception of the whole Chinese society about copyright, loose government control of piracy, and lower legal standards of copyright protection. All these contributing factors underlie the government's mentality of defining copyright protection as part of its national policies, which aim to regulate China's specific economic and social development. Above all, the traditional Chinese society used to view claiming monetary rewards for one's spiritual works as a shameful thing. "Stealing books is an elegant deed," as the saying goes around in China.

More important, the public policy priorities defined by the Chinese government in regulating publication often lie in controlling the production and dissemination of ideas/knowledge. As a corollary, copyright protection, if anything can be termed as such in China, has always been subject to censorship. Such an underlying policy prevailed in the legislative process of copyright laws before and after China's copyright system was established. In fact, the Chinese government has upheld an understanding of copyright based on the vague term of "interest balancing," which the government often defines in the light of the socialist value of placing collective interests above individual interests. Ultimately, this means control of free expression through censorship.

Such a practice has largely impeded the institutionalisation of the proprietary nature of intellectual works produced by individuals and private entities, thwarting free speech to a considerable extent. Moreover, it also renders the commercial distribution of and access to such works difficult and even frustrating, thus hampering the free flow of information. Even today, when China firmly claims to accord copyright protection an unprecedentedly important role in facilitating its process of economic development and globalisation, it remains challenging how

China could interpret and readjust its national copyright system in a coherent way to cater to different needs that arise from “public” and “private” spheres in specific economic and social contexts.

Certainly, these conflicting interests, as they represent a general “paradox” under other jurisdictions, would have to be weighed against one another in terms of the level of China’s economic and social development. Therefore, it seems right to start a conversation on Chinese copyright law with the topic on “interest balancing.” However, the State’s will to suppress free expression remains the sword of Damocles. So far, most scholarship on copyright in China has focused on the issue of interest balancing from the traditional perspective of private law and national law.<sup>4</sup> Unlike the research on copyright laws in other countries, however, any meaningful scholarship concerning Chinese copyright law would only present an incomplete picture if it is oblivious to the crucial role of censorship, for China’s copyright system hinges on the control, rather than the encouragement, of free expression from the outset.

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In fact, there has long been another important element that complicates China’s copyright conundrum: the development of China’s copyright law can only be better understood from a comparative perspective, ideally in the international context. This is because the fundamental and irreversible factor that catalyses the establishment and development of China’s national copyright system is copyright internationalisation. Since the beginning of the twentieth century, international copyright law has exerted considerable influence on the way in which China designs and constructs its copyright system and, in particular, the extent to which China exercises its censorship in the domain of publication. Thus, copyright in China presents a nuanced paradox. The development of Chinese copyright law involves not only the conflict between authorial interests and public interests in general, but also the conflict between China’s censorship and international law.

The way international law interacts with Chinese law involves a long diplomatic process. Historically, international negotiations have influenced profoundly the making of China’s modern copyright system and the role of censorship in copyright protection. The first process of such

<sup>4</sup> See, e.g., G. Tang, *Copyright and the Public Interest in China* (Cheltenham/Northampton: Edward Elgar, 2011).

negotiations occurred toward the end of the Qing Dynasty, when the United States and Japan raised their requests for copyright protection in bilateral commercial negotiations. Around the 1980s, economic and political pressure from both at home and abroad pushed China to develop its own national copyright system in line with international copyright law. After several rounds of international IP negotiations, the PRC accomplished the stunning process of acceding to the most important international copyright treaties, including the Berne Convention for the Protection of Literary and Artistic Works (BC)<sup>5</sup> and the Universal Copyright Convention (UCC).<sup>6</sup> More recently, international trade negotiations brought forth China's accession to the WTO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>7</sup> In addition, China has become a party to the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).<sup>8</sup> Obviously, China has taken prompt steps toward internationalisation of its copyright law. However, a question remains: does international law neutralise China's censorship regime or vice versa?

In all those historical stages of negotiation, China's partners insisted either on China's accession to or enforcement of international copyright treaties. While China, in the light of China's censorship policies, claimed to be wrestling with balancing private interests against public interests, China's negotiation partners compelled China to look to international copyright law for establishing, improving, and redesigning its national copyright system. As such, China has committed itself to attuning its copyright rules to international copyright law, and is constantly implementing copyright reforms to adapt its own interest-balancing approach to that of the international copyright system. Thus, international copyright law has provided the fundamental legal framework within which China could develop, interpret, and implement its

<sup>5</sup> The Berne Convention for the Protection of Literary and Artistic Works, Paris Act, revised 14 July 1971, 1161 UNTS 3.

<sup>6</sup> Universal Copyright Convention, done 6 September 1952, [1955] 3 UST 2731, TIAS No. 3324, 216 UNTS 132 (UCC); UCC revised 24 July 1971, Paris, 25 UST 1341, TIAS No. 7868.

<sup>7</sup> 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, vol. 31, 33 ILM 1197 (15 April 1994).

<sup>8</sup> WIPO Copyright Treaty, 20 December 1996, 36 ILM 65. WIPO Performances and Phonograms Treaty, 20 December 1996, 36 ILM 76.

economic and social policies. This legal scenario is sophisticated and warrants an in-depth examination.

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Based on the aforementioned linkage between Chinese copyright law and international copyright law through international negotiations, this book attempts to explore the development and architecture of Chinese copyright law in parallel with those of international copyright law, clarify China's nuanced patterns of the control of free expression through copyright law, and identify a breakthrough for neutralising the impact of China's censorship through copyright law. In international trade and IP negotiations so far, China has shown its willingness to defer to international copyright law without jeopardising its censorship regime. Such a policy goal, however, presents an uncompromising conflict: copyright is set to be an engine of free expression, whereas censorship strangles it.

Can international negotiations that aim to indoctrinate China with international copyright law breathe an engine of free expression into China? A historical study of the parallel development of Chinese copyright law and international copyright law might reveal how both legal branches are interrelated through negotiations. Such developments are, certainly, accompanied by complicated economic and sociopolitical backgrounds at home. In addition, a comparative study of relevant copyright rules of the PRC and international copyright law would carve out the legal contours concerning how the conflicts between general copyright policies and China's specific policy of controlling free expression might be viewed and mitigated. Through international IP and trade negotiations, the international copyright system has exerted, and might continue to exert, a positive impact on the functionality of China's national copyright law in regulating free expression. Following are the most important findings of this examination.

First, China's will to exercise the control of free expression is recalcitrant, the way China perceives the international copyright system is multidimensional and the strategies that China incorporates into its copyright system are sophisticated. Traditionally, Western countries have dominated the process of making fundamental global economic rules. Global economic rules, however, are invariably the result of contentions and compromises made between nations to reap more important shared interests. Thus, parallel with the negotiations toward China's accession to

the BC and the UCC, China infused its will to exercise the control of free speech into its copyright law, as exemplified by Article 4 of its previous Copyright Act, which denies explicitly copyright protection to certain works that fail to pass the threshold of censorship. Further, although China took over a number of international copyright rules, its practice of establishing a copyright system in this stage is characterised by lower standards of copyright protection and reflects the traditional policy of discouraging intellectuals, who are engaged in creating independent works, thus thwarting free speech. This anti-free-speech pattern of copyright law was, certainly, backed up by a planned economy that suppressed the intellectuals' pursuit of financial independence from the State.

Second, international copyright law has been able to infiltrate into China's copyright system and counterbalance certain chilling effects of the practice to dampen free expression. In an incrementally integrated global system that encompasses knowledge as a fundamental engine and new pattern of economic development, a nation's cultural and social policies can be largely assimilated into its trade interests through its IP laws. Upon becoming a Member State of the WTO, China became fully aware of the significance of enforcing international copyright rules when implementing its economic, cultural, and social policies. In that connection, China was not able to dodge its obligations under TRIPS, but was obliged to boost its copyright standards considerably. The subsequent copyright reform reshaped the contours of authorial protection and enhanced their economic status, which contributed to encouraging free speech. Nonetheless, China was able to react and redefine its national IP policies within the purview of international copyright rules to achieve its goal of controlling free expression. For instance, Article 47 of the revised Copyright Act confers authority on administrative departments to enforce copyright protection and define the "public interest." In practice, China has launched regular campaigns that crack down on the piracy of copyrighted materials. These campaigns, however, are targeted practically at the circulation of specific information that fails to rise to the threshold of censorship. By readjusting its copyright law, China shifts the focus of its control of free expression from the production to the circulation of intellectual works and, thus, from control of free speech to control of the free flow of information.

Finally, concerning its future, the Chinese copyright system looks to a trend of modernisation geared to the development of international law. In aligning its national copyright system with international copyright

law, China endeavours to balance different kinds of tensions and conflicts of interests, while maintaining its censorship regime. In the ongoing process of IP and trade negotiations, China defines its national copyright strategy as an intellectual framework that defers to international law, but takes priorities in local economic and social development into account. Clearly, under TRIPS, China is obliged to provide for copyright protection on a full scale and remove any barriers that might hinder the functioning of a modern copyright system. As exemplified by the Sino-US copyright dispute, China deleted Article 4 of the earlier Copyright Act. This does not, however, mean that international copyright law could redeem free expression in China once for all. Further, in the era of digital copyright, China is and will be engaged in a spate of negotiations with powerful global players, which will produce diverse new copyright rules. As such, China's digital copyright system, burdened by the task to exercise censorship, grows, collides, and develops with international copyright law. Once they are planted into the Chinese copyright system, these international copyright rules, which render the promotion of free expression irreversible, may present new challenges to, and opportunities for, facilitating free expression in China.

This work is also looking to the future of Chinese copyright law, as China launched its copyright law reforms in 2012, which is going to witness the third, but probably the most significant, revision of its Copyright Act in history. So far several revision drafts have been presented to the public to solicit opinions. Although the formal revision is likely to come in near future, there are still some fundamental issues that give rise to controversies in China. In any event, China proclaims that it will adopt internationalisation as one of its fundamental goals of copyright reform. New dialogues between China and its commercial partners that cover this topic are also under way. Therefore, it is crucial to address Chinese copyright law in a historical lens and, in particular, China's entrenched policy of regulating free expression through copyright law, which represents a cutting-edge issue that underlies the Chinese copyright system and merits attention in the long run.

As such, the title of this book reveals that positioning China in international negotiations would prompt China to reshape its copyright law in terms of international copyright law. Although China adopts sophisticated legal strategies to incorporate censorship into its copyright system, this process of legal integration might become a fundamental engine, which drives China to advance a modern copyright system that contributes to free expression. This book seeks to achieve this end in



three dimensions. First, the book explores the historical process of positioning China's national copyright system in international negotiations, which helps channel Chinese copyright law into the international copyright system. Second, this book provides an analysis of positive law, comparing relevant international copyright rules and Chinese copyright rules that might affect free expression. Finally, the book evaluates how the role of Chinese copyright law, in serving the State's will to exercise censorship, has developed and may develop further in parallel with international copyright law. This book will be divided into the following four chapters.

Chapter 1 sets the scene of the whole book by providing an overview of the fundamental problem and methodology. The chapter raises the general question of balancing private interests against public interests in traditional copyright rationales and discusses its relationship with the regulation of free expression. The chapter highlights the specific role of the predominance of the government's interest in conducting censorship in Chinese copyright law. After that, the chapter moves on to the history of legal transplantation in China and focuses on a specific episode of China's international negotiations, which encompasses the imbroglio of copyright issues. This process shows how international negotiations have led China to transplant rules of international copyright law into Chinese law, which compromises China's policy of exercising censorship. Finally, this chapter presents a legal approach in copyright law for the purpose of promoting free expression in the normative dimension.

Chapter 2 reveals how China relies on international legal resources for making its earlier copyright law, which compromises its strategy of controlling free expression. In this dimension, the architecture of Chinese copyright law aims to legitimise the government's interest in controlling free speech by imposing limitations on copyright protection in general or by limiting copyright owners' economic interests. The chapter reviews the history of the economic and social development of the PRC prior to the 1990s, in which China's cultural policies concerning copyright and intellectuals were embedded. In particular, the chapter examines China's accession to the BC and the UCC through a series of international negotiations and how China took steps toward copyright law making. The chapter also explores the international copyright framework with an eye on the legal resources, which are apt to generate a scenario amiable to free expression by facilitating the economic interests of copyright owners. Further, the chapter will probe into the legal framework of China's national copyright system of the 1990s, as China's initial interest-balancing

approach aims to suppress such interests to buttress the policy goal of exercising censorship. The chapter ends by evaluating China's inverted legal architecture in a comparative perspective.

Chapter 3 considers China's commitment to the international obligation of enforcing copyright protection, which may further contradict the government's interest in controlling free expression. At this stage, the problem is relocated in controlling the free flow of information by restricting the interests of the general public in accessing intellectual works. This chapter first provides an overview about the historical background concerning the establishment of a new economic system until the beginning of the new century, which hails the advent of an information society. The chapter elaborates on how China underwent harsh rounds of multilateral trade negotiations to accede to the WTO and, thus, to the TRIPS Agreement. The chapter also analyses the new legal framework under TRIPS with regard to its rules that may facilitate public access to copyrighted materials and the free flow of information. The chapter then turns to the 2001 copyright reform and elucidates how China endeavoured to bring a relevant framework under its revised copyright law into harmony with that of international copyright treaties. The chapter ends with an appraisal of China's alternative interest-balancing approach that aims to bring such public interests under control for the purpose of ensuring the censorship regime.

Chapter 4 offers an overall review of China's national copyright system in terms of the government's policy to exercise censorship in the context of copyright internationalisation, which indicates the irreversible tide of aligning copyright with free expression. In this regard, the chapter will explore the new global copyright framework, in which China's international IP and trade negotiations are rooted (within and beyond WIPO and the WTO). The chapter will also enunciate China's copyright reforms and strategies in the new era, considering China's contemporary domestic policies relating to the regulation of free expression. In that connection, the chapter reconsiders China's current copyright framework with respect to the conflicts between the interests protected by copyright and China's censorship policy. Finally, the chapter provides a prospect on China's ongoing reform of its Copyright Act since 2012 in terms of China's peculiar approach of balancing free-expression-oriented interests against its censorship-directed interests.