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The Sly Rabbit and the Three C's: China, Copyright and Calligraphy

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Abstract

This article posits that among the many different methods being used to try to increase enforcement of Western style IP laws in China, that ultimately one of the most effective methods may be to support and aide the slow but steady shift in Chinese culture, away from a collective society view, and towards an individual ownership view – not just as to economics, but also as a cultural and social perspective – with broader support for the concept of individual rights and freedoms on a variety of fronts, and not just the IP arena. In this context also, I note in passing that the movement in China to embrace many of the attributes of Western culture is a mixed blessing, as media coverage of the rise in obesity and lung cancer in China is a byproduct of some of the less salutary aspects of Western culture.

The merit of this hypothesis is shown in this article by the discussion of the example of calligraphy arts in China. This art form, and its history, and modern interpretation, provides a demonstration of my hypothesis. Calligraphy symbols in China are, in essence, pictograms that draw their inspiration from things found in nature – trees, rocks, animals, elements, etc. For most of the history of calligraphy as an art form in China, this source history supported the view that calligraphy symbols could not, and should not, be protected by copyright – just as in patent law, you cannot obtain a patent on items found in nature.

However, modern calligraphy art, uses the symbols of traditional calligraphy only as a jumping-off point – the modern works contain interpretations of these classic symbols that are virtually unrecognizable, and are imbued deeply with the artist’s own vision and perspective – they often bear no visible resemblance to their source symbols at all. Since these symbols, under a Western view, would, by virtue of their age and utilitarian function, be deemed to be in the public domain, the new calligraphy artists would face no derivative rights challenges, and would be entitled to claim sole ownership of these works.

The first section of this Article discusses the history of copyright (in significantly abbreviated form) in the West, starting with the common elements established in the middle ages, and then identifying the manner in which copyright protection diverged in the U.S. from its European origins. The second section looks at the history of copyright in China, from its Imperial age origins, followed by a consideration of how copyright has been implemented during modern times in both the communist nation of the People’s Republic of China on the mainland, and the Republic of China (ROC) on the island of Taiwan.

The third section of this Article surveys some of the methods used in teaching art in China, and how the idea of individual property ownership has been interpreted by Chinese artists, both with respect to their own works, as well as their usage, and in some instances, appropriation, of the artistic expression of others, both within and outside of China. This section also discusses why, despite efforts by both the Chinese government, and Western governmental entities, the attempt to import Western-style copyright enforcement mechanisms have been largely unsuccessful to date.

The fourth section of the Article explores how Chinese Calligraphy, a classic and highly traditional art form in China, has evolved into a very different contemporary form of artistic expression, and offers this evolution as a basis for suggesting that as this and other forms of fine art evolve in China, they present an opportunity to convert those artists into the kind of stakeholders, to borrow the concept articulated by Professors Peter Yu and William P. Alford in many of their published works, which may provide the best opportunity to create an environment more conducive to successful enforcement of copyright protection for members of the Chinese creative community.

Introduction

There is a classic Chinese proverb which reads: Jiao tu san ku – “A sly rabbit will have three openings to its den.” The meaning has been interpreted to be that “to succeed one must have several alternatives”. Applicable to many circumstances, this proverb is particularly apt in describing the approach that the United States and the European Union (referred to variously herein collectively as the “West”, or “Western”) needs to take in attempting to develop an effective means for enforcing copyright rights in both Taiwan and the Peoples Republic of China.

As is discussed in greater detail in Section 2 of this Article, the West has, for at least the past forty years, attempted to foster a stronger enforcement environment regarding copyright law in the PRC and the ROC via external pressure, primarily in the area of international treaties and trade agreements. While these efforts contributed, along with significant internal economic factors which played an even greater role, to the adoption of Western style copyright law in both the PRC and ROC, this adoption was not followed in any significant degree by a strong enforcement regimen. Both countries remain the source of vast quantities of pirated goods, primarily in the sound recording, motion picture, computer games and software industries. To a lesser, but by no means insignificant degree, this laxity in enforcement has also affected the market for fine art in, and from, China.

Like the sly rabbit, we need to develop new and alternative approaches to the issue of copyright enforcement in China. This is not to say that the approaches used to date have not had some impact – without these laws on the books we would lack the basic structure necessary to begin the needed process – a cultural and political change of view that supports private ownership of intellectual property rights, and the means to enforce those rights. But laws alone do not effect cultural change – one need look no farther than the music downloading history in the United States for support for this view. Cultural change also presents numerous challenges, particularly where the goal of the change is to effect legal reforms. In part, the difficulty of effecting cultural change stems from the reality that culture itself is an enormously complex concept, and within any nation, culture is an ever-changing attribute. The mutability of culture makes it particularly difficult to serve as an engine of legal reforms, since those reforms are generally intended to function in a far more static environment than the cultural one.

It is, therefore, appropriate to expand our analogy to note that while it is desirable for a sly rabbit to have more than one entrance to its den, the rabbit must also choose each of those entrances with care – poorly chosen entrances can do more harm than good. The Western legal community must exercise the same care in choosing its next generation of approaches to copyright enforcement in China – and it is the goal of this Article to articulate some of the issues facing us in meeting this challenge, and to offer at least one example where internal changes in one area of art – calligraphy – may offer us an opportunity to develop one such successful new approach.

The following is a synopsis of the remainder of this paper.

I. Western Copyright Law

a. Common Approaches

In this section, I will discuss the earliest stages of copyright law in the West, referencing the Statute of Anne in the U.K., and noting that the initial goal of copyright was to respond to the concern of publishers of books that competitors would copy their published works freely unless the law prevented this. The publisher's economic interest was what the first copyright law sought to protect, which is also why the first term of copyright was so short – only seven years, because the sense at the time was that the shelf life (no pun intended) of books would be short.

As time went on, and as the West moved away from traditional monarchies, and artists concurrently were no longer under the protection of wealthy and powerful benefactors, the emphasis of copyright law began to shift to a means of protecting the rights of the authors.

Thus by the time the Berne Convention was signed in Europe in the late 1800s, and the U.S. Constitution was drafted and included Article I, Section 8's concept that Congress should provide a limited monopoly of ownership in intellectual property to stimulate its creation, the shift in protection from publishers to artists was

complete. (in this context it is somewhat ironic to note that much of the current dialogue about the scope of copyright pits the publishers and distributors of creative works against the creators, in a reversal of their historic roles – a subject I addressed in my article *Reason or Madness: A Defense of Copyright's Growing Pains*, 7 *John Marshall Review of Intellectual Property Law* 2 (2007)).

b. Divergences – Formalities and Moral Rights

As copyright law evolved in the 20th century, divergences began to appear between the U.S. and the E.U. with respect to a number of aspects of the law. Two key areas of divergence were with respect to moral rights and registration formality and term of protection. This section of the Article will discuss the development of *droit morale* in the E.U., aided by Article 6 *bis* of the Berne Convention, and the concurrent resistance to the adoption of moral rights in the U.S. Similarly, the E.U., through Berne, banned formalities in registration, while the U.S., under the 1909 Copyright Act, imposed significant formal requirements for registration and renewal of works, with draconian results in the event of noncompliance with those formalities. Lastly, the term of copyright protection in the E.U., at life plus 50 years, and then expanded to life plus 70 years, was also rejected in the U.S., which until 1976 retained its two terms of 28 years as the length of protection.

This section on divergences will conclude with a recitation of the history which has, post 1976, slowly but surely brought the West's copyright regimes into a period of greater harmony. The U.S. became a signatory to Berne, and with the revision of copyright law in the 1976 Act, began the process of dismantling the formalities which were not allowed for Berne signatories. The Copyright Term Extension Act brought the length of protection into harmony with the E.U., and the Supreme Court's rejection of the challenge to that extension, in the *Eldred* case, seemed to signal that the need for harmony with the E.U. approach was an important policy goal of U.S. law.

II. Copyright Law in China

This section of the Article will discuss the history of copyright law in China. The goal of copyright protection in China was to protect designs and other creative works which were to be the exclusive property of the Imperial family. These works were not allowed to be copied and used by any other persons. Thus the initial goal of copyright laws in China was to protect a very different interest than the Western version of these laws.

This section will also discuss the millennia-long debate within Chinese society between those who follow the teachings and doctrines of Confucius, and those known as the Legalists. The debate centers on one's view of the nature of society. In the Confucian teachings, the goal of society is to create a world motivated by high moral principles, in which the individual's materialistic needs and desires are subsumed by the needs of the greater good of all members of the society. The Legalists take a somewhat more jaundiced approach to human nature, and stress the need for legal structures to protect and enhance the lives of members of the society.

With this sociological backdrop in mind, I will next discuss the unsuccessful efforts from both outside and within China, to adopt a Western-style legal structure to provide protection for creative works. I will discuss the adoption of sweeping reforms in Copyright law in China in 1990, and again by amendment in 2001. The failure of this imposition of a Western approach, both in the PRC and the ROC, will then be discussed, and updated to address the state of copyright protection in contemporary China.

III. Art and Art Education in China

In this section of the Article, I explore the history in which the Confucian doctrine, followed by communism, gave rise in China to an approach to ownership of creative works that saw little value in individual ownership. Chinese artists were, up until the late 20th century, educated with a deep reverence towards the art and artists of the past. It was a time-honored tradition of young artists to study the works of the masters of prior

generations, and to create works of art which imitated those masters, down to the calligraphy through which those masters signed their works. These masters developed an attitude of tolerance, and even receptivity, to forgery of their works. Imitation of works did not carry the negative implications that practice would have in Western art.

The current economic explosion of building activity in China has been accompanied by the creation, for the first time in its history, of many new museums in outlying communities far from the major urban areas of Shanghai and Beijing. There are now more museums, than there are original works of the great masters of Chinese art. The cultural attitude that views replication of these works by pupils as an innocent activity, now supports instances where the works hanging in the museum, although copies rather than originals of these masters, are not identified as copies.

As Chinese art has become increasingly popular to Western collectors and museums, the first instances of problems with the conflicting cultural viewpoints regarding imitation/forgery have come to the fore. I will, in this section, discuss an array of forgery instances regarding Chinese art sold by U.S. and U.K. auction houses.

The intersection of these divergent viewpoints about the value of individual ownership, and the degree of significance appropriate to attach to the provenance of a given artwork, is the next area to be discussed in the Article.

IV. The Three C's: Copyright, China, and Calligraphy

The art of Chinese Calligraphy presents a fascinating example of both the problems of enforcing copyright in China, and a possible hope for the future success of such efforts. This section of the Article explores both of these aspects of calligraphy in China.

The section begins by discussing the history of the characters which constitute the Chinese language. These characters are pictograms, which depicted creatures and conduct that comes from nature. As such, the

view of Chinese calligraphers was that copyright protection could not attach to calligraphy, since no one should exclude others from these elements of their common heritage.

Calligraphy also takes on greater significance in China because while the Chinese written language dates from the 13th to 11th century BCE, there is no tradition of political oratory in China, so political influence and viewpoints depended heavily on the written word. Following the political revolution in the early twentieth century in China, the traditional art of calligraphy was increasingly used for political propaganda by the State, and as a basis for expressions of protest by activists opposed to the State. In this arena of political ferment, a new art form, based on traditional calligraphy, but encompassing a very different, and unique and original form of expression, arose and became known as “modern” calligraphy.

Modern calligraphy bore little resemblance to the traditional forms, and was instead, as articulated by artist and theorist Zhang Qiang, about “self-openness”, or “calligraphic openness”. The artists creating these works are challenging official definitions of art, and are claiming individual ownership of their work. As their works move beyond China’s borders, they bring, through the interest shown in their work by collectors, curators and dealers, recognition and fame to China – values prized and desired by the government.

Noted art critic and Columbia University Philosophy Professor Arthur C. Danto, in his book of essays, *Beyond the Brillo Box: The Visual Arts in Post-Historical Perspective*, discusses, in an essay in the book entitled *Shapes of Artistic Pasts, East and West*, how the essence of the Modernism movement in art is the rejection of history. To a significant degree, modern calligraphy is a Modernist movement. And it is precisely this rejection of history, in this case the history of Confucian doctrine which eschewed individual expression and ownership, which if supported and encouraged, may create in these new artists the kind of local stakeholders who will see the value of implementing a regime of strong

copyright protection, and in so doing, achieve internally the goal sought by the West.

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