

About “Face”: Using Moral Rights to Increase Copyright Enforcement in China

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Introduction

In the United States, copyright protection stems from a constitutional promise, made over two centuries ago, to promote the progress of “[s]cience and useful [a]rts.”¹ Around the world, constitutions, civil codes, and international treaties ensure that creators may seek a remedy for copyright infringement.² Application and enforcement of copyright protections, however, are not uniform, even among nations who are signatories to the same international treaties. These differences have led to economic and political clashes. For example, the United States has intensely focused on increasing copyright protections in China for nearly two decades.³ This twenty-

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1. U.S. CONST. art I, § 8, cl. 8.

2. See, e.g., Copyright Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001), available at http://portal.unesco.org/culture/en/files/30384/11424207963cn_copyright_2001_en_.pdf/cn_copyright_2001_en%2B.pdf (China); CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTEL.], available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414&dateTexte=20110326> (Fr.); GESETZ ÜBER URHEBERRECHT UND VERWANDTE SCHUTZRECHTE [GUVSR] [LAW ON COPYRIGHT AND NEIGHBORING RIGHTS], amended on Dec. 17, 2008), available at http://portal.unesco.org/culture/en/files/39644/12512067323gr_copyright_2008.pdf/gr_copyright_2008.pdf (Ger.); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter *Berne Convention*].

3. See generally USITC, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, USITC Inv. No. 332-514, Pub. No. 4199 (Nov. 2010), available at <http://www.usitc.gov/publications/332/pub4199.pdf>.

year struggle has been characterized by various top-down efforts to impose Western-style copyright law on the Chinese legal system, largely because Western commercial interests perceive an effective Chinese copyright regime as critical to the protection of both international and domestic intellectual property, or IP.

This Note proposes that a more effective means of increasing copyright enforcement in China is through further development of the moral rights concept of copyright protections, a theoretic basis for copyright law endorsed by many of the civil law countries of continental Europe, most notably France. A moral rights-focused approach to copyright more closely resembles traditional Chinese cultural values, whereas the economic rights central to American and British copyright law are largely anathema to the Chinese. Traditional Chinese notions of honor and integrity⁴ are not identical to the principles underlying moral rights,⁵ yet emphasizing the similarities between the two concepts could result in a broadly accepted and enforced copyright law in China. For the Chinese, approaching copyright through the gateway of moral rights is less problematic than accepting Western concepts of individual intellectual property rights that have no analog in Chinese culture.

The first section of this Note explores the roots of current Chinese copyright law, including its constitutional and statutory bases, and provides an overview of the contemporary enforcement regime. The second section addresses the origins of the moral rights view of copyright protections, and the interplay between economic rights and moral rights ideas in American and Chinese copyright law. In particular, I explore how moral-rights arguments influence legal decisions differently in the common-law tradition, as compared to civil law systems, and I illustrate this phenomenon by examining contemporary cases from both the United States and China. Finally, the third section advances the idea that the United States could increase the effectiveness of copyright law in China by emphasizing its connection to the moral rights of authors, artists, and creators.

4. GE GAO & STELLA TING-TOOMEY, COMMUNICATING EFFECTIVELY WITH THE CHINESE 55–63 (1998). In China, these concepts are closely linked to the idea of “face,” or *mian zi*, concern for *mian zi* is “an integral part” of Chinese self-image, personal relationship development, discourse and communication strategies whose prominence in Chinese culture is absolute and “insurmountable.”

5. Traditionally, moral rights protect rights to claim authorship or attribution; the right to protect the integrity of the work; the right to decide how the work will be published or disclosed; and the right to withdraw a work after publication. See *Berne Convention*, *supra* note 2, at art. 6*bis*.

I. Chinese Copyright Law, its Origins, Enforcement, and Flaws

Various forms of intellectual property protections have existed in China for centuries. The first known protections were granted to trademarks during the Tang Dynasty (618–907 C.E.), where merchants and traders used brand names and logos to distinguish their goods at market.⁶ Later, the Ming (1368–1644 C.E.) and Qing (1644–1911 C.E.) dynasties officially recognized trademark through an informal registration system operated by trade guilds.⁷ Yet the notion of protecting intangible property, recognized in trademark, did not lead to the creation of a similarly organic system of copyright protections. To the contrary, with the rise of Confucianism, Chinese culture shifted away from the idea that a creator possesses an individual right to his own creations.⁸ When it comes to the problems of counterfeiting and piracy in China and other Asian countries, Confucianism is commonly identified as the cultural predisposition responsible for a general lack of recognition of individual property rights, and especially of intellectual property rights.⁹ A brief overview of Confucian philosophy will help contextualize the Chinese notion of copying and its influence on contemporary Chinese copyright law.

A. The Influence of Confucian Thought

The Confucian school of thought did not develop *sui generis* but rather as a cohesive articulation of existing attitudes and values in ancient China.¹⁰ Confucianism became official state doctrine, inculcated in the people through persuasion and coercion.¹¹ At its core, the Confucian system emphasized respect for personal virtue and propriety,¹² and required that individuals adhere to these values

6. Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World*, 47 AM. BUS. L.J. 455, 475 (2010).

7. Charles Baum, *Trade Sanctions and the Rule of Law: Lessons from China*, 1 STAN. J. E. ASIAN AFF. 46, 51 (2001), available at <http://www.stanford.edu/group/sjeaa/journal1/china4.pdf>.

8. See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

9. Brent Yonehara, Note, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. 63, 74–80 (2002).

10. GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 6 (1996).

11. *Id.* at 7.

12. Alford, *supra* note 8, at 20.

to avoid bringing shame on themselves and their families.¹³ Laws were seen as largely unnecessary because a population that followed Confucian philosophy produced a well-ordered society.¹⁴ Accordingly, rulers in the Confucian tradition emphasized education rather than law as the best means for guiding the people.¹⁵ This emphasis on education was itself rooted in a concept of the scholar as a conduit for relaying the knowledge of the past.¹⁶ Extreme cultural respect for the past is a significant reason that China lacks robust native IP protections. According to Professor William Alford, the past functioned as the “instrument through which individual moral development was to be attained and the yardstick against which the content of the relationships constituting society was to be measured, and both of these functions militated against thinking of intellectual property as private property.”¹⁷ The concept of protecting an individual’s creative output was inimical to Chinese thought: Confucius said, “I treat antiquity with trust and affection; and my function is to transmit rather than to originate.”¹⁸ China’s deeply rooted acceptance of activity that the West would deem “copying” is a large part of the reason China did not develop a native copyright system.

B. Building Constitutional and Statutory Copyright Protections in China

Although constitutionally founded, the copyright regimes in both the United States and China are primarily regulated by statute. While these laws bare a facial similarity, origins of copyright law in the two countries could not be more different. The United States, like many former British colonies, inherited a large portion of its legal system from England.¹⁹ Five hundred years of legal tradition support the primary federal law protecting creative works in the United States, the Copyright Act of 1976.²⁰ Moreover, many specific aspects

13. Alford, *supra* note 8, at 20.

14. MacCormack, *supra* note 10, at 8.

15. MacCormack, *supra* note 10, at 8.

16. Alford, *supra* note 8, at 20.

17. Alford, *supra* note 8, at 20.

18. Guan Hong Tang, *China*, in MORAL RIGHTS 709 (Gillian Davies & Kevin Garnett eds., 2010) (quoting THE ANALECTS OF CONFUCIUS 7.1).

19. Charles Nagy, *English Common Law*, 15A C.J.S. § 5 (2011); *see also* Wheaton v. Peters, 33 U.S. 591, 591–92 (1834).

20. The Copyright Act, 17 U.S.C. § 101 *et seq.* (West 2011); *see generally* Ronan Deazley, *RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE* (2006); *see also*

of the current American copyright regime developed during the twentieth century in response to rapidly advancing technology and changing economic conditions.²¹ The current emphasis on intellectual property-owners' economic rights mirrors the increasing commercialization and commodification of all types of creative works.²²

During the same period, China has overcome colonization and foreign invasion, experienced a Marxist revolution, and is now grappling with unparalleled economic evolution. Early twentieth century China established a civil law framework, based on the French civil law system, on top of centuries of government based on Confucian thinking.²³ When the Communist Government of the People's Republic of China came to power in 1949, it repealed existing copyright laws because Marxist doctrine considers all creative and artistic work valueless and the concept of personal property ownership inimical to the goals of Communism.²⁴ Following the revolution, a limited number of administrative orders and regulations prohibiting plagiarism and guaranteeing artist remuneration remained in effect,²⁵ but these rights were abolished in 1966 during Mao Zedong's Cultural Revolution.²⁶ Following Mao's death, the new Communist Party leadership recognized the need for a more organized legal system to promote national stability, and passed the Chinese Constitution, *Xianfa*, in 1982.²⁷

Like the United States, China proclaims the broad purpose and principles of copyright protection in its constitution. Chapter I, Article 22 of the Chinese Constitution echoes the provisions of

Wheaton, *supra* note 19, at 591. Although the Statute of Anne was codified in 1710, the English monarchy began using and modifying a form of copyright shortly after the invention of the printing press. The monarchy granted individual monopolies to publishers, which were largely used as a form of censorship. Eventually, in the Statute of Anne, Parliament recognized the individual rights of authors and enacted the first modern copyright law. The Statute of Anne, 8 Ann., c. 19, § 1 (1710) (Eng.).

21. See generally *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985) (discussing the legislative reexamination of copyright law that led to the total revision of the copyright statute and the passage of the Copyright Act of 1976).

22. *Id.*

23. Piero Tozzi, *Constitutional Reform on Taiwan: Fulfilling A Chinese Notion of Democratic Sovereignty?*, 64 *FORDHAM L. REV.* 1193, 1199–1202 (1995-1996).

24. June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 *LAW & POL'Y INT'L BUS.* 1185, 1186 (1996).

25. *Id.*

26. *Id.* at 1186–87.

27. *Id.* at 1187.

Article I, § 8 of the United States Constitution, which promote the development of science and the useful arts.²⁸ The *Xianfa* pledges that the state will promote “the development of art and literature, the press, radio and television broadcasting, publishing and distribution services, libraries, museums, cultural centers and other cultural undertakings.”²⁹ However, the *Xianfa* limits this promotion to “undertakings that serve the people and socialism.”³⁰ In spite of these constitutional protections, recognition and enforcement of copyrights protections remained lax following adoption of the new Constitution, largely due to the perception that the Chinese judiciary lacked authority to review and interpret the *Xianfa*.³¹

Extensive copyright piracy in China led Western governments to put considerable economic and political pressure on China to adopt stronger IP laws.³² In response, China enacted a statutory copyright protection scheme more in line with Western laws. The Chinese Copyright Law (“CCL”),³³ went into effect beginning June 1, 1991.³⁴ In 2010, the Standing Committee of the National People’s Congress

28. XIANFA art. 22 (1982) (China). (“The state promotes the development of art and literature, the press, radio and television broadcasting, publishing and distribution services, libraries, museums, cultural centers and other cultural undertakings that serve the people and socialism, and it sponsors mass cultural heritage.”).

29. *Id.*

30. *Id.*

31. Yu Xingzhong, *Western Constitutional Ideas and Constitutional Discourse in China 1978-2005*, in BUILDING CONSTITUTIONALISM IN CHINA, 120 (Stephanie Balme & Michael W. Dowdle eds., 2009). In China, it was perceived that interpretation and enforcement of the Constitution was an area left to administrative control. *Id.* However, due to the popularity and increasing acceptance of Western scholarship, the Judiciary is beginning to review the constitution—Supreme People’s Court Judge Huang Songyou noted (in a 2001 decision) that in *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court of the United States pioneered the practice of judicializing the Constitution, and made constitutional interpretation part of the judicial process, indicating that this type of review is likely to increase in China. Yu, *Western Constitutional Ideas*, *supra* note 31, at 120.

32. Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 73–74 (1997-1998); see also Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 340 (2006). (noting that China enacted its intellectual property laws in response to the United States Trade Representative’s placement of China on its Priority Watch List in 1989). Xiaoqing Feng & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC’Y U.S.A. 917, 917 (2002).

33. *Id.*

34. *Id.*

substantially revised the CCL.³⁵ The current CCL enumerates the many statutory rights included in copyright, including rights of: (1) publication; (2) authorship; (3) revision; (4) integrity; (5) reproduction; (6) distribution; (7) rental; (8) exhibition; (9) performance; (10) presentation; (11) broadcasting; (12) communication of information on networks; (13) making cinematographic work; (14) adaptation; (15) translation; (16) compilation; and (17) any other rights copyright owner is entitled to enjoy.³⁶ According to the statute, copyright protection encompasses works of literature, art, natural science, social science, engineering technology and the like, that are expressed as (1) written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic works; (4) works of fine art and architecture; (5) photographic works; (6) cinematographic works; (7) graphic works such as drawings of engineering and product designs; (8) maps, sketches and other graphic and model works; (9) computer software; and (10) other works as provided for by law and administrative regulations.³⁷

C. Chinese Copyright Enforcement

Copyright enforcement in China falls into two broad areas—judicial and administrative.³⁸ This approach is known as a system of “two channels, coordinated operation.”³⁹ In the judicial branch, the civil trial division of the Chinese People’s Courts decides all IP disputes.⁴⁰ International concern over China’s lax IP protections also led the Chinese government to establish a specialized Intellectual Property Rights Trial Division.⁴¹ Furthermore, the Supreme People’s Court of China established the Intellectual Property Rights Office to guide all judicial issues in IP trials nationwide.⁴² As of October 2008, there were a total of 298 separate IP divisions and 84 IP panels in civil

35. See Chinese Copyright Law [hereinafter CCL] (promulgated by the 13th Standing Comm. of the 11th Nat’l People’s Cong., Feb. 26, 2010) (China). For example, newly revised Article 4 recognizes the *Xianfa* and provides “[i]n exercising their copyright, no copyright owners may violate the Constitution or laws, nor prejudice public interests.” *Id.* at art. 4.

36. *Id.* at ch. 2 art. 10.

37. *Id.* at ch. 1 art. 3.

38. Zhang, *supra* note 32, at 66.

39. Feng & Huang, *supra* note 32, at 940.

40. Zhang, *supra* note 32, at 66.

41. Zhang, *supra* note 32, at 67.

42. Zhang, *supra* note 32, at 67.

divisions throughout China, with 2,126 specialized IP judges presiding over these divisions.⁴³

In April 2009, the Supreme People's Court published a white paper recognizing the improvements in adjudication of IP claims.⁴⁴ In the Court's opinion: "[t]he current comprehensive judicial intellectual property protection regime embodies the ideals of socialism with Chinese characteristics, embraces the country's development needs, observes China's duties under international conventions. It is an essential part of China's judicial architecture."⁴⁵ According to the study, the People's Courts decided 166,408 IP-related cases between 1985 and 2009.⁴⁶ The Court noted that, in addition to an increased caseload, the types of cases have shifted from disputes relating to technology contracts, to patent cases, and since 2002, primarily to copyright cases.⁴⁷ Additionally, the Court heralded that judicial protection has expanded to include several emerging IP issues such as IP on the internet and concerns about protecting cultural heritage.⁴⁸ On the surface, these improvements indicate that the judiciary is aware of the deficiencies in IP enforcement, and is beginning to work towards remedying the problems.

Administrative agencies provide an alternate avenue for IP protection and are used more extensively than judicial enforcement.⁴⁹ Article 7 of the Copyright Law Implementing Regulations established the China National Copyright Administration ("NCA") as the State Council's copyright administration department.⁵⁰ The NCA has authority to investigate copyright infringement cases that have a

43. Supreme People's Court of the People's Republic of China, *Intellectual Property Protection by Chinese Courts in 2009*, 31 (中国法院知识产权司法保护状况 (2009年)) (Beijing, 2009), available at: http://www.court.gov.cn/zscq/zjss/201004/t20100426_4545.html. As a comparison, among the general courts, there are 31 High People's Courts, 409 Intermediate People's Courts, and 3110 Primary People's Courts.

44. *Id.* at 25.

45. *Id.*

46. *Id.* at 26.

47. *Id.* at 27.

48. *Id.* The full list of emerging issues provided by the Court includes: "copyright on the internet, computer software, new plant varieties, layout-designs (topographies) of integrated circuits, folk literature & art, geographical indications, special signs, corporate names, domain names, judicial recognition of well-known marks, non-material cultural heritage, franchise, application for pre-trial provisional measures, declaration of noninfringement, and anti-monopoly."

49. Feng & Huang, *supra* note 32, at 940.

50. Feng & Huang, *supra* note 32, at 940.

major effect on the entire nation.⁵¹ Pursuant to Article 7, each NCA office is responsible for copyright administration within designated jurisdictions.⁵² The NCA may penalize infringement by confiscating unlawfully earned income and imposing fines.⁵³ If an infringement “harm[s] the public interest, the copyright administrative agency can order the infringer to cease the infringing act, confiscate unlawful profits, confiscate and destroy the infringing copies and impose a fine.”⁵⁴ Following the “two channels” approach, a party who is unsatisfied with an administrative penalty may appeal for judicial review by the People’s Court.⁵⁵ Additionally, the NCA may seek judicial enforcement of an administrative judgment when the penalized party refuses to comply with the administrative decision.⁵⁶

The administrative system has been criticized as an ineffective means to deter IP infringement. From the perspective of international businesses, administrative enforcement is problematic because its remedies are “limited to injunctive relief, the seizure of infringing goods, and the imposition of small administrative fines; [additionally] compensation for damages is unavailable, and proceedings generally have little deterrent effect.”⁵⁷ If fines are collected, those fines are paid to the agencies directly and are not transferred to the rights holder.⁵⁸

D. Western Criticism of Chinese Copyright Enforcement

The passage of the CCL did not entirely eliminate piracy problems, and the United States remains dissatisfied with the lack of meaningful copyright enforcement.⁵⁹ Immediately following the enactment of the CCL, the United States threatened trade sanctions and China responded by enacting tariffs on American goods.⁶⁰ While the two nations signed a Memorandum of Understanding in early

51. Feng & Huang, *supra* note 32, at 940. (citing Copyright Law Implementing Regulation, art. 7, (Zhonghua Renmin Gongheguo Zhuzuoquanfa Shishi Xize), 1990 (China)).

52. Feng & Huang, *supra* note 32, at 942.

53. Feng & Huang, *supra* note 32, citing 1990 CCL art. 46.

54. Feng & Huang, *supra* note 32, citing 2001 CCL art. 47.

55. Feng & Huang, *supra* note 32, citing 2001 CCL art. 47.

56. Feng & Huang, *supra* note 32, citing 2001 CCL art. 47.

57. USITC, *supra* note 3, at 1-8 to 1-9.

58. USITC, *supra* note 3, at 1-8 to 1-9.

59. Lazar, *supra* note 24, at 1188.

60. Bird, *supra* note 32, at 340.

1992,⁶¹ the relationship continues to produce a “cycle of coercion.”⁶² In response to ongoing IP infringement, the United States threatens sanctions, and China responds with crackdowns. Overall, although China sees improvement in its system, the United States views China’s enforcement of IP rights as inadequate and an impediment to optimal bilateral relations. The United States International Trade Commission (USITC) reported in November 2010 that:

Intellectual property rights (IPR) infringement in China reduces market opportunities and undermines the profitability of U.S. firms when sales of their products and technologies are undercut by competition from illegal, lower-cost imitations. Intellectual Property (IP) is often the most valuable asset that a company holds, but many companies, particularly small ones, lack the resources and expertise necessary to protect their IP in China.⁶³

USTIC’s policy is to encourage China to enhance enforcement of IP protections, especially copyright, by emphasizing the subsequent economic benefits, such as increased tax revenues, more commercial imports, and greater foreign direct investment.⁶⁴ Unfortunately, these economic incentives do not have a broad enough impact to function as much more than a stick. To function as a carrot, economic incentives must be coupled with familiar, conceptual reasons that will also encourage adoption of a copyright regime. Enter moral rights-centered copyright.

II. Can Copyright Protection Improve Through an Emphasis on Moral Rights?

Advancing the concept of moral rights as a means of promoting copyright protection is one strategy that has not been tested. Scholars often suggest methods for improving the general consciousness of IP law in China. The most culturally invasive begin with a holistic change to the behavior of the entire nation:

61. Bird, *supra* note 32, at 340–43.

62. Bird, *supra* note 32, at 340–43.

63. USITC, *supra* note 3, at i.

64. USITC, *supra* note 3, at 1-8 to 1-9. See generally *Cong.-Exec. Comm. on China, 109th Cong., Roundtable Discussion: Intellectual Property Protection as Economic Policy: Will China Ever Enforce Its IP Laws?*, Inv. No. 21-813, USITC (May 16, 2005), available at <http://www.cecc.gov/pages/roundtables/051605/index.php>, also available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg21813/pdf/CHRG-109shrg21813.pdf>.

The trick, therefore, is to develop a way to begin to change normative behavior in Chinese society so that acceptance of the principle of private ownership of intellectual property becomes the norm. From that acceptance, one can build a concurrent norm wherein enforcement of copyright ownership is a necessary part of that principle.⁶⁵

However, building a normative acceptance of private ownership is not something that can simply be imposed, particularly in China, which has a population over 1.3 billion people.⁶⁶ If such changes were easily accomplished, IP awareness in China would be a nonissue. Additionally, broad cultural acceptance of a foreign concept such as private property rights in intellectual property remains unlikely so long as China is dominated by socialism, which still supports the notion that cultural production does not belong to the individual.

Instead, a much simpler and less invasive means of encouraging Chinese artists, authors, and courts to recognize and enforce existing statutory and constitutional copyright protections may be to promote moral rights and their connection to copyright. The idea of personal honor and integrity is already a key aspect of Chinese culture, reflected in the traditional concept of “face.” Increasing awareness of copyright by emphasizing how the law protects an artist’s honor could eventually lead to a more effective copyright regime in China. In copyright systems, like the United States and China, where moral rights are only recently codified, “moral rights that can be balanced and shaped in accordance with all the other values and interests relating to uses of works, from freedom of commerce to freedom of expression.”⁶⁷ This section will define the Chinese concept of “face,” illustrate how it relates to moral rights view of copyright held in civil law countries, and contrast this approach with the economic-rights view prevalent in common law countries, particularly the United States.

65. Marc H. Greenberg, *The Sly Rabbit and the Three C's: China, Copyright, and Calligraphy*, 7 LOY. U. CHI. INT'L L. REV. 163, 184 (2010).

66. The World Bank, Databank by Country, shows a population of 1,338,299,512 as of 2010, available at <http://data.worldbank.org/country/china>.

67. Zhiwen Liang, *Between Freedom of Commerce and Protection of Moral Rights: The Chinese Experience and a Comparative Analysis*, 57 J. COPYRIGHT SOC'Y U.S.A. 601, 651 (2009-2010).

A. Saving “Face”: Relating Artistic Integrity in China to Moral Rights Views of Copyright

Moral rights are closely related to traditional Chinese cultural values. China is considered a collectivist culture, a society which places the well-being of the group and society before that of the individual.⁶⁸ Key to the functioning of individuals within a collectivist culture is the notion of “face,” translated variously as *mian zi* or *lian*.⁶⁹ An influential Chinese author articulated the importance of “face” by explaining:

It is not a face that can be washed or shaved, but a face that can be “granted” and “lost” and “fought for” and “presented as a gift.” Here we arrive at the most curious point of Chinese social psychology. Abstract and intangible, it is yet the most delicate standard by which Chinese social intercourse is regulated.⁷⁰

Where *mian zi* translates to “image,” or one’s outside projection of prestige and reputation, the corollary “face concept,” *lian*, represents the “confidence of society in the integrity of [one’s] moral character, the loss of which makes it impossible for him [or her] to function properly within the community.”⁷¹ Thus, the loss of *lian* often brings shame and disgrace to a person and to their family.⁷² In China, the concept of *mian zi* is connected closely with issues of “social pride, honor, dignity, insult, shame, disgrace, humility, trust, mistrust, respect and prestige.”⁷³ Parallels may be drawn between a violation that causes loss of “face” with a violation that impinges upon a creator’s moral rights. Moral rights are tied to the idea of personhood and as such, represent the personality interest that a creator has in his or her works.⁷⁴ The emphasis on the personality interest is the key to the moral rights-based copyright law prevalent in civil law systems, and it is the principle reason a similar approach to copyright law in China would be effective.

68. Moyra Grant, KEY IDEAS IN POLITICS 20 (2003).

69. See generally Gao & Toomey, *supra* note 4, at 57.

70. Lin Yutang, MY COUNTRY AND MY PEOPLE, 199–200 (1935).

71. *Id.* at 55. See also Hsien Chin Hu, *The Chinese Concept of “Face”* 46 AMERICAN ANTHROPOLOGIST 1, 45–64 (1944).

72. *Id.*

73. Gao & Toomey, *supra* note 4, at 54.

74. Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities in the U.K.’s New Performances Regulation*, 24 B.U. INT’L L.J. 213, 217–18 (2006).

B. Moral Rights in Civil Law Countries

Since the mid-twentieth century, the most significant difference between Anglo-American (common-law) and continental European (civil law) copyright was their distinct attitudes toward moral rights.⁷⁵ Like most of continental Europe, China is a civil law country, and its legal system, including its copyright regime, is modeled after the system in France.⁷⁶ The idea of moral rights derives from the French idea of *droit moral de l'auteur*, or author's moral right.⁷⁷ Moral rights, doctrinally separate from economic rights, is the label given to the traditional set of copyrights in continental Europe.⁷⁸ Moral and economic rights are not mutually exclusive, and many civil law legal systems conceptualize moral and economic rights as two distinct, yet fundamental attributes and objectives of comprehensive copyright protection.⁷⁹ This formal and conceptual combination of moral and economic rights is the defining feature of continental European copyright theory.⁸⁰

In the early nineteenth century, France was the first nation to explicitly recognize moral rights that gradually gained acceptance in Germany, Italy and other neighboring countries during the first half of the twentieth century.⁸¹ Unlike economic rights, moral rights are fundamentally concerned with the nonpecuniary interests of authors and help "secure the bond between authors and their works."⁸² Broadly speaking, the person-centric approach originated with the philosophies of Immanuel Kant and Georg Wilhelm Friedrich Hegel, who viewed private property rights as the "embodiment of personality," particularly when the property interest involved an artistic endeavor.⁸³ Philosophers and early proponents of moral rights

75. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355, 355 n.10 (2006).

76. Liang, *supra* note 67, at 612. See also Yu, *supra* note 31, at 121. According to Yu, in the early twentieth century, French philosophical thought became rooted in China, and French thinkers influenced Chinese thought to a larger extent than Anglo-American philosophers or academics. In particular, the Chinese responded to Jean-Jacques Rousseau's argument that the sovereignty of the state stems from the collective general will of its people.

77. GILLIAN DAVIES & KEVIN GARNETT, *MORAL RIGHTS* 3 (2010).

78. Rigamonti, *supra* note 75, at 353.

79. Rigamonti, *supra* note 75, at 360.

80. Rigamonti, *supra* note 75, at 360.

81. Davies & Garnett, *supra* note 77, at 3.

82. Davies & Garnett, *supra* note 77, at 3.

83. Bird & Ponte, *supra* note 74, at 218.

believed that artistic endeavors were unique in the realm of copyright because:

When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect.⁸⁴

Today, continental and Chinese moral rights protections extend beyond the “creative classes” to any lawful copyright holder.⁸⁵ The standard set of moral rights protects one’s right to claim authorship of, or attribution for a work; to protect the integrity of the work; to decide how the work will be published or disclosed; and the right to withdraw a work after publication.⁸⁶ These protections are codified in the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), Article *6bis*, which is the primary international reference for moral rights law.⁸⁷ Article *6bis* provides that an author’s moral rights are independent of their economic rights, and endure even after the transfer of economic rights.⁸⁸ Under the Berne Convention, the author has the right to “claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”⁸⁹ In 1996, the World Intellectual Property Organization Copyright Treaty (“WCT”) incorporated, by reference, Article *6bis* of the Berne Convention.⁹⁰ The WCT confirms its signatories’ full obligation to protect the moral rights provided for in the Berne Convention.⁹¹

84. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940). Contrast this view with the Confucian view. See Tang, *supra* note 18.

85. See, e.g., CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTEL.] (Fr.) *supra* note 2.

86. Davies & Garnett, *supra* note 77, at 3. The standard set of moral rights was first recognized in literature, but applies more broadly to encompass any creative works.

87. *Berne Convention*, *supra* note 2.

88. *Berne Convention*, *supra* note 2.

89. *Berne Convention*, *supra* note 2.

90. World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997).

91. *Id.*

China imported its moral rights laws from the continental European tradition via the Berne Convention. China joined the Berne Convention on July 1, 1992, pursuant to a decision of Standing Committee of National People's Congress, effective Oct. 1, 1992.⁹² Further, China became a signatory to the WCT in June 2007.⁹³ Unlike the difficulties that Chinese law and culture has had in adopting common-law concepts of economic rights, the Chinese accepted the European theory of moral rights “effortlessly: the treatment of an authors' works may easily affect the author's reputation or honor, something which has always been emphasized and respected in Chinese culture.”⁹⁴ The CCL recognizes moral rights by affirming that rights arising from creative works are both economic and moral.⁹⁵ Article 10 of the CCL contains provisions that protect “personality rights,” which consist of the rights of paternity (or attribution), alteration, integrity, and disclosure.⁹⁶ Additionally, the CCL defines an author as the person who creates a work, with a presumption that the author is the individual or organization whose name is stated on a work, unless proven to the contrary.⁹⁷ These protections, although part of Chinese copyright, are distinct from copyright for their ease of acceptance and because they apply more broadly than copyright law.

C. Moral Rights in the United States

The relatively easy acceptance of moral rights in China stands in contrast with the difficulty its adoption faced in the United States. Although the United States is a signatory to the Berne Convention, Congress has resisted pressure to substantively implement Article 6*bis* because of the traditional common-law emphasis of economic rights in copyright law.⁹⁸ Congress has stated that federal and state legislation along with common-law doctrines—unfair competition, copyright, contract, defamation, and privacy—offered protection roughly equivalent to the Berne Convention.⁹⁹ In the Berne

92. Guan Hong Tang, *supra* note 18, at 713.

93. See WIPO, WCT Notification No. 66, WIPO Copyright Treaty: Accession by the People's Republic of China (Mar. 9, 2007), http://www.wipo.int/edocs/notdocs/en/wct/treaty_wct_66.html. The WCT entered into force in China on June 9, 2007.

94. Guan Hong Tang, *supra* note 18, at 712.

95. 2010 CCL ch. 2 art. 10.

96. *Id.*

97. 2010 CCL art. 11.

98. Davies & Garnett, *supra* note 77, at 857.

99. *Id.* at 858 (citing S. Rep. No. 100-352, at 9 (1988), as reprinted in 1988 U.S.C.A.N. 3706, 3714-15; H.R. Rep. No. 100-609, at 38 (1988)).

Convention Implementation Act of 1988, Congress declared that the Berne Convention is not self-executing; its provisions do not establish an independent cause of action; and neither the Convention itself nor the implementing legislation “expands or reduces” any rights under existing law to claim authorship of a work or to object to any distortion, mutilation, or other modification of a work.¹⁰⁰

The Copyright Act’s exclusive protection of the right to prepare derivative works was likened to the moral right of integrity in that unauthorized mutilation or alteration of a work may also result in an unauthorized derivative work.¹⁰¹ Additionally, the Lanham Act has been proposed as a vehicle for protecting the right of attribution¹⁰² by using its prohibition of deception “as to the affiliation, connection, or association of such a person with another person, or as to the origin, sponsorship, or approval of . . . goods, services, or commercial activities.”¹⁰³ Yet extending these two provisions into the area of moral rights does not, in reality, offer much in the way of additional protection. The Copyright Act’s provisions protect the copyright holder, who may or may not be the author.¹⁰⁴ There may even be instances where it is the copyright holder’s preparation of a derivative work that violates the author’s moral right of integrity.¹⁰⁵ The Lanham Act’s protections are similarly unhelpful in the case of moral rights because, in order to prevail in a trademark action, one must show actual consumer confusion or a substantial likelihood of consumer confusion.¹⁰⁶ This is a high bar to meet, and the Supreme Court’s decision in *Dastar v. Twentieth Century Fox Film Corp.* has made moral rights protection under the Lanham Act unlikely.¹⁰⁷

100. *Carter v. Helmsley-Spear*, 71 F.3d 77, 83 (2d. Cir. 1995).

101. *Id.* at 126.

102. Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 126 citing Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 265–66 (2004).

103. Lanham Trademark Act, 15 U.S.C. § 1125 (West 2011).

104. Holst, *supra* note 102, at 126.

105. Copyright violation was one of the initial claims made by the artist Richard Serra in his case against the United States Government, for relocating Serra’s *Tilted Arc*. *Serra v. U.S. General Services Admin.*, 667 F. Supp. 1042, 1057 (S.D.N.Y. 1987). The copyright claims were dismissed at the district court level, and Serra pursued his case on First Amendment and Moral Rights grounds—he did not prevail. *Serra v. U.S. General Services Admin.*, 847 F.2d 1045, 1048–51 (2d Cir. 1988).

106. 15 U.S.C. § 1125(a)(1)(A).

107. *See Holst, supra* note 102, at 127.

Against this background, the adoption of civil-law moral rights legislation in 1990 represented a major shift in American copyright law.¹⁰⁸ In 1990, Congress enacted the Visual Artist Rights Act (“VARA”), a statute with protections analogous to Article 6*bis*, but limited to visual artists.¹⁰⁹ VARA is codified within the copyright act, and provides that:

[T]he author of a work of visual art (1) shall have the right (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; and (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.¹¹⁰

Like 6*bis*, VARA only protects the author of the work, even if that author does not hold the copyright, and the rights last for the rest of the author’s life and may be waived only by explicit agreement.¹¹¹ Congress cabined VARA by including stringent limitations as to how widely it would apply.¹¹² Specifically, an artist may invoke VARA’s protection only when “any intentional distortion, mutilation, or other modification” of their work “would be prejudicial to his or her honor or reputation.”¹¹³ Moreover, an artist may only “prevent . . . destruction of a work of recognized stature.”¹¹⁴

108. Rigamonti, *supra* note 75, at 354. Rigamonti notes, “The fact that the law of moral rights is a field in which the United States is an importer rather than an exporter of legal concepts makes this shift all the more noteworthy in times in which it is typically the law of the United States that is received in other countries, especially in intellectual property law.”

109. *Id.* Congress stated: “These rights are analogous to those protected by Article 6*bis* of the Berne Convention, which are commonly known as ‘moral rights.’ The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.” *Id.* (citing H.R. Rep. No. 514 at 5).

110. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(West 2011) [hereinafter VARA].

111. *Id.* The waiver requirement specifies, “those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.” *Id.* at § 106A(e).

112. *Id.* at § 106(b).

113. *Id.* at § 106A(a).

114. *Id.*

D. Moral Rights Litigation

Since moral rights protection is both limited in scope and relatively new in the United States and China, both countries have relatively few judicial decisions related to claims of moral rights infringements. Additionally, problems arise with the Chinese decisions, which are not extensively reported abroad. However, consideration of actual decisions is needed to best estimate the scope of moral rights protections because “the substantive level of protection depends on the concrete rules that courts use to adjudicate moral rights claims, not on the analytical framework that is used to conceptualize.”¹¹⁵ Examining a sample of judicial decisions reveals that, in the United States, moral rights are incidentally protected through traditional copyright law while in China courts address moral rights claims head on, and often protect copyright in the process.

One of the earliest cases litigated under VARA’s integrity provision was *Carter v. Helmsley-Spear*.¹¹⁶ The court’s decision in *Carter* is notable as an early example of a court grappling with a claimed violation of moral rights. Although the court referred extensively to the moral rights protections available to artists under VARA, it did not give an in-depth explanation of how to determine when a “distortion, mutilation, or modification” has occurred.¹¹⁷ *Carter* illustrates that in the earliest years of moral rights litigation, courts were more comfortable basing their decisions on well-accepted elements of copyright law, such as the work-for-hire doctrine, rather than exploring moral rights law in a meaningful way. The same is true for contemporary moral rights cases—because moral rights protections are restricted to visual artists, courts only see a small number of these cases and most courts are more comfortable approaching moral rights questions from the traditional copyright framework.¹¹⁸ In *Clean Flicks of Colorado, LLC v. Soderbergh*, the court used copyright law to implicitly protect the moral right of integrity in spite of congressional legislation to the contrary.¹¹⁹ The plaintiffs in *CleanFlicks* were in the business of creating and distributing edited versions of commercial films, and sought a court

115. Liang, *supra* note 67, at 626, quoting Rigamonti, *supra* note 75, at 367.

116. *Carter v. Helmsley-Spear*, 71 F.3d 77 (2d Cir. 1995).

117. Davies & Garnett, *supra* note 77, at 875.

118. See *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, 593 F.3d 38 (1st Cir. 2010); *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.C. Cir. 2005).

119. *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006).

injunction to prevent the filmmakers from bringing suit for copyright infringement.¹²⁰ The CleanFlicks company deleted “sex, nudity, profanity, and gory violence” for the purpose of making the films acceptable for families or other patrons who might wish to see the films without objectionable content.¹²¹ CleanFlicks did not make and distribute multiple copies of an edited film, but rather edited one copy of a film at a time in the belief that CleanFlicks was protected by the First Sale Doctrine.¹²² The defendants in the case were filmmakers and distributors who were the rightful copyright holders of the films that CleanFlicks edited.¹²³ The court dismissed the plaintiff’s argument that their alteration fell within the fair use exceptions to copyright infringement.¹²⁴ In finding an infringement, the court focused on the “intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright.”¹²⁵ This decision expanded the rights of filmmakers to control the use of their work, and in doing so, recognized moral rights for the copyright holders of films.¹²⁶ The case demonstrates the gradual expansion of moral rights protections, as U.S. courts become familiar with and accept the doctrines underlying moral rights. The inverse scenario could be employed in China, where moral rights law and copyright law are developing in tandem. Explicit protection of moral rights in China would be one way for courts to expand, by association, protection for copyrighted products.

In fact, moral rights litigation is increasing in China.¹²⁷ Unlike in the United States, Chinese moral rights were not grafted onto an existing copyright system that resisted their adoption. Instead, China’s copyright system, based largely on the European civil law model, recognizes a broader set of moral rights protections than the United States. In France, for example, the right of integrity is

120. *Id.*

121. *Id.*

122. The First Sale Doctrine protects lawful purchasers of copyrighted goods, if those owners choose to sell or otherwise dispose of the lawfully purchased goods. See 17 U.S.C. § 109 (West 2011). See also *Clean Flicks*, 433 F. Supp. 2d at 1242.

123. *CleanFlicks*, 433 F. Supp. 2d at 1242.

124. *Id.*

125. *Id.*

126. Suresh Pillai, *Mr. Soderbergh Goes to Washington: How Congress and the Clean Flicks Court Created Moral Rights for Filmmakers*, 17 DEPAUL-LCA J. ART & ENT. L. 339, 365–66 (2007).

127. See He Zhonglin, *Author’s Moral Rights in UK and China* (2002), available at <http://www.chinaiprlaw.com/english/forum/forum22.htm>.

considered subjectively, and the legal inquiry looks for harms to “the reputation of the author in a strict sense,” as well as for damage to the author’s “general image as an artist.”¹²⁸ This approach contrasts with the objective, “substantial harm” standard employed by common law countries, particularly the United Kingdom.¹²⁹ In China, courts make a hybrid of the objective and subjective standards, looking to the extent of *waiqu* or *cuangai*—translated as distortion and mutilation—to determine if a modification would tarnish an author’s artistic reputation.¹³⁰ Likewise, if modifications do not significantly harm the author’s reputation, they are not considered substantially harmful.

In China, many moral rights cases arise in the publishing industry.¹³¹ For example, in *Shen Jiahe v. Beijing Publisher Co.*, the court held that publishing unauthorized copies of a work containing printing errors would harm the author’s public reputation and thus violated that author’s right of integrity.¹³² In this way, the court applied subjective considerations to the question of moral rights violations. In the same case, the Court found that instances where the publisher changed the actual language of the work were noninfringing because the modifications did not objectively change the Beijing dialect used in the author’s work.¹³³ Use of the subjective and objective standards in the same case illustrates the hybrid model preferred by Chinese courts when adjudicating moral rights cases.

In another example, *Lin Yi v. China News Press*, the defendant used a photo taken by the plaintiff for the purpose of an article exposing the corruption of Chinese customs officials.¹³⁴ The plaintiff brought suit because the photo was originally taken for a pro-government propaganda piece “praising the bravery of Chinese Customs staff.”¹³⁵ Allegations were made that appropriating the photograph for a satirical aim violated the photographer’s moral

128. Liang, *supra* note 67, at 637.

129. Liang, *supra* note 67, at 638.

130. *Id.*

131. Tang, *supra* note 18, at 718.

132. Liang, *supra* note 67, at 145 (citing Eijingshi Gaoji Renmin Fayuan (2001) Gaominzhongzi Di77hao Minshi Panjueshu [No. (2001) 77 of Civil Judgment of Beijing Higher People’s Court, final judgment]).

133. *Id.*

134. *Id.* at 146 (citing Linyi Su, Zhongguo Xinwenshe Qinfan Baobhu Zuopin Wanzhengquan Ji Mingyuquan An (Lin Yi v. China News Press), in Zhuzuoquan Jiufen Anjian Faguan Dianping [Copyright Civil Cases Commented by Judges] 204 (Cheng Yongshun ed., 2004)).

135. *Id.*

rights. In that case, the use of the photograph infringed the artist's right of integrity because the particular use of the work harmed the author's reputation.¹³⁶ The *Lin Yi* decision exposes a major difference between American and Chinese copyright systems, namely the overarching application of socialist policy as an influence on legal protections. In China, courts often find that modifications or abridgements which are necessary to uphold national policy and to further the goals of socialism do not infringe on the author's rights.¹³⁷ In contrast, U.S. courts generally see appropriation as within the bounds of the Fair Use doctrine and as protected by the First Amendment's guarantee of Freedom of Speech.¹³⁸

Cases involving an artist's right to attribution also arise in China. For example, in *Wu Guangzhong v. Shanghai Duoyunxuan Auction Co. & Hongkong Yongcheng Antique Collection Co.*, the defendant auctioned a painting entitled *The Portrait of Mao*, and falsely attributed it to Wu Guangzhong, a famous Chinese painter.¹³⁹ The plaintiff sued for an injunction of the sale, a public apology and large monetary damages.¹⁴⁰ The court held that copyright law protected the right of the painter as author. Thus, the production and sale of a forged painting was a direct infringement of right Wu Guangzhong's right of attribution.¹⁴¹

Applying a close scrutiny of the judicial approach to moral rights cases in China is difficult because of the lack of comprehensive reporting. However, these few cases illustrate the proposition that Chinese courts are willing to consider moral rights claims separately from copyright actions. Unlike American moral rights litigation, Chinese cases are often resolved in favor of the creator, indicating that the People's Court is willing to recognize the importance of moral rights protections. It also indicates the possibility that protection of the cultural values that underlie moral rights,

136. *Id.*

137. *See, e.g., id.*

138. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). *Campbell* involved a parody of the famous Roy Orbison Song, "Oh Pretty Woman" made by the hardcore rap group 2 Live Crew. The Court recognized that parody falls within the Fair Use exception, acknowledging that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose." *Id.* at 575.

139. *Art Law in China*, (citing the Written Judgment of Shanghai People's High Court (1995)), available at <http://www.iolaw.org.cn/showArticle.asp?id=61>.

140. *Id.*

141. *Id.*

particularly reputation and honor, as expressed in the notion of “face,” may constitute a means by which Chinese copyright law could develop further.

III. Using Moral Rights to Promote Copyright in China

One flaw in existing Western efforts to increase copyright protection in China is that these efforts take the form of a “top-down” imposition of Western values on a foreign system. The most successful aspects of the U.S. copyright system are those whose roots are in the common-law system and which recognize the idea of the individual as creator. These roots are well established, which explains the success of American copyright as applied domestic courts.

A. Why American Copyright Works in the United States

When drafting the “Intellectual Property Clause,”¹⁴² the framers of the U.S. Constitution drew on the long history and development of copyright law in England.¹⁴³ Beginning with the introduction of the printing press in 1476, and continuing until 1710 when Parliament enacted the Statute of Anne, English courts struggled to develop a copyright law that both served the people and reduced the threat that copyright could be used as a tool for government censorship.¹⁴⁴ Following ratification of the U.S. Constitution in 1789, one of Congress’s first acts was to pass a copyright law, called “[a]n act for the encouragement of learning.”¹⁴⁵ This initial copyright law provided two fourteen-year terms of protection, so long as authors complied with several formalities, including registration.¹⁴⁶ Legal protections of copyright continued to expand, particularly when Congress passed the modern Copyright Act in 1976 (“the Act”).¹⁴⁷ Currently, the Act protects “original works of authorship fixed in any tangible medium of expression, now known or later developed,” for a duration

142. U.S. CONST. art I, § 8, cl. 8.

143. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 21–22 (3d ed. 2010).

144. *Id.* at 21–23. The Statute of Anne granted as assignable right to authors to control the publication of their writings. The preamble to the statute stated: “For preventing therefore [printing, reprinting and publishing . . . without the Consent of the Authors] for the future, and for the Encouragement of learned Men to compose and write useful Books [this statute is therefore enacted].” *Id.* at 22 (quoting Statute of Anne, 8 Anne c. 19 (1710)).

145. *Id.*

146. *Id.* (citing Act of 1790, 1st Cong., 2d Sess., ch. 15, 1 Stat. 124 (1790)).

147. Copyright Act, 17 U.S.C § 101 *et seq.* (West 2011).

approaching ninety years.¹⁴⁸ Like the Chinese statute, the Act enumerates the exclusive rights of copyright owners, but is not as extensive as those granted by Chinese law.¹⁴⁹

This system of copyright seeks to create economic incentives for the creation of new works, by granting extensive economic rights to the copyright holder. The expanded rights in and lengthened increased terms of copyright protection of the United States, however, has left the American system open to harsh criticisms in recent years. The efforts to reign in U.S. copyright culminated in the case of *Eldred v. Ashcroft*.¹⁵⁰ In *Eldred*, Stanford University law professor Lawrence Lessig argued two central claims: “that extending existing terms violated the Constitution’s ‘limited times’ requirement and that extending terms by another 20 years violated the First Amendment.”¹⁵¹ These claims were rejected and the copyright extension was found constitutional.¹⁵² The Court’s decision in *Eldred* illustrates the strength of judicial support for the U.S. copyright system. This support, and the long history of relatively successful copyright protection, helps explain why moral rights have not gained more ground, judicially or statutorily, in the United States. Yet, this system, with its foundations, cannot be easily transplanted to the copyright systems of the developing world, particularly China. The formal Chinese copyright system is now twenty years old; the American system has existed for over two hundred and twenty years.

B. Copyright Through Moral Rights in China

In the *Lin Yi* case, the court found that the reuse of the photographer’s work tarnished his reputation.¹⁵³ Although reputation is not a protected right under the CCL, the rights of attribution and integrity are protected, and the court equated violation of those rights with damage to an author’s reputation. Similarly, Wu Guangzhong’s

148. 17 U.S.C. § 102(a) (West 2011).

149. *Id.* at § 106.

150. *Eldred v. Ashcroft*, 537 U.S. 186 (2004).

151. Lawrence Lessig, *How I Lost the Big One: When Eric Eldred’s Crusade to Save the Public Domain Reached the Supreme Court, It Needed the Help of a Lawyer, Not a Scholar*, LEGAL AFFAIRS (Mar.-Apr. 2004), available at http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp; see also *Eldred*, 537 U.S. at 186–87.

152. *Eldred*, 537 U.S. at 191.

153. Liang, *supra* note 67, at 146, citing Linyi Su, Zhongguo Xinwenshe Qinfan Baobhu Zuopin Wanzhengquan Ji Mingyuquan An (*Lin Yi v. China News Press*), in Zhuzuoquan Jiufen Anjian Faguan Dianping [Copyright Civil Cases Commented By Judges] 204 (Cheng Yongshun ed., 2004).

reputation was tarnished by the auction house's misattribution of his painting.¹⁵⁴ This allowed him recovery under the moral rights provisions of the CCL. Both these cases recognize, implicitly, concepts that form the basis of "face." These concepts include social pride in oneself as an artist or creator; the dignity in attaching one's name to an object of his or her creation; the prestige associated with one's own works; and the ability of the community to trust that a work was created by the person to whom it is attributed. In China, the enumerated moral rights provisions of the CCL protect each of these notions.

The strength of these concepts in Chinese culture helps explain why, in contrast to the United States, moral rights litigation is frequently decided in favor of the artists. Judges are able to relate to a creator's desire to protect their reputation, honor and "face." They apply the moral rights provisions in a way that honor these concerns, thereby allowing the author to save "face." In so doing, they simultaneously uphold and protect the copyright laws.

Conclusion

If China does adopt a program enhancing moral rights protection, this could benefit American copyright holders through increased protection of both domestic and foreign copyrighted material. Critically, under the CCL, moral rights are guaranteed to foreigners, who could easily bring actions under these provisions rather than litigating only their economic rights. Additionally, although it is not extensively documented, plaintiffs in moral rights actions may be awarded both injunctions and damages. Awarding damages to harmed parties would counter one of the United States' chief criticisms of Chinese copyright enforcement, namely that damage awards are too small to deter infringement and are paid to the prosecuting agencies rather than the plaintiff.

Moral rights are not an instant fix for all of the Chinese copyright system's problems, but they are surely a move in the right direction. In the United States, moral rights protections are limited by existing copyright law, but in China, they could be a means of furthering copyright protection and aligning Chinese standards more closely with those of the West. The copyright and moral rights systems in China are evolving simultaneously. Yet, unlike copyright rights, moral rights have connections to traditional ways of thinking about

154. *Art Law in China*, *supra* note 139.

honor and reputation, a Chinese person's *mian zi* and *lian*. By fostering the connection between the the copyright system and the moral rights protections rooted in *mian zi* and *lian*, the Chinese government could promote a more effective copyright regime and ensure heightened protection of both domestic and foreign rights holders.

* * *