12. THE IMPACT OF CULTURE ON THE SEMIOTICS OF TREATY INTERPRETATION
How Pirates Read and Misread the Berne Convention*

I. INTRODUCTION

China’s rampant piracy of American intellectual property costs the United States billions of dollars annually. Economics alone cannot explain why a country chooses to steal books, cassettes, movies, and computer programs rather than obey the law. The causes and effects of intellectual property piracy are intricately connected to, and affected by, a multiplicity of factors, including the economy of the country in which the piracy is committed, the political history and ideology of the pirating nation, the culture of the people engaged in the piracy, and the adequacy of the legal system to enforce domestic and international intellectual property laws. This chapter examines the effect of these interrelated factors on a

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nation's interpretation of an international treaty designed to protect intellectual property rights of authors and artists.

At the end of the chapter, I will provide a brief analysis of a related film entitled Flash of Genius. This film portrays the catastrophic impact of patent infringement on an American inventor whose patented invention (a windshield wiper for cars) is stolen by Ford and other big car companies. The movie details the grueling human drama, the difficult legal process, and the ultimate success of the inventor who represents himself in court, suing on principle alone and refusing to take offers of sizable settlements from these patent-infringing pirates.

A nation's possible responses to an international treaty include its recognition of, and decision to adhere to, the international treaty; its implementation of domestic laws in compliance with the international treaty, and its success or failure to enforce these domestic and international laws. These responses are hermeneutic signs indicating the manner in which a nation reads, interprets, and possibly misreads the legal discourse of an international treaty.

This chapter explores the role culture plays in the application of a hermeneutic method based on principles of semiotics and reader-response theory. The hypothesis is that culture plays a significant role in how a nation reads and interprets an international treaty. The purpose of this investigation is to decode the meaning of different cultural practices in China and the United States to determine how culture influences these nations' interpretations of texts, notably the Berne Convention and its unique form of writing.

Semiotics involves the decoding of cultural signs. Umberto Eco referred to semiotics as a “substitute for cultural anthropology.” According to Eco, “systems of meanings (understood as systems of cultural units) are organized as structures (semantic fields and axes) which follow the same semiotic rules as were set out for the structures of the sign-vehicle.” For example, an automobile “is not

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3. See generally Susan Tiefenbrun, Legal Semiotics, 5 Cardozo Arts & Ent. L.J. 89 (1986) for a history of semiotics as applied to the law, and Chapter 2 of this book.

4. Post-structuralists include the reader-response critics such as H. Jauss, Literaturgeschichte als Provokation (1970); H. Jauss, Literary History as a Challenge to Literary Theory, in New Directions in Literary History, 11–41 (R. Cohen, ed. 1974); H. Jauss, Aesthetische Erfahrung und Literarische Hermeneutik (1977); Stanley Fish, Is there a Text in this Class? The Authority of Interpretive Communities (1980). See also Susan Tiefenbrun, Legal Semiotics, supra note 3, at 147–48, note 294.


8. Id.
only an object as such but a *cultural unit* inserted into a system of *cultural units* with which it enters into certain *relationships* (emphasis added).

Yuri Lotman, the great Russian formalist who contributed mightily to the field of semiotics, also believed that semiotics embraces the study of culture. Lotman said, “Semiotics aims to study the entire range of sign systems and the various processes of communication. . . .” Lotman’s goal was to define a typology of cultures, both to discover universal aspects common to all cultures and to identify the specific systems that represent the “language” of medieval or Renaissance culture. According to Lotman, “a culture is a set of texts seen as a set of codes.” In any culture several codes exist simultaneously. Lotman provided a typology of cultures across time, and he understood that there is a multiplicity of codes in any given culture, which give rise to contrasts and hybrids as well as a multiplicity of valid interpretations. However, he did not go so far as to say that the multiplicity of codes produces “indeterminacy” of interpretation; he merely led the way to acceptance of many interpretations based on cultural differences and codes. Yuri Lotman, Roman Jakobson, and Umberto Eco all share the view that there is an “organic link between culture and communication,” but Lotman was the first to study in depth the semiotics of culture.

The focus of this investigation is to determine the role of cultural (i.e., political, esthetic, economic, etc.) factors affecting the Chinese and U.S. interpretations of the Berne Convention as well as the cultural differences between the U.S. and European conceptions of copyright. In considering the cultural factors that influence the interpretation of a treaty, this particular study does not view law as literature nor does it attempt to uncover the literature in the law. Rather, the goal of this study is to explore a hermeneutic method in which the legal language of the Berne Convention is viewed as a cultural, ideological, and esthetic (if not literary) artifact. Thus, this study could legitimately be classified as a type of law and literature analysis.

After examining arguments proposed for and against the protection of author’s rights, this chapter will explore the dramatic irony represented in the history and development of U.S. and Chinese adherence to the Berne Convention.

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9. Id.
11. Id.
12. Id.
13. Id.
14. Id. at xii.
15. Id. at 20.
16. Id. at 215, 261.
17. Minda, *supra* note 6, at 246.
It will attempt to uncover the copyright theories encoded in the language of the Berne Convention that constitute sources of cultural clashes that overdetermine the Chinese and American interpretations of the Convention. U.S. and Chinese compliance with the Berne Convention's minimum standards and other forms of responses to the Berne Convention are viewed as significant signs of these nations’ respective interpretations of the Convention.

In this chapter I advance the theory that the United States has read the Berne Convention in a manner consistent with the intent of the treaty and has interpreted the implications of the minimum standards it imposes; it is precisely for those hermeneutic reasons that the United States chose not to sign or even adhere to this international treaty for more than one hundred years. In contrast, China superimposed its own specifically Chinese cultural, political, and esthetic values on the European value systems embedded deeply in the Berne Convention. In other words, China read the treaty in its own idiom and interpreted the legal discourse of the Berne Convention in a manner inconsistent with the spirit and intent of the treaty. The Chinese interpretation of the Berne Convention is evidenced by a careful study of the substance and enforcement of Chinese domestic copyright laws that were drafted to enable China to comply with the Berne Convention's minimum standards. The Chinese intellectual property laws, which are adequate in substance but ineffectively enforced, result in a high rate of piracy of foreign and, notably, American intellectual property.

II. HERMENEUTICS AND READER-RESPONSE THEORY

Professor John Ciardi once asked the significant question, “How does a poem mean?” which launched the literary world on a giant voyage in a new direction away from the study of history instead of text and toward the interconnected islands of stylistics, structural analysis, and ultimately deconstruction and postmodernism. This investigation begins with a similar question: “How does a nation interpret a treaty?” Hopefully, this question will launch legal scholars on a hermeneutic adventure into multiculturalism.

The varied responses a nation makes to an international treaty are surface signs of its interpretation. Hidden deeply below these surface signs in the interstices of the legal discourse are cultural practices that overdetermine a nation's interpretation of the law. The varied responses to the treaty are considered signs of a semantic or stylistic legal event in the discourse that triggers the response. The semantic legal event, called the signified, is expressed in the written language of the treaty called the signifier. The task of this investigation is to decode the language of the law triggering the response and to analyze the culturally determined etiology of the reader responses.

Let us consider the United States and China as reader-nations of the Berne Convention and analyze their responses to the treaty. According to reader-response
theory, the reader is an average reader, something like the “reasonable man” construct, which includes government officials, legislators, informed citizens, and all those who are held accountable for drafting, obeying, and enforcing the law in question.

In China, the role of one such group of readers, the State and local government officials, is more extensive than in the United States. China’s massive bureaucracy, which was already firmly in place by 1600, is harmonized by a millennium of tradition and bonded by an immense body of statutory laws that govern the daily life of China’s people and especially the business practices of its State-owned companies. The hand-in-hand collusion of business and government and the nature of the legal system in China are “at the root of structural problems” that account for the general failure to enforce copyright law in China. The central government officials, province officials, and other local Chinese government officials who are the very same framers, readers, and enforcers of the Chinese domestic copyright laws are also allegedly connected to and even committing the massive pirating of CD-ROMs, videos, books, and computer software. Piracy of intellectual property fits neatly into the Chinese traditional ways of doing business, which depend on directives from government officials who write and enforce the laws. For example, the fair use exceptions and vague language of the Computer Software Regulations published in China in 1991 for the purpose of protecting authors’ rights are tantamount to the wholesale license to pirate by the State.

III. ARGUMENTS FOR AND AGAINST PROTECTING AUTHORS’ RIGHTS

The Berne Convention for the Protection of Literary and Artistic Works was concluded in 1886 due to the influence of the celebrated French poets Victor Hugo and Alphonse de Lamartine. In 1883, Victor Hugo presided over a historic meeting of the members of the Association Littéraire et Artistique Internationale in Berne, Switzerland that resulted in the enactment of the Berne Convention three years later. Earlier in 1841, Alphonse de Lamartine spoke before the French Chamber of Deputies proclaiming the urgent need for a universal copyright law

20. See Susan Tiefenbrun, Piracy of Intellectual Property in China, supra note 1, at 37. See also Peter K. Yu, supra note 1, for an update of piracy of intellectual property in China.
22. Precursors of this meeting were held on Sept. 27, 1858 in Brussels where the Congress of Authors and Artists held its first international meeting. See Peter Burger, The Berne Convention: Its History and Its Key Role in the Future, 3 J.L. & TECH. 1, 11 (1988).
to protect authors’ rights. Hugo and Lamartine were persuasive poet/diplomats who represented the interests of creative people seeking to end the piracy of artistic works in foreign countries. Thus, the Berne Convention, the doyenne of all multilateral intellectual property treaties, was born out of the felicitous marriage of law and the humanities.

Although more than one hundred nations have joined the Berne Convention to date, the United States and China refused to do so for more than one hundred years. The United States and China ultimately joined the Berne Convention in 1989 and 1992, respectively, for different reasons, and for reasons that constitute the very stuff of dramatic irony!

The Berne Convention is the international intellectual property treaty with the longest history, the greatest number of adherents, and the highest level of protection. The history of the Berne Convention reflects the vagaries of legal arguments that either oppose or support authors’ rights protection. The Berne Convention strives to protect the rights of authors in their literary and artistic works, including books, pamphlets, writings, musical compositions, designs, and scientific works. It has been periodically modernized through six revisions, and was last amended in 1979. To date there are over 164 member states, with the last three important countries to accede to the Berne Convention being the United States, China, and Russia.

Protection against the widespread piracy of foreign works was the underlying cause of the enactment of the Berne Convention at the end of the nineteenth century. At that time arguments raged both for and against the protection of foreign authors. Support for the protection of authors’ rights is founded on the theory of creative incentive. According to this theory, an artist whose endeavors

24. See id.
25. Russia also was late to join the Berne Convention. See generally György Boytha, The Berne Convention and the Socialist Countries with Particular Reference to Hungary, 11 Colum.–VLA J.L. & Arts 57 (1986) for a discussion of the failure of the Soviet Union to join the Berne Convention, opting instead to enter into bilateral treaties with other nations.
are remunerated will be inspired to create more works for the benefit of society.\textsuperscript{30} Countries opposing protection such as the United States based their arguments against a universal copyright treaty on the need for greater public access to knowledge. Opponents of authors’ rights protection argued that the activities of pirates resulted in cheaper copies and greater availability of the foreign work in developing countries where people were thirsty for knowledge; thus, less protection would be advantageous and in the public interest. This argument was the basis of the persistent refusal by the United States throughout the nineteenth century to protect foreign works.\textsuperscript{31}

\textbf{IV. PIRACY, THE BERNE CONVENTION AND DRAMATIC IRONY}

Piracy\textsuperscript{32} is the leitmotif of the Berne Convention and the springboard of its dramatic irony. The Europeans encouraged the United States to join the Berne Convention in 1886 to stop American piracy of European artistic works, primarily of British origin.\textsuperscript{33} The United States refused to do so, claiming a belief in public access to knowledge. The U.S. attitude toward copyright protection in the nineteenth century mirrors the prevalent culture of the swashbuckling rugged individualist who would not hesitate to steal rather than buy personal or intellectual property. The United States ultimately joined the Berne Convention a century later in response to pressure by the American computer industry seeking to curb or eradicate Chinese piracy of American intellectual property. China joined the Berne Convention in 1992 primarily to stop threats of American trade sanctions, which were part of the paradox of the U.S. big-stick foreign policy toward China. The United States has continued to increase trade with China at the very same time it has attempted forcefully to curb China’s escalating piracy of American intellectual property.\textsuperscript{34}

Throughout the twentieth century and while the United States continued to refuse to join the Berne Convention (defending its position on the basis of a need to protect and increase public access to foreign works), the Chinese continued happily to pirate American CD-ROMs, movies, and cassettes. The theft of U.S. intellectual property by China escalated exponentially in the 1980s and

\footnotesize{\textsuperscript{30} See infra text accompany footnotes 56–64 for a discussion of natural law theory and economic theory that relates to arguments for and against the protection of authors’ rights.}

\footnotesize{\textsuperscript{31} See Ricketson, supra note 23, at 13.}

\footnotesize{\textsuperscript{32} See id.}


\footnotesize{\textsuperscript{34} See Tiefenbrun, supra note 1, at 30.}
accounted for the annual loss of billions of U.S. dollars.\footnote{53} The International Trade Commission estimated that the annual loss to the United States in all intellectual property theft was between $43 and $71 billion.\footnote{36}

In response to the piracy of important technology and artistic works, the United States adopted a big-stick policy towards China in the 1980s and 1990s. To deter piracy, the United States threatened to impose trade sanctions against China under §301 of the Omnibus Trade and Competitiveness Act of 1988.\footnote{37} The United States placed China on a priority watch list under “Super 301”.\footnote{38} The United States also threatened to impose §337 relief under the Tariff Act of 1930.\footnote{39} In fact, the United States came close to a trade war with China in 1995 because of China’s continued piracy of American intellectual property.

This big-stick policy toward China is the U.S. government’s response to the American entertainment industry and the high-technology companies who lose billions of dollars each year to Chinese pirating. Nevertheless, the United States still continues to trade with China and even signed thirty-four contracts worth more than $6 billion in Beijing and elsewhere in China at the very same time it threatened severe sanctions against China.\footnote{40} Consistent with its contradictory trade policy toward China, the United States sought further protection against piracy provided in the GATT/TRIPS Agreement\footnote{41} that gave teeth to the Berne Convention and embodied its basic principles and tenets.\footnote{42} However, not being a member of the Berne Convention made it difficult for the United States to claim protection from China under the GATT/TRIPS Agreement, so the United States finally decided to accede to the Berne Convention in 1989. In response to American trade policy, China acceded to the Berne Convention on October 15, 1989.\footnote{42}
1992 and to the Universal Copyright Convention in October 1992, as required by the 1992 China-United States Memorandum of Understanding on the Protection of Intellectual Property.\(^{43}\)

Why did it take so long for the United States and China, two important players in the international economic community, to adhere to an international treaty that boasts of more than 164 signatories? The answer may be found in hermeneutics and the way a nation interprets a treaty, which is overdetermined by cultural factors and ideological differences. The history of copyright reveals the development of ideological differences among nations (i.e., the cultural, political, economic and aesthetic differences between China and the United States, on the one hand, and between each of these nations and the European nations on the other). These cultural differences influence the nation’s interpretation of the Berne Convention, which can be seen in a study of the respective responses to the treaty.

V. HISTORY OF COPYRIGHT

A. System of Privileges

The history of copyright began with invention of the printing press. Censorship of the press and monopolies to print specific works quickly developed after Gutenberg’s invention of the printing press appeared in 1436.\(^ {44}\) The printing press increased the level of copying and publishing worldwide, replacing the slaves and scribes who copied authors’ manuscripts by hand.\(^ {45}\)

The resultant increase in the illegitimate copying of texts prompted national jurisdictions to respond with new laws and entitlements.\(^ {46}\) The invention of the printing press enabled “pirate” booksellers to copy books already published by legitimate booksellers. Pirate booksellers sold copied books at lower prices with neither authors nor legitimate booksellers having any legal recourse.\(^ {47}\) The sovereigns of Europe could not tame the thriving commerce in books and ideas.\(^ {48}\)

In the fifteenth century, pressure for legislation came not from authors but from booksellers motivated by pecuniary interest. They requested protection from their respective sovereigns pleading for an exclusive right known as a privilege. The privilege provided the bookseller with a limited monopoly and an exclusive


\(^{45}\) See Burger, supra note 22, at 3.

\(^{46}\) See 1 International Copyright Law and Practice, supra note 44, at § 2-14.1.

\(^{47}\) See Burger, supra note 22, at 4.

\(^{48}\) See 1 International Copyright Law and Practice, supra note 44, at § 2-16.
right to print and sell a specific author’s manuscript for a limited time. The use of privileges ended about two hundred years later in the seventeenth century.

B. Statutory Copyright
The key to the system of privileges that preceded the development of true copyright throughout the seventeenth century was in the sovereign’s right to police the dissemination of works. This system soon proved ineffective, and statutory protection developed. Statutes focused for the first time on the rights of authors rather than booksellers. National legislators fashioned a new entitlement to be enforced by civil suit. Thus, copyright was born.

Great Britain was the first nation to enact statutory protection of authors’ rights in the 1709 Statute of Anne. Other European states and the United States followed soon thereafter. Economic circumstances and cultural trends made it necessary to put the theory of copyright into practice. The Statute of Anne and the French Laws of 1791 and 1793, which were prototypes of copyright laws to come, secured only rights of economic exploitation. Later in the nineteenth century, French judges began to enforce moral rights.

VI. COPYRIGHT THEORIES AND THE BERNE CONVENTION

A. Natural Rights Theory: Economic Rights versus Moral Rights
When the focus of copyright switched from the bookseller to the author, a debate emerged as to the origin of the author’s right. Under the old privilege system, the right was justified on economic grounds. Booksellers needed an exclusive right for a limited duration in order to make an adequate profit to cover the costs of a printing press and authors’ manuscripts.

Authors, unlike booksellers, were creators. Many argued that copyright should protect both the author’s economic and personal interests, which should be unlimited. This view establishing economic and moral rights was based on a natural law theory, according to which statutes existed only for the limited purpose of recognizing the creator’s God-given rights and of endowing these natural rights with a more precise embodiment in the law.

49. See Burger, supra note 22, at 4.
50. See 1 International Copyright Law and Practice, supra note 44, at § 2-17.
51. See Burger, supra note 22, at 4.
52. See 1 International Copyright Law and Practice, supra note 44, at § 2-17.
53. See id. at § 2-18 & 19.
54. See id. at § 2-21.
55. See id. at § 2-21. See infra text accompanying footnotes 59–61, 79–82, and 87–90 for a discussion of moral rights theory.
56. See Burger, supra note 22, at 6.
The natural rights approach was partially rejected in Great Britain and the United States. Under their common laws, these countries respectively recognized a copyright of perpetual duration based on property right principles. Statutes later replaced common law copyright at least for published works. The statutes did not codify natural law, and they created in authors an exclusive (but now time-limited) right to prevent others from copying their works without authorization. In Britain, the Statute of Anne enacted in 1709 provided an exclusive right to copy for fourteen years. The purpose of this exclusive right was to protect the economic rights of publishers who bought the authors’ copyrights.

In Europe under the natural rights approach, authors always retain their personal or moral rights even if they sell their economic rights to publishers. Personal rights are inalienable. However, the U.S. Supreme Court rejected the natural law theory of copyright in 1854. Because the United States did so and did not explicitly incorporate moral rights theory into its copyright legislation, the copyright laws in European **droit d’auteur** countries have been viewed to be more favorable to authors than the laws of Anglo-American countries. With time, the United States has continued to incorporate moral rights into its laws, especially with the passage of the Visual Artists Rights Act. The United States has also extended the period of copyright protection from the life of the author plus fifty years to the life of the author plus seventy years.

Thus, modern American copyright scholars recognize two apparently conflicting copyright theories. The first dominant theory, which is based on economics, states that copyright exists solely to provide necessary remunerative incentives for the production of creative works. The second theory, which is based on natural law, considers copyright as the legal vindication of people’s moral right to property in the fruits of their labor. Thus, the natural rights approach views copyright protection for authors as an entitlement while the Anglo-American countries view copyright as a statutorily created privilege for the economic benefit of copyright owners.

57. See id.
58. See id.
64. See Burger, supra note 22, at 7.
B. Diverse Rights Theories Interrelated

Property rights theory and diverse rights theories that developed later became interrelated in the concept of copyright and are now reflected in the language of the Berne Convention. However, property theory, privacy theory, personality rights theory, and market theory underlying the notion of copyright do clash in many different ways with the American and Chinese ideologies.

1. Property Rights Theory

By the end of the seventeenth century, a theory of property in works of the mind began to develop. However, socialist countries such as China find it difficult ideologically to accept the notion of a private property right in works of the mind. The strangeness of the concepts of property and ownership to the Chinese mind are reflected in the remarks made in 1984 by a Chinese scholar in intellectual property who, with the amazement of an ingenu, stated: “We recognize that copyright is a type of property” and “we recognize that copyright, generally speaking, is a type of right that may be owned by an individual.”

Copyright is strongly connected to the concepts of individual inspiration and initiative, and to the act of creation, which is a materialization of human freedom. Socialist nations, bound by traditional schemes of collectivism and planning, have to go through profound ideological and cultural changes before being able to accept the notion that works of the mind are private property.

Some scholars maintain that China’s failure to enforce anti-piracy laws stems from its deep-rooted cultural notions based in Confucianism. Chinese writers, artists, and creators in all areas of knowledge have significant reverence and attachment for the past, which results in legitimized copying. Moreover, China’s esthetic views reflect a preference for imitation in art over innovation.

65. See 1 International Copyright Law and Practice, supra note 44, at § 2-22.


68. See id. See also Sanford Levinson’s Political Change and the “Creative Destruction” of Public Space, in Cultural Human Rights 341–51 (Francesco Francioni & Martin Scheinin eds., 2008). Levinson presents a very interesting and informative discussion of culture, multiculturalism, political change, and the destruction of statues that are iconic symbols of a political regime, such as the destruction of the Soviet statue of Dzerzhinsky on August 22, 1991 (the father of the secret police and the founder of the infamous gulag) signifying the end of Communism. The destruction of the statue of Sadaam Hussein when the U.S. defeated the Iraqi regime signified the end of Sadaam’s oppressive regime and the victory of democracy. Levinson discusses the multiple meanings of the term culture.

69. See Declet, supra note 35, at 60, citing William P. Alford, Don’t Stop Thinking about Yesterday: Why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China, 7 J. Chinese L. 3, 9 n.17 (1993) (arguing that China’s lack of protection for intellectual property stems from its Confucianist cultural and legal traditions).

This preference for imitation flies in the face of the prohibition against reproduction and emphasis on innovation established in the Berne Convention. For example, in the eighteenth century under the Qianlong dynasty, the Emperor maintained total indifference to foreign objects, manufactures, and ideas, and objected to “ingenious” objects and innovation.  

Given the Chinese preference for imitation, their reverence for tradition, and their penchant for the legitimate appropriation of the creative works of others, copyright theory as it is codified in the Berne Convention seems to be on a collision course with Chinese cultural, esthetic, and political beliefs. This ideological incompatibility would explain the failure of the Chinese to properly interpret and enforce the Berne Convention that views copying as illegal.

Education in the basic value systems that underlie the Berne Convention is necessary to insure that its interpretation will be consistent with its spirit and intent. The Chinese government has implemented widespread training programs to teach its people and the government agencies (which are allegedly largely responsible for committing and condoning the pirating) about the notion of private property and authors’ rights. This training program is another sign of the prominence of China’s own cultural identity that accounts for its specific interpretation of the Berne Convention.

2. **Agency Theory of Copyright** Toward the end of the eighteenth century, another theory of copyright proposed a norm for the author’s relationship with the media; this theory conceptualized the agency relationship of the author to the publisher who disseminates the author’s work. The American and British recognition of the important role of the publisher in the creative process (which is sometimes viewed by the author as exploitative) is a source of friction between the European and American/British views of copyright protection. The agency relationship of the author to the publisher is also quite strange to the culture of communism or socialist ideology where ownership of property is held by the State.

3. **Privacy Theory of Copyright** By the end of the nineteenth century, a theory of privacy developed in common law copyright that afforded control over the initial disclosure of works. The notion of privacy is difficult to reconcile with
socialist philosophy, collectivist planning, and State control over the individual that is at the heart of the Chinese socialist economy, but which has been modified by market reforms.

4. Personality Rights Theory of Copyright The personality rights theory developed in Germany. This theory enables any natural person to protect his name, social or professional status, public reputation and image, freedom of self-expression, and privacy interests. However, a difference is immediately discernable between the quality of freedom of expression that exists in socialist nations and in Western democratic nations. Moreover, the demands of uniformity imposed upon individuals by collectivism conflict with the desire to develop respect for the individual personality in Western democratic nations.

5. Market Theory of Copyright In the eighteenth and nineteenth centuries, copyright laws were intended to govern market use; they were designed to permit private suits against unauthorized use. In the twentieth century, the courts, legislators, and collecting societies fashioned rights of remuneration for widespread uses of works by allowing these uses to take place pursuant to legal, compulsory, or blanket licenses. In China, the socialist political system of central planning suddenly began to coexist and develop alongside an economic system involving market reforms that were instituted in 1979 under Deng Xiaoping. The simultaneity of two conflicting systems in China explains some of the confusion that besets the average Chinese reader attempting to comprehend Western copyright theories encoded in the Berne Convention.

Property, agency, privacy, personality, and market theories of copyright are not mutually exclusive and are often interrelated and reflected harmoniously in the copyright law of a nation. Anglo-American statutes tend to enumerate a “bundle” of property-like rights and remedies, calling these entitlements “copyright.” Other interests of the author are not thought of as “copyright.” Thus, in the United States there is a certain pluralism among the legal bases of what the European law calls “moral rights.”

VII. CLASHES OF CULTURE

The Chinese and American delays in joining an important international treaty such as the Berne Convention are complex to explain, due in part to cultural differences between China and the United States on the one hand and among each of these nations and the European nations on the other. European nations that

75. See id.
76. See id. at § 2-24.
77. See id. at § 2-25.
78. Id. at § 2-27.
79. Id.
signed the Berne Convention support the principles of natural law, moral and property rights theories, and automatic protection that are reflected in the language of the Berne Convention and that conflict with American and Chinese ideologies for very different reasons.

American opposition to the concept of universal copyright protection and its continued refusal to join the Berne Convention were due, in part, to the absence of a formality provision and the insistence on moral rights in the Berne Convention, which conflicted with U.S. copyright procedure and with the interests of the book and movie industry. The United States claimed that developing countries needed greater public access to knowledge, which universal copyright protection would diminish.

European arguments for the protection of foreign works are founded in an ideology of natural law and in moral, practical, and personal interests of the author whose creative works are considered private property, whose rights to ownership are endowed naturally, and whose financial remuneration acts as an incentive to continue creating. In contrast, China has a concept of intellectual property and copyright founded in an esthetics of tradition and imitation that flies in the face of the requirements of the Berne Convention.

VIII. BERNE CONVENTION: UNDERLYING PRINCIPLES AND RIGHTS THEORIES

The Berne Convention embodies three basic principles and several different rights theories. The three basic principles are national treatment, automatic protection, and independence of protection. The Berne Convention imposes minimum standards of protection on “every production in the literary, scientific, and artistic domain, whatever may be the mode of its expression.”

The Berne Convention protects “economic rights” such as the right to translate, to perform, to broadcast, to make reproductions, to make motion pictures and to make adaptations and arrangements of the works. The Berne Convention also provides for “moral rights” (i.e., the right of paternity and identity) protecting authors against the distortion or mutilation of their works, even after they have sold or licensed their economic rights.

The Berne Convention protects developing countries that are understandably in need of gaining access to information and technology. As set forth in the Berne Convention, Appendix to the Paris Act of 1971, under certain circumstances

80. Id.
81. The Berne Convention, supra note 5, at Article 2.
82. Greenwald & Levy, supra note 27, at 711–12.
83. See the Berne Convention, supra note 5, at Appendix to the Paris Act of 1971; Greenwald & Levy, supra note 27, at 712; Guo Shoukang, The Berne Union and Developing
developing countries are permitted to deviate from the minimum standards of protection with respect to the right of translation and the right of reproduction. However, the developing nation that seeks reservations concerning translation and reproduction rights must institute a system of compulsory licensing and provide for just compensation to the licensor of the intellectual property in question.

Each member of the Berne Union must enact national laws that afford the following rights to foreign authors: national treatment; absence of formalities; right of enforcement and seizure of infringing works; term of years protecting the author’s copyright for at least the life of the author plus fifty years; very limited compulsory licenses; wide range of coverage for categories of original works; and right to control a wide range of possible uses of the protected work. These are the minimum standards required by the Berne Convention.

IX. U.S. AND CHINESE COMPLIANCE WITH THE BERNE CONVENTION’S MINIMUM STANDARDS

The principle of automatic protection and the absence of formalities presented a significant problem for U.S. compliance with the minimum standards of the Berne Convention. For many years, the United States required such formalities as notice, registration, and deposit to obtain copyright. For example, all U.S. authors seeking copyright protection had to register their works in the U.S. Copyright Office, affix a copyright notice to the protected work, and deposit their works in the U.S. Copyright Office. Failure to provide notice resulted in the work losing copyright protection and falling into the public domain. These U.S. formalities fell afoul of the Berne Convention’s principle of automatic protection and absence of formalities.

The Berne Convention also requires national treatment and prohibits reciprocity. National treatment is a provision contained in some treaties (mostly international commercial treaties) according foreigners the same rights, in certain respects, as those accorded to nationals. The very basis of the GATT and the WTO is the notion of according national treatment to foreign products and of protecting the principle of nondiscrimination. Under a regime of reciprocity, one country would protect foreign authors only at the level that the foreign country protects its own authors.


84. Shoukang, _supra_ note 83, at 121.
85. Greenwald & Levy, _supra_ note 27, at 713.
86. See Oman, _supra_ note 26, at 237–38.
The Berne Convention does permit one instance of reciprocity with respect to the term of protection. If a country gives its own authors protection for life plus seventy years, which is longer than the Berne Convention requirement of protection during the life of the author plus fifty years, that country with the longer term does not have to give the longer term to foreign authors. This is known as the Rule of the Shorter Term that blatantly discriminates against foreign authors and contradicts the Berne Convention’s basic principle of national treatment. In the U.S. Copyright Act, the United States now protects its own copyrighted works for the life of the author plus seventy years pursuant to the United States v. Eldred Supreme Court case.

The Berne Convention bans compulsory licenses, permitting them only for developing countries. China could arguably fall into the category of a developing country. However, a compulsory license requires adequate compensation to the author and, therefore, piracy cannot be explained away as a “license.”

The Berne Convention protects the author’s personal or moral rights. Personal rights include the right of paternity, which prevents others from being named as the author (the so-called right of attribution); the right to decide whether, when and how to divulge the underlying work to the public (the so-called droit de divulgation, occasionally referred to as the right of dissemination); and the right to prevent distortions, deformations, modifications, or changes (the right to protect the integrity of the work). Moral rights reflect the French or continental approach to copyright rather than the U.S. approach that does not explicitly provide the moral right in its copyright statute. The United States has a weaker moral rights regime than France and other nations on the continent. In France, for example, the right of integrity gives the director of a black-and-white motion picture the power to bar the colorization of the author’s work even if the author is no longer the copyright owner. However, despite a reportedly weaker moral rights regime, the United States provides other related remedies and is effectively in compliance with the moral rights requirements of the Berne Convention.

X. U.S. Responses to the Berne Convention

America’s delay in joining the Berne Convention reflects a clash of cultures. In the nineteenth century, Europeans (most notably the British) deplored the lack

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87. Id. at 239.
88. See Shen, supra note 66, at 532 for a discussion of moral and personal rights.
89. See Oman, supra note 26, at 240. However, moral rights are recognized in the Visual Artists Rights Act, supra note 61, at § 106. On the French copyright laws and French views toward moral rights, see, e.g., Jane Ginsburg, French Copyright Law: A Comparative Overview (1989) and her many excellent articles on international copyright issues.
90. See 1 International Copyright Law and Practice, supra note 44, at § 2-27. See Burger, supra note 22, at 240.
of international copyright protection in the United States. The Europeans attempted forcefully but unsuccessfully to encourage America to join the Berne Convention. Anthony Trollope accused the Americans of appropriating “the goods of other people . . . with impunity,” insisting that the United States would continue to oppose international copyright protection because “American readers are the gainers . . . and this argument . . . comes not from the people, but from the book-selling leviathans and from those politicians whom the leviathans are able to attach to their interests.”

Charles Dickens and Anthony Trollope exchanged revealing views on the grim prospects of U.S adherence to the Berne Convention: “I discussed this matter of American international copyright with Charles Dickens, who strongly declared his conviction that nothing would induce an American to give up the power he possesses of pirating British literature . . . the American decision has been, according to his thinking, dishonest . . . American dishonesty is rampant; but it is rampant only among a few.”

In fact, U.S. piracy of European intellectual property was the principal reason for the establishment of the Universal Copyright Convention in 1952 that paved the way for American accession to the Berne Convention. The Universal Copyright Convention was viewed as a compromise between the high level of automatic protection implicit in the Berne Convention’s European concept of the droit d’auteur as a natural right and the conditional protection accorded to authors in American copyright law that views authors’ rights not as automatic, but as a privilege obtainable only upon compliance with certain statutory formalities.

Close readings of the Hearings of the Committee on the Judiciary House of Representatives in 1988 indicate that the U.S. delay in joining the Berne Convention had nothing to do with American indifference or its misreading of the treaty. On the contrary, America validly interpreted the importance of moral rights in the Berne Convention, which ran counter to publishers’ interests and threatened to upset the existing balance between creators and proprietors, employees and employers, authors and publishers. To appease the publishers’ interests, Congress took a minimalist approach to joining the Berne Convention.

91. See Sandison, supra note 33, at 91.
93. See Sandison, supra note 33, at 119.
95. See Sandison, supra note 33, at 89.
97. See Oman, supra note 26, at 242.
Finally, the Berne Convention Implementation Act\textsuperscript{98} went into effect on March 1, 1989 eliminating notice, recordation, and registration requirements.

XI. HOW THE UNITED STATES READS THE BERNE CONVENTION

The U.S. choice not to join the Berne Convention for more than a century after its enactment justifies the theory that the United States correctly interpreted the Berne Convention and understood that American copyright law was incompatible with many of the Berne Convention’s key provisions. Moreover, the United States refused to “muster the political will to make the necessary changes.”\textsuperscript{99} As the representative of the United States at the Berne Convention’s 100th anniversary in 1998 said, “We took a perverse pride in the fact that we did it our way.”\textsuperscript{100}

The Universal Copyright Convention was created in the early 1950s for the specific purpose of making it possible for the United States to join the Berne Convention. The Universal Copyright Convention established a low-level international regime requiring no change in U.S. law to bring it into the international copyright legal arena and to stop U.S. piracy of foreign works.

Once the United States joined the Universal Copyright Convention, the U.S. Copyright Office, with the encouragement of Congress, undertook the task of drafting a new copyright law that would bring the United States into harmony with most of the Berne Convention’s basic provisions. The revision process began in the mid-1950s and took twenty years to conclude, resulting in the 1976 Copyright Act that brought the United States to the doorstep of Berne Convention compliance.\textsuperscript{101}

Under the provisions of the 1976 Copyright Act, the United States dropped the 28-year term that was renewable for another 28 years in favor of the Berne Convention’s “life plus 50 year term”; it expanded the breadth of subject matter protection to follow the comprehensive formulation of “literary and artistic works” as provided in Article 2 of the Berne Convention;\textsuperscript{102} and it dropped strict

\begin{footnotesize}
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\item 99. Oman, supra note 26, at 241.
\item 100. Id.
\item 101. See id.
\item 102. Berne Convention, supra note 5, at art. 2: “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without works; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are
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copyright formalities, including registration and deposit as preconditions to copyright protection and renewal after 28 years. With federal preemption, the U.S. copyright law created a national system of copyright protection simplifying the protection of foreign works in a uniform and predictable manner. It established liability for jukeboxes; and it allowed the manufacturing clause to expire.\footnote{103} It also established the complete divisibility of copyright and adopted a broad formulation of exclusive rights that met the expectations of the Berne Convention as to the scope of public performance rights and the meaning of reproduction. Finally, it moved toward a nonformalistic means of giving authors the opportunity to renegotiate unfavorable copyright assignments.\footnote{104}

Despite these changes that brought the United States very close to Berne Convention compliance, the United States took another twelve years to finally make the changes needed for compliance and ratification of the Berne Convention. This delay was due to pressure from publishers. The magazine publishers, led by Time-Life, believed that adherence to the Berne Convention would threaten their interests in favor of authors. To appease the publishers’ interests, Congress took a minimalist approach to joining the Berne Convention and made only those changes to U.S. copyright law explicitly required by it.\footnote{105}

The Berne Convention Implementation Act\footnote{106} went into effect on March 1, 1989. It eliminated the requirement of copyright notice and the recordation and registration requirements for filing copyright infringement actions in federal court. It added architectural plans to the list of protected works, and it modified the jukebox compulsory license to allow the composers and the jukebox operators to negotiate the terms of the license. Most importantly, nothing in the new legislation changed the level of moral rights existing in the United States at the time of its enactment.\footnote{107}

The United States finally entered the Berne Convention in 1989, and the impact of U.S. adherence has been dramatic. The Berne Convention has acted as a brake on legislative creativity in the proverbial battle between users and creators of copyrighted works.\footnote{108} Berne Convention adherence has also prompted pro-author legislative initiatives. For example, in the nine years since joining, the United States has continued to move toward and even surpassed the high Berne Convention standards. Specifically, the United States has enacted a strong law

\footnote{103. See Oman, supra note 26, at 242.}
\footnote{104. See id. at n.1.}
\footnote{105. See id. at 242.}
\footnote{107. See Oman, supra note 26, at 242.}
\footnote{108. See id. at 249.}
protecting works of architecture, and it has adopted a higher level of moral rights protection for visual artists.\textsuperscript{109} It made copyright renewal for pre-1978 works automatic, eliminating the last vestige of formalities. The United States also enacted a digital home recording levy that compensates composers for the home taping of their music on digital media. Finally, the United States restored copyright in foreign works that had fallen into the public domain in the United States because of a failure to comply with a U.S. formality (such as registration, notice, or renewal).

Another example of the strong impact of the Berne Convention on U.S. copyright law is its prospective application. The United States has no federal provision on droit de suite or the artist’s resale right. To adopt such a regime, the United States would have to strictly comply with the Berne Convention’s provision on this issue.\textsuperscript{110}

The successful enforcement of Berne Convention provisions by the United States and their implementation into U.S. copyright law indicate the validity of the American interpretation of the treaty. However, certain standard U.S. business practices in dealing with copyrighted works simply do not pass muster in other Berne Convention countries. For example, the U.S. concept of work-made-for-hire is not well received in France. Moreover, differences in the very definition of certain terms in copyright law still exist, such as the definition of an author (the one who can collect royalties allocated for authors and who can authorize changes in a copyrighted work) is not the same in the United States and Europe. The disparity in the basic definition of key terms such as the author indicates that the United States prefers, in these limited instances, to read the Berne Convention in its own idiom, with reference to its own cultural, political, and economic ideology.\textsuperscript{111}

\section*{XII. China’s Responses to the Berne Convention}

China’s responses to the Berne Convention include delay in joining until 1992, failure to enforce recently enacted anti-piracy laws, failure to enforce domestic copyright laws,\textsuperscript{112} and failure to enforce the Berne Convention. China’s responses to international law are often explained via simple economic principles: it is

\textsuperscript{109} Visual Artists Rights Act, supra note 61, at § 106.

\textsuperscript{110} See Oman, supra note 26, at 251.

\textsuperscript{111} Id. at 256.

currently cheaper for China to steal than to buy. However, this explanation is not sufficient. China delayed joining the Berne Convention because of the strangeness to the Chinese mind of the concepts of private property and ownership.

The principle of strangeness explains why the purpose clause of the Chinese Authorship Right Law is culturally and politically overdetermined, combines individual and society interests, aims to promote “socialist spiritual civilization and material civilization,” and promotes “the development and advancement of socialist, cultural, and scientific undertakings.”¹¹³ The “fair use” provisions of this law give the State the right to make unauthorized use of copyrighted materials in order to “execute official duties.”¹¹⁴ The language of the Chinese Authorship Right Law’s purpose clause, which is overdetermined by socialist ideology, is very different both semantically and stylistically from the purpose clause of the Berne Convention, which reflects the European concern for authors’ rights: “The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works. . . .”¹¹⁵

It is interesting to compare the emphasis on the protection of authors’ rights encoded in the language of the Berne Convention’s purpose clause and the language of the copyright clause of Article I, Section 8 of the U.S. Constitution, which almost one hundred years earlier enumerated the powers vested in the United States federal government.¹¹⁶ By its choice and ordering of words, the copyright clause of the U.S. Constitution focuses less on authors’ rights and more on the need to provide greater access to knowledge: “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹¹⁷ The juxtaposition of these two clauses (in the U.S. Constitution and the Berne Convention, respectively) crystallizes the ideological differences between the American and European conceptions of copyright.

The ideological differences between the American and Chinese conceptions of copyright are even more pronounced. China is steeped in a history of Marxist philosophy that is arguably incompatible with the copyright principle of property ownership. Moreover, Marxist political theory rejects market economy principles based on the profit motif. Nevertheless, since 1979, under the leadership of Deng Xiaoping the Chinese have gradually adopted market reform tactics into their

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¹¹⁴. Id. at Art. 22.
¹¹⁵. The Berne Convention, supra note 5, at (Preamble) 223.
economic system by encouraging foreign investment in the form of joint ventures and wholly owned foreign direct investments that can—and often do—involves the sale or licensing of intellectual property. Thus, the Chinese people have been indoctrinated in Marxist/Leninist ideology on the one hand, and have been required by reform policies to accept the incompatible notions of private property ownership and individual initiative for profit on the other. Chinese scholars report that the inherent contradictions between Marxism and market economy theories have led to “societal dislocation and transformation” and, more importantly, to a general confusion of values among the Chinese people. This transformation and confusion of values explain, in part, the Chinese particular “reading” and understanding of copyright law and theory. This confusion coupled with the particular quality of the Chinese legal system explain the failure by the Chinese to enforce domestic and international copyright laws that require strong protection of private property rights in general, and intellectual property rights in particular.

XIII. HERMENEUTICS AND CULTURAL DIFFERENCE

Just as beauty is in the eyes of the beholder, interpretation is in the mind of the reader. As Professor Weisberg stated in his work on *Vichy Law and the Holocaust*, “under any model of reading, interpretive communities control the meanings of important texts.” In the long and rich cultural history of the Chinese, there is little evidence of Chinese appreciation for either private property rights or intellectual property rights. William P. Alford, one of the most respected Chinese legal scholars today, concludes that strong protection of intellectual property will be accorded by China only if its citizens gain enough access to cultural goods to develop their appreciation for a multiplicity of viewpoints, a sense of the role of private ownership, and an understanding of the part that intellectual property can play in fostering a marketplace of ideas.

Chinese esthetics places value on imitation over innovation. Chinese writers, artists, and creators in all areas of knowledge have significant reverence for the masters of the past, and copying the works of great artists is not only condoned but encouraged.\textsuperscript{122} The Chinese esthetic preference for imitation is difficult to reconcile with the Berne Convention’s prohibition of illegitimate reproduction and its respect for innovation.

\textbf{XIV. HOW CHINA READS THE BERNE CONVENTION}

To comply with the requirements of the Berne Convention, a nation must pass adequate domestic copyright law. Although rudimentary copyright legislation existed in China as far back as the Song Dynasty in the tenth century,\textsuperscript{123} China’s first true copyright law, the Authorship Right Law, was not passed until 1990.\textsuperscript{124} This law was followed by the Authorship Right Law Implementing Regulations (1991) and the Computer Software Protection Regulations (1991). China acceded to both the Berne Convention and the Universal Copyright Convention in July 1992. China ultimately joined the WTO and therefore signed and ratified TRIPS, which incorporates by reference both the Berne Convention and the Paris Convention protecting copyrights, patents, and trademarks, respectively.

\textbf{A. The Chinese Authorship Right Law}

It is beyond the scope of this chapter to analyze in depth the Chinese Authorship Right Law. Suffice it to say that even the title of the law (which utilizes the term \textit{authorship} rather than \textit{copyright}) and other linguistic anomalies that exist in it are signs of the cultural strangeness of copyright theories to the Chinese people. The Chinese framers chose to employ the word \textit{zhuzhoquan}, which means literally “authorship right,” rather than the better known and more commonly used term \textit{banquan},\textsuperscript{125} which literally means “copyright.” Today the two terms in Chinese are practically synonymous, connoting what is generally understood to be copyright.\textsuperscript{126} Thus, copyright in Chinese no longer means simply the rights of printers or publishers. It symbolizes the whole bundle of rights of authors and other copyright holders, and even includes neighboring rights.\textsuperscript{127} The Chinese readers’

\textsuperscript{122} See Alford, \textit{To Steal a Book is an Elegant Offense}, supra note 70, at 29.
\textsuperscript{124} See Chinese Authorship Right Law, supra note 112.
\textsuperscript{125} See Shen, supra note 66, at 529.
\textsuperscript{126} See Decet, supra note 35, at 61, n. 24.
\textsuperscript{127} Shen, supra note 66, at 530.
cultural strangeness to the concept of copyright might account for their failure to enforce its provisions.\textsuperscript{128}

The Chinese Authorship Right Law includes personal rights (moral rights) and proprietary rights (property or economic rights),\textsuperscript{129} but these are encoded in a peculiarly socialist idiom. Thus, the law protects moral and economic rights only if the works are advantageous to the development of science, culture, and the arts.\textsuperscript{130} For this reason, only “acceptable” works can be copyrighted under Chinese law. This same subtle form of censorship that reflects socialist ideology existed in Russia as well as in China until the fall of communism in Russia in 1991 when the entire system of intellectual property protection in Russia had to be revised.

In a sense, the Chinese concept of copyright as embodied in the Chinese Authorship Right Law is broader than the American concept of copyright because the Chinese law provides explicitly for both personal (moral) and economic rights of the author. The Chinese concept of works-made-for-hire is narrower than in American law because the Chinese Authorship Right Law adheres in theory to an author-centered ideology that is closer to the Berne Convention’s European conception of copyright that protects the author’s natural and moral rights.\textsuperscript{131}

The Chinese Authorship Right Law is in compliance with the Berne Convention and even provides remedies for pirating, including civil liabilities, mediation, and administrative penalties.\textsuperscript{132} In 1995, criminal liabilities for intellectual property infringement cases were instituted in the Chinese Supreme People’s Court.\textsuperscript{133}

**B. Chinese Computer Software Protection Regulations**\textsuperscript{134}

Chinese piracy of American computer software constitutes a serious problem resulting in U.S. threats of trade sanctions and the reestablishment of Chinese anti-piracy laws. An adequate law regulating computer software does exist in China, but it is not effectively enforced. This response can be viewed as a sign of the nation’s particular interpretation of the law.

The Computer Software Protection Regulations establish both personal and economic rights and guarantee the following rights to software copyright owners: the right of publication, the right of attribution, the right of exploitation,

\textsuperscript{128} See id.
\textsuperscript{129} See id. at 534.
\textsuperscript{130} See Chinese Authorship Right Law, supra note 112, at art. 1.
\textsuperscript{131} Shen, supra note 66, at 542–43.
\textsuperscript{132} See id. at 554 (citing to the Chinese Authorship Right Law, supra note 112, at art. 48).
\textsuperscript{134} See Software Protection Regulations, supra note 112, at §16, 15–31.
the right to license and to receive remuneration, and the right to assign.135 On their face, the Chinese Computer Software Protection Regulations appear to address every mode of piratical activity. However, the overall protection is potentially diminished by a series of broad fair use provisions136 that are similar to the Chinese Authorship Right Law’s troublesome fair use provisions. These exceptions allow for reproduction “in small quantities” of software for “such non-commercial purposes as classroom teaching, scientific research and carrying out of official duties by State agencies.”137 Because so many of China’s businesses are partially State-owned, the fair use provision could be misconstrued and abused by pirates or State agencies themselves to get around the Computer Software Protection Regulations’ otherwise adequate copyright protection.138 Therefore, the fair use exceptions explicitly stipulated in the law itself, coupled with the cultural and political overdetermination of the law that implicitly places power in the hands of State agencies, account for the failure of the law to protect against piracy of computer software.

An old Chinese proverb, often quoted, sums up the Chinese perception of copyright protection: “To steal a book is an elegant offense.” This proverb is founded on a metaphor whose basis of comparison is encoded in an oxymoron (“elegant offense”). The proverb can be interpreted to mean many different things, but it is above all an apt crystallization of the Chinese mind that reads copyright law in its own idiom and interprets the Berne Convention in accordance with its own cultural background.

XV. U.S. VIEWS ON PIRACY OF PATENTED INVENTIONS AS EXPRESSED IN FILM: FLASH OF GENIUS139

Piracy of intellectual property today is not confined to China and Russia. The people and corporate entities in the United States continue to pirate their own U.S. citizen’s patented inventions.140 The theft by Ford of Dr. Robert Kearn’s invention of the intermittent windshield wiper in the early 1960s is the subject of the movie Flash of Genius. In it, a hardworking engineering professor spends

135. Declet, supra note 35, at 68.
137. Id. at art. 22.
139. Flash of Genius (Universal Films, 2008), starring Greg Kinnear, Lauren Graham, Dermot Mulroney, Alan Alda, Jake Abel, Daniel Roebuck, Tim Kelleher, and Bill Smirrovich. This film was based on a New Yorker magazine article by John Seabrook.
140. People and corporations in the United States continue to pirate their own copyrighted works, especially with regard to musical downloads off the Internet. See Music Piracy Suit Against N.Y. Family is Settled for $7,000, N.Y. Times, Apr. 28, 2009, at B4.
a good deal of his life inventing a windshield wiper and an even greater part of his life suing (by himself without the expertise of an intellectual property patent lawyer) the big car manufacturers worldwide for patent infringement of his invention. This inventor is obsessed with the indecency of piracy by rich car manufacturers who exploit the creative scientist, whose only dream in life is to invent something wonderful to help people live better.

Rather than reward the inventor, Ford and Chrysler steal with elegant duplicity the inventor’s intermittent windshield wiper, claiming the wiper to be their own invention. Ford, realizing it might lose the case, offers to settle with Kearn for as much as $30 million, but the inventor stubbornly refuses to settle, risking everything to fight for his principles of fair play. This movie uncovers the realpolitik of patent infringement litigation and the illegal machinations of duplicitous manufacturers, lawyers, and businesspeople. Here the inventor is no less than a superhero who ends up winning $40 million, but who loses his job, his sanity, and even his wife in the throes of this battle.

Early in his legal fight to slew the giant Ford, Kearn dismisses (with good reason) his greedy and self-dealing lawyer. Deciding to represent himself in this uphill battle against the big car manufacturers, he asks his loving children to help him find the law he needs to win each case. This inventor mistrusts the car manufacturer who steals his invention and mistrusts his own friend who gets him the job with the car manufacturer. He also mistrusts his lawyer who prefers to get a settlement rather than fight for the principles of copyright law.

In the end, the inventor wins and wins big, and the American legal system ends up looking very good in its ability to favor the little guy in a world dominated by corporate giants. In this narrow sense, the film seems to point in the direction of an implicit adoption by the United States of moral rights principles and a return to the European doctrine of the romantic author or the mad scientist whose ambitious and noble endeavors need incentivization and recognition as well as financial remuneration.

XVI. Conclusion

As expressed in the film Flash of Genius, some people and corporations in the United States continue to pirate their own and probably foreign patented and copyrighted works. China also continues to pirate U.S. intellectual property even though it has joined the Berne Convention and has enacted adequate domestic laws to protect foreign works. Unlike the United States, China has a conception of intellectual property founded in a political theory that rejects ownership of private property. China has adopted an esthetic theory that values tradition and imitation. But Chinese politics, economic theory, and esthetics are necessarily shifting, aligning themselves more closely with the international legal discourse which is, itself, reshaped by modern conditions.
U.S. intellectual property policy has also shifted. In 1854, the U.S. Supreme Court rejected moral rights, but since then the United States has slowly adopted a moral rights theory, which is reflected in the enactment of the Visual Artists Rights Act. The development in China of its own technology may in time reshape its economy and alter its current economic incentive to steal rather than buy or license intellectual property. Continued efforts at education of the people and enforcement of the law are likely to realign deep-rooted cultural practices that influence a nation’s interpretation of a widely accepted international treaty and that are reflected in that nation’s responses to that law.

141. See Wheaton v. Peters, supra note 59, at 654-68.
142. See Visual Artists Rights Act, supra note 61, at § 106. The Visual Artists Rights Act constitutes landmark legislation creating moral rights for artists in the United States. It was enacted on Dec. 1, 1990 as an amendment to the copyright law that took effect on June 1, 1991. This law is analogous to the moral rights protected in the Berne Convention by protecting artists’ rights of attribution and integrity in paintings, drawings, and photographs produced for exhibition, prints, and sculpture. See id.