

The Chinese Copyright Dream

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Abstract

Chinese President Xi Jinping's vision of the "Chinese Dream" has captured the popular imagination. As a slogan, the Chinese Dream is intentionally broad. Intended to inspire rather than prescribe, it captures diverse aspirations including dreams of material prosperity, environmental sustainability, national rejuvenation, and global leadership. The Dream's ramifications continue to ricochet through state policy echelons and lend themselves to competing interpretations. In that spirit, we advance a modest suggestion: that the Chinese Dream should be, at least in part, a dream about copyright law.

A more effective copyright system would bolster China's creative industries, generating a diverse supply of high-quality expressive works whose realization would advance many plausible goals of the Chinese Dream. Yet, copyright has a more fundamental role to play. Xi himself has emphasized that "[t]he Chinese dream, after all, is the dream of the people." Now that dreaming broadly and boldly is state policy, China's people need the space to dream. Copyright provides a mechanism to harness the collective imagination of China's authors and artists. Decentralized investments in diverse, high-quality media will stimulate the robust popular discourse that

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China needs to articulate and actualize its Dream. In short, copyright can help China dream its own dream.

Because the Dream metaphor is meant to inspire bold thinking, we argue that China should be equally bold in reimagining copyright law for the future. China has shown great capacity to trailblaze in technological fields such as telecommunications and payment systems, leapfrogging Western legacy systems bogged down by path dependence and entrenched stakeholders. China should harness its technological prowess to similarly reinvent copyright in a more efficient, streamlined form. Ultimately, China must devise its own copyright system that reflects its needs and priorities, but we suggest a few candidates for such streamlining: simplified substantive rights; an automated, online registration and licensing platform; enhanced accessibility measures for small creators; low-cost enforcement mechanisms; and targeted use of competition law. A state-of-the-art Chinese copyright system reflecting suitably ambitious reforms will pay lasting dividends, not only for China's creators and content industries, but ultimately for all of China. To succeed, however, China will have to adjust its current top-down approach to cultural policy and allow greater room for decentralized expression. Creative inspiration—like dreams—emerges through mysterious processes. China should muster the confidence to dream boldly in copyright policy and reap the rewards in cultural vitality.

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I. INTRODUCTION

China's president Xi Jinping has a dream.¹ Upon taking power in 2013, Xi announced a new slogan to define his era: the "Chinese Dream."² Like Martin Luther King before him, Xi's dream proclaimed a vision of his country's destiny. Where King's rhetoric invoked the American Dream and its foundational promises of liberty and equality, the "Chinese Dream" was less clearly tied to articulated policy aims. In the ensuing years, the ramifications of Xi's dream have reverberated through China's communist party policy apparatus as competing factions strive to implement the leader's vision while bending it to their particular agendas.³

Xi's Chinese Dream struck a chord in Chinese society that its stodgier predecessors, such as Jiang Zemin's "Three Represents" and Hu Jintao's "Harmonious Society," never could.⁴ The Chinese Dream has inspired hit pop songs, academic conferences, and grammar-school contests.⁵ While previous official slogans "focused on internal politics and were problem-oriented motos," the Chinese Dream is "future oriented and outward looking in search of China's greatness in the world."⁶ The new messaging marked a generational change in leadership and heralded the new-found confidence of a strong China no longer reticent to reassert its Great Power status.⁷ In previous Party edicts, "[n]o 'dreams' were alluded to much less officially sanctioned. The Chinese people were told to work, to study, but never to dream. The Party in essence served as China's 'Tiger Mom.' But, of course, Chinese did and do dream. Chinese art, literature, and philosophy throughout history were filled with

1. See *Xi Jinping's Vision: Chasing the Chinese Dream*, ECONOMIST (May 4, 2013), <https://www.economist.com/briefing/2013/05/04/chasing-the-chinese-dream> [hereinafter *Chasing the Chinese Dream*] (detailing President Xi Jinping's "Chinese Dream").

2. *Id.*

3. *Id.*

4. See Joseph Kahn, *China Makes Commitment to Social Harmony*, N.Y. TIMES (Oct. 10, 2006), <https://www.nytimes.com/2006/10/12/world/asia/12china.html> (explaining Hu Jintao's "Harmonious Society" ideology); *Chasing the Chinese Dream*, *supra* note 1. "The adoption of a personal slogan—one that conveys a sense of beyond-normal wisdom and vision in a short, memorable and perhaps somewhat opaque phrase—has been a rite of passage for all Chinese leaders." *Chasing the Chinese Dream*, *supra* note 1. Xi Jinping's "'Chinese dream' slogan is exceptional, though, . . . [t]he dream seems designed to inspire rather than inform." *Id.*

5. See *Chasing the Chinese Dream*, *supra* note 1.

6. JING SUN, RED CHAMBER, WORLD DREAM: ACTORS, AUDIENCE, AND AGENDA IN CHINESE FOREIGN POLICY AND BEYOND 132 (2021).

7. See *id.* at 132–33.

dreams.”⁸ Now, dreaming broadly and boldly is state policy.

At the time of this writing, nearly a decade after Xi first heralded the Chinese Dream, the Dream remains “a key concept” and “abiding goal of the Communist Party of China to seek national rejuvenation”⁹ Moreover, “Xi Jinping Thought” has been enshrined in China’s constitution, granting core tenets of the Dream canonical status within the Party.¹⁰

But what does the Chinese Dream mean? Is it an individualistic dream—a vision of a better material life?¹¹ Does it capture a broader aspiration of personal happiness?¹² Does it gesture toward a greener, more sustainable pathway to development?¹³ Or herald a commitment to the rule of law, with strengthened rights for ordinary citizens?¹⁴ Perhaps it is an outward-looking dream of a peaceful, prosperous rise of China to leadership on the world stage?¹⁵ Or is it, instead, a harder edged dream of military dominance in a

8. Winberg Chai & May-lee Chai, *The Meaning of Xi Jinping’s Chinese Dream*, 20 AM. J. CHINESE STUD. 95, 96 (2013).

9. Cao Desheng, *Xi: Chinese Dream Is the People’s Dream*, CHINA DAILY (Nov. 10, 2021), <https://www.chinadaily.com.cn/a/202111/10/WS618afb05a310cdd39bc74540.html>.

10. Salvatore Babones, *The Meaning of Xi Jinping Thought*, FOREIGN AFFAIRS (Nov. 2, 2017).

11. Jiayu Wang, *Representing Chinese Nationalism/Patriotism Through President Xi Jinping’s “Chinese Dream” Discourse*, 16 J. LANGUAGE & POL. 830, 833 (2017).

12. See Chai & Chai, *supra* note 8, at 95–96 (noting that, according to *Caixin*, “China’s arguably most respected news magazine,” the Chinese Dream refers to “personal happiness for the Chinese people: ‘The fulfillment of China’s top national priorities requires a renewed focus on happiness’”).

13. See Thomas L. Friedman, *China Needs Its Own Dream*, N.Y. TIMES (Oct. 2, 2012), <https://www.nytimes.com/2012/10/03/opinion/friedman-china-needs-its-own-dream.html>. Some observers viewed Xi’s initial “Chinese Dream” speech as, in part, a response to the *New York Times* column penned by Thomas Friedman a few months earlier, asking explicitly, “Does Xi have a ‘Chinese Dream[?],’” and exhorting the Chinese leader to embrace a more sustainable path than the American Dream of consumerist materialism. *Chasing the Chinese Dream*, *supra* note 1 (quoting Friedman, *supra*). While Xi’s dream clearly extends well beyond environmental policy, his government has committed to pursuing greener policies, and Xi himself grabbed international headlines at the United Nations for setting ambitious goals for China to hit peak emissions before 2030 and achieve carbon neutrality by 2060. Matt McGrath, *Climate Change: China Aims for ‘Carbon Neutrality by 2060,’* BBC (Sept. 22, 2020), <https://www.bbc.com/news/science-environment-54256826>.

14. See *Chasing the Chinese Dream*, *supra* note 1 (noting the inherent contradictions between such rule-of-law rhetoric and a ruling party that sees itself as above the law).

15. Wang, *supra* note 11, at 843–44; Cao, *supra* note 9 (“According to the Chinese president, the Chinese dream is also a dream about peace, development, cooperation and win-win result. It has resonated far and wide across countries as the world looks to enduring peace and common prosperity.”). Xi Jinping has emphasized that boosting China’s “soft power” influence globally is “a vital ingredient of [his] ‘Chinese Dream.’” *China Is Spending Billions To Make the World Love It*, ECONOMIST (Mar. 25, 2017), <https://www.economist.com/china/2017/03/23/china-is-spending-billions-to-make-the-world-love-it>; see Wang, *supra* note 11, at 844.

post-American world order?¹⁶ Depending on the context, it means any of these and more; it is intentionally vague and malleable.¹⁷ As one expert put it, “Xi’s Chinese Dream is protean. He associates it with different things at different times in different places. At its core, though, [it] is a vision of national rejuvenation.”¹⁸ However, “[t]he vagueness of the ‘Chinese dream’ slogan . . . provides a space in which the Chinese can think of their own dreams.”¹⁹ Xi himself has acknowledged that, “[i]n the end, the Chinese dream is the people’s dream.”²⁰

Dreams are mysterious things.²¹ Their source and meaning often defy

16. See SUN, *supra* note 6, at 132 (“One representing voice is that of Liu Mingfu . . . from the National Defense University. In his book titled *The China Dream: Great Power Thinking and Strategic Posture in the Post-American Era*, Colonel Liu proclaims that the time has come for China to replace America as the world’s top military power.”). Xi himself has spoken of a “strong-army dream,” while stopping short of explicit challenges to U.S. power. *Chasing the Chinese Dream*, *supra* note 1; see also ORVILLE SCHELL & JOHN DELURY, WEALTH AND POWER: CHINA’S LONG MARCH TO THE TWENTY-FIRST CENTURY 387 (2013) (noting that Xi has stated the Chinese Dream includes “preserv[ing] the bond between a rich country and a strong military”).

17. See *Chasing the Chinese Dream*, *supra* note 1; Benjamin Carlson, *The World According to Xi Jinping*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/international/archive/2015/09/xi-jinping-china-book-chinese-dream/406387/> (observing that “the Chinese Dream can mean many things to many people”); *Chasing the Chinese Dream—If You Can Define It*, NPR (Apr. 29, 2013), <https://www.npr.org/2013/04/29/179838801/chasing-the-chinese-dream-if-you-can-define-it> (noting the pliability of the Chinese Dream concept given the diverse interpretations and understandings of its meaning and implications).

18. Jeffrey Wasserstrom, *Here’s Why Xi Jinping’s ‘Chinese Dream’ Differs Radically from the American Dream*, TIME (Oct. 19, 2015, 12:10 AM), <https://time.com/4077693/chinese-dream-xi-jinping/>.

19. *Chasing the Chinese Dream*, *supra* note 1.

20. *Id.* (quoting Jinping Xi, President of the People’s Republic of China, Keynote Address to the National People’s Congress (Mar. 14, 2013)).

21. The enigmatic nature of dreams has long played an important role in Chinese literature, culture, spirituality, and philosophy. See ROY BING CHAN, THE EDGE OF KNOWING: DREAMS, HISTORY, AND REALISM IN MODERN CHINESE LITERATURE 4 (2017). As Roy Bing Chan observes,

Many are familiar with the passage in the “Inner Chapter” of the Zhuangzi titled “Discussion on Making All Things Equal” (Qi wu lun) in which the philosopher muses on whether he dreamed of being a butterfly or is actually a butterfly that dreamed of Zhuangzi. This parable illustrates the constant flux and instability of reality. In Buddhism, dream is often used as a metaphor for the illusoriness of the phenomenal world, thus underscoring the necessity of letting go of one’s attachments.

Id. Dreams feature centrally in Cao Xueqin’s Qing Dynasty-era novel *Hong Lou Meng* (红楼梦), or *The Dream of the Red Chamber*, arguably the greatest literary work in Chinese history. CAO XUEQIN, THE STORY OF THE STONE, ALSO KNOWN AS THE DREAM OF THE RED CHAMBER, VOLUME I: THE GOLDEN DAYS (David Hawkes trans., 1973) (1791). The novel frequently uses dream imagery to evoke the Buddhist idea that “the worldling’s ‘reality’ is illusion and that life itself is a dream from which we shall eventually awake.” *Id.* at 15 (quoting introduction by translator David Hawkes).

human understanding. Perhaps instead of speculating on what Xi meant, we might instead consider what a plausible Chinese Dream *should* entail. Here, we are going to venture onto a limb and advance a modest suggestion: We argue that, whatever else the Chinese Dream may encompass, the Chinese Dream should be, in part, a dream about copyright law.²²

Why copyright law? How does copyright relate to Xi's goal of national rejuvenation? The answer admittedly may not be intuitive. Yet, there are several reasons why copyright law deserves a prominent place in the Chinese Dream.

First, Chinese copyright law aims to “encourag[e] the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and . . . promot[e] the development and flourishing of socialist culture”²³ As such, it accords well with the forward-looking aspirations of Xi's Chinese Dream. As China seeks to transition its economy from manufacturing to higher value productivity centered on the knowledge economy, copyright industries arguably have a valuable role to play.²⁴ Second, the intangible content-creating industries that copyright protection sustains accord well with environmentalist versions of the Dream, heralding a greener, more sustainable China ready to move beyond its polluting industrial past.²⁵ Third, copyright advances other plausible conceptions of the Chinese Dream—by encouraging investment in creative works that simultaneously entertain and edify, copyright advances consumer welfare, fosters national unity through shared media consumption, and promotes a more informed, sophisticated public.²⁶ Fourth, modernizing China's copyright

22. See *infra* Part II (discussing broadly how copyright law relates to the Chinese Dream).

23. Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 11, 2020, effective June 1, 2021), art. 1, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. (China) [hereinafter 2020 Copyright Law]. Promoting progress through innovation represents a core goal of intellectual property law, one that is instantiated in many aspects of copyright doctrine, including standards on originality, fair use/fair dealing, and the idea-expression dichotomy. See generally Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 48–56 (2001).

24. See *infra* Section II.C.

25. See, e.g., McGrath, *supra* note 13 (explaining President Xi's environmental goals for China's future).

26. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 349–54 (1996) (asserting that “creative works have broad political and social implications” and are “powerful vehicles for attitude changes or reinforcement”). It's no accident that the first modern copyright act, England's 1701 Statute of Anne, was titled, an “Act for the Encouragement of Learning.” See *id.* at 308 n.102. Copyright's Enlightenment goals were also prominent considerations among the Framers of the U.S. Constitution in creating the Intellectual Property Clause. See *id.* at 356–57; Sean M.

system would accord with Xi's commitment to strengthening the rule of law and serve to negate China's enduring notoriety as an epicenter of global piracy.

To the extent that the Chinese Dream harbors an outward vision of Chinese leadership on the world stage, copyright law has far more to offer than merely reversing the stain of China's unsavory pirate past. As we explain below, vibrant cultural industries hold the key to achieving the global "soft power" to which Chinese leaders have long aspired. Copyright provides the engine that could underwrite such cultural vitality and produce attractive cultural exports that burnish China's cross-border influence.²⁷

The final, and perhaps most fundamental, reason why copyright belongs at the core of the Chinese Dream focuses inwardly on copyright's effects on domestic discourse. Copyright scholar Neil Netanel has described the vital role that copyright plays in promoting democratic discourse by fostering vibrant content industries that operate largely outside of government control.²⁸ As Netanel notes,

In our age of mass media and electronic communication, much democratic citizenship consists not in face-to-face dialogue or community organization, but rather in exchanging ideas about political, social, and cultural issues through television, radio, films, newspapers, books, music, art, and now multi-media CD-ROMs and the [i]nternet. While such fora lack the intersubjective intimacy of face-to-face interaction, they are no less a locus of deliberative discourse. Indeed, they make up the primary space in our society where public opinion is forged and social norms are contested and elaborated.²⁹

By incentivizing the creation and dissemination of such expressive media, copyright promotes democratic discourse and "fortif[ies] our democratic institutions by promoting public education, self-reliant authorship, and robust

O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 CHI. L. REV. 733, 737–38 (2015); Birnhack, *supra* note 23, at 17–22, 38–40. In "promoting the progress and flourishing of socialist culture and sciences," Chinese copyright law follows in this intellectual tradition, albeit with a socialist twist. *See* 2020 Copyright Law, *supra* note 23.

27. *See infra* Section II.C.

28. *See* Netanel, *supra* note 26, at 352–64.

29. *Id.* at 349 (citations omitted). "The millions of fixed works of authorship that are regularly broadcast, distributed, and transmitted every day . . . are the lifeblood of civic association." *Id.* at 348.

debate.”³⁰ Moreover, by operating in a decentralized manner through market mechanisms relatively insulated from state control, copyright supports an independent expressive sector that upholds the democratic character of public discourse.³¹

On its face, Netanel’s account of copyright’s democratic function may seem poorly suited to the Chinese context, given China’s unapologetically authoritarian government and its widespread censorship and media controls.³² Yet, the absence of democracy in China does not negate the value of the democratic discourse that Netanel describes. Indeed, the lack of meaningful opportunities for the public to assert its preferences through elections arguably underscores the importance of alternative mechanisms for expressions of the popular will.³³ By fostering such public discourse, copyright’s democratic function can thus arguably play a valuable, socially stabilizing role even in the absence of democracy.³⁴

Furthermore, promoting and attending to such democratic expression affords China’s government a much-needed source of legitimacy. Having largely jettisoned its revolutionary commitment to Communist ideology—in practical policy terms, albeit not rhetorically—China’s Communist Party has long retained its mantle of legitimacy by delivering material prosperity

30. *Id.* at 291. Skeptics might question whether copyright incentives are needed in the digital age where social media platforms facilitate non-commercial exchanges between ordinary citizens. *See, e.g.,* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 1–3, 99–106 (2006). A full response to such skeptics requires an extended answer beyond the present scope. Suffice to say, however, that the level of civil discourse prevalent on social media falls far short of democratic ideals. *See, e.g.,* Jay David Bolter, *Social Media Are Ruining Political Discourse*, ATLANTIC (May 19, 2019), <https://www.theatlantic.com/technology/archive/2019/05/why-socialmedia-ruining-political-discourse/589108/>. Exchanges on such online platforms are typically superficial, poorly reasoned, factually suspect, and prone to manipulation, sensationalism, and ad hominem attacks; moreover, participants too often remain siloed within narrow echo chambers that fail to challenge their preconceived positions and biases. While commercially produced media have their own flaws, the more fully developed and professionally vetted forms of authorial expression represented there arguably play a vital role in compensating for the former shortcomings by presenting more nuanced positions and exploring alternative perspectives. Commercial media, of course, *do* respond to copyright incentives.

31. *See* Netanel, *supra* note 26, at 291.

32. *See* Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELS. (Feb. 17, 2017, 7:00 AM), <https://www.cfr.org/backgrounders/media-censorship-china> (noting the intense censorship exerted by the Chinese government).

33. *See* Netanel, *supra* note 26, at 347; Eric Priest, *Copyright and Free Expression in China’s Film Industry*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 60–68 (2015) [hereinafter Priest, *Copyright and Free Expression*].

34. *See id.* at 352–64 (noting copyright law’s potential to impact democracy positively).

through rapid economic growth.³⁵ Yet, China's growth trajectory has become unsustainable, and the full impact—human, environmental, spiritual—of pursuing economic growth at all costs is increasingly apparent.³⁶ Rising inequality, pollution, and corruption have all contributed to growing currents of popular discontent.³⁷ Repression and censorship can only do so much to keep the lid on social unrest.³⁸ The Party leaders desperately need an alternative means of legitimation.

Cultural industries provide an ideal solution. Marxist theorists have long recognized popular culture's role as an opiate for the masses. Chinese state media are as adept at deploying bread and circuses as any Roman emperor.³⁹ China's rulers also value the morally uplifting potential of culture to instill good values, promote a harmonious society, and foster positive national sentiment through stirring narratives of Chinese heroism and virtue.

But popular culture's potential goes beyond its use as a vehicle for party-approved messaging. Propaganda can only go so far in shaping public preferences and warding off criticism.⁴⁰ Moreover, excessive appeals to nationalist pride risks stoking a rabid patriotism that provokes unintended foreign policy complications.⁴¹ To maintain legitimacy and head off challenges to Communist Party hegemony, China's leaders must instead proactively attend to the public's needs and aspirations. Xi was correct: in the end, the Chinese Dream must be a dream of the Chinese people.⁴² In the absence of a

35. See ODED SHENKAR, *THE CHINESE CENTURY* 18 (2006).

36. See David Dollar et al., *Preface*, in *CHINA 2049: ECONOMIC CHALLENGES OF A RISING GLOBAL POWER* iv–xxi (David Dollar et al. eds., 2020); EVAN OSNOS, *AGE OF AMBITION: CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA* 130, 151, 311–16 (2014).

37. See Chun Han Wong, *Chinese Begin To Vent Discontent with President Xi and His Policies*, WALL ST. J. (Aug. 15, 2018, 12:34 PM), <https://www.wsj.com/articles/chinese-begin-to-vent-discontent-with-president-xi-and-his-policies-1534350856>. Having dodged the “color revolutions” that toppled post-communist regimes in many of its neighbors and haunted by the ghosts of Tiananmen square, China's leaders have an almost neuralgic fear of civil unrest. See SUSAN L. SHIRK, *CHINA: FRAGILE SUPERPOWER* 53 (2008). China has mobilized an army of censors to squash dissenting voices and keeps a close watch on social gatherings. See REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 34–40 (2012). Even so, undercurrents of discontent continue to bubble up as China's rising middle class, a highly educated, digitally savvy cohort, confront the enduring imperfections of the system and aspire for more. See *infra* notes 185–87 and accompanying text.

38. See, e.g., Wong, *supra* note 37.

39. See Eyck Freyemann, *Maria Repnikova on How China Tells Its Story*, THE WIRE CHINA (Apr. 4, 2021), <https://www.thewirechina.com/2021/04/04/maria-repnikova-on-how-china-tells-its-story/>.

40. See SHIRK, *supra* note 37, at 97–104.

41. See *id.* at 64, 98.

42. See *Chasing the Chinese Dream*, *supra* note 1 (citing President Xi's statement that “the

democratic franchise, the Party needs an alternative mechanism to discover the people's will, respond to their grievances, and reorient policies around public values and priorities.⁴³

China's government has shown itself surprisingly willing to respond to public opinion and adjust course accordingly.⁴⁴ At the same time, the Chinese state retains a neuralgic fear of public expression and civil society organizations that could threaten its hegemonic authority.⁴⁵ By stifling public demonstrations, online petitions, or other forms of democratic mobilization, China has left a gap between its rulers' claimed mandate to exercise the people's will and their ability to accurately determine and respond to popular sentiment.

Mass media consumption and the shared popular expression it promotes provide a safe space for democratic discourse to function within the limits of state censorship. Such public discourse, albeit constrained, operates as a pre-political process that encourages the Chinese public to debate issues, distill priorities, clarify values, and forge consensus.⁴⁶ Allowing such bottom-up expression provides a safety valve for the Chinese public to vent their frustrations.⁴⁷ It also allows China's rulers to take measure of public sentiment and reorient policies to respond to the public will.⁴⁸

Chinese Dream is the people's dream").

43. See DANIELA STOCKMANN, MEDIA COMMERCIALIZATION AND AUTHORITARIAN RULE IN CHINA 14–15 (2013) ("Over time, the dynamics of responsive authoritarianism in Chinese newspapers appear to have led to cautious adjustments of the CCP's political positions as disseminated by newspapers. . . . Market-based media may increase the responsiveness of authoritarian rulers while also preventing pluralism and disintegration.").

44. See *id.*; see also MARIA REPNIKOVA, MEDIA POLITICS IN CHINA: IMPROVISING POWER UNDER AUTHORITARIANISM 111–41 (2017); SHIRK, *supra* note 37, at 103–04; CHRISTOPHER HEURLIN, RESPONSIVE AUTHORITARIANISM IN CHINA: LAND, PROTESTS, AND POLICY MAKING (2016).

45. See Xu & Albert, *supra* note 32.

46. See Binchun Meng, *From Steamed Bun to Grass Mud Horse: E Gao as Alternative Political Discourse on the Chinese Internet*, 7 GLOB. MEDIA & COMMUN 33, 39 (2011) ("The control over political discussion and the difficulty of articulating a counter-hegemonic agenda in the Chinese context have only made it more important to explore political discourses in non-conventional formats.").

47. See *id.* at 44 ("[T]he dirty pun of Grass Mud Horse," which "has become a euphemism often used by netizens to refer to the act of censorship, . . . represents the average internet users' anger and frustration at censorship, and with the help of digital technology this unique form of expression is evolving into a collective attempt at resistance.").

48. See Freymann, *supra* note 39; see also SHIRK, *supra* note 37, at 103–04; Angela Hsu et al., *Why Has This Environmental Documentary Gone Viral on China's Internet?*, CHINAFILE (Mar. 3, 2015), <https://www.chinafile.com/conversation/why-has-environmental-documentary-gone-viral-china-internet> (discussing the Chinese independent documentary "Under the Dome," which investigated China's chronic air pollution problem, was viewed hundreds of millions of times, and led to official recognition of pollution problems); Priest, *Copyright and Free Expression*, *supra* note 33, at 60–68 (discussing how Chinese filmmakers push censorship boundaries, sometimes resulting in formal

However, to make this work requires decentralized cultural processes that bubble upward organically rather than emanating through top-down decrees.⁴⁹ As Netanel explains, copyright provides the ideal tool to nurture such decentralized expression.⁵⁰ China is a country beset by internal contradictions, struggling to reconcile its communist ideology with its capitalist reality and to balance the embrace of modernity with enduring respect for its ancient traditions and heritage.⁵¹ Globally, China is still feeling its way as a resurgent Great Power, aspiring to global leadership, yet distrusted by many of its neighbors.⁵² Finding the right path forward to negotiate these contradictions will require harnessing the collective imagination of China's people.⁵³ In short, China needs the space to dream.

Copyright, and the creative content it underwrites, can facilitate this process.⁵⁴ Tellingly, Hollywood and other popular-content industries are often referred to as “dream factories.”⁵⁵ On one level, the phrase evokes celluloid fantasies that shimmer evanescently on the silver screen, cloaked in Tinseltown's glamor.⁵⁶ But at a deeper level, “dream factory” captures well the role that popular media play in fostering public discourse and shaping visions of

changes to censorship rules over time).

49. See Netanel, *supra* note 26, at 347–63.

50. See *id.* at 288 (“Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association.”).

51. See Wasserstrom, *supra* note 18 (“Xi makes no secret of wanting to see China assume a position of international centrality, as well as to see it modernize while revering its classical traditions.”).

52. China claims to champion the developing world against Western domination. See RUSH DOSHI, *THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER* 239–40 (2021). Yet, it is increasingly willing to act unilaterally to reassert its own historic role as a global hegemon. *Id.* at 277–96.

53. See Robert Lawrence Kuhn, *Understanding the Chinese Dream*, CHINA DAILY USA (July 19, 2013), http://usa.chinadaily.com.cn/opinion/2013-07/19/content_16814756.htm (“The Chinese dream is both collective and individual.”); Wasserstrom, *supra* note 18 (“The Chinese state today is robust, yet the country's leaders won't let fears of its being precariously weak die a natural death. If only they would. Then there would be space not just for their dreams but the often different ones of many individual Chinese.”).

54. See Netanel, *supra* note 26, at 288 (explaining copyright's function in a democratic society).

55. See Robert Sklar, *Hollywood's Dream Factory: Luring Moviegoers Out of Their Own Lives, Into Distant and Exotic Worlds*, WASH. POST (Feb. 23, 1978), <https://www.washingtonpost.com/archive/local/1978/02/23/hollywoods-dream-factory-luring-moviegoers-out-of-their-own-lives-into-distant-and-exotic-worlds/92ac96dc-5758-4a53-a385-78e6eeb4b8ff/> (observing that, “in its heyday,” Hollywood was often referred to as “The Dream Factory”).

56. See *id.* (discussing “Hollywood's glamorous attraction” and asserting that movies “fulfill a unique role as purveyors of dreams to a popular audience”).

the future.⁵⁷

By harnessing the creative visions of China's artists and stimulating popular debates over conflicting imperatives, copyright thus has a vital role to play: it can help China dream its own dream. In the end, copyright is thus about *how* to dream as much as it is *what* the Chinese Dream should be. However, China's copyright system could itself benefit from bolder imagination. In the pages that follow, we offer some tentative suggestions as to how to pursue the Chinese copyright dream.

II. WHY IS COPYRIGHT AN IMPORTANT PART OF THE CHINESE DREAM?

A. A Development Policy Focused on China's Culture Industries May at First Blush Appear Unsuitable

1. Chinese Development Policy Has Focused on Industrial and Technological Development

Focusing on copyright and cultural policy as a development strategy might seem counterintuitive in light of China's recent development history.⁵⁸ China's development success is usually measured in terms of economic growth, industrial capacity, and infrastructure development.⁵⁹ The industrial sector has driven China's stunning economic growth since the beginning of the post-Cultural Revolution economic reforms.⁶⁰ As a result of government policies prioritizing growth through exports and investment in industry,⁶¹ China is best known as "the world's factory, churning out massive quantities of laboriously produced goods," not as a producer of modern culture or intangibles.⁶² To the extent that innovation has been perceived and articulated as part of China's development strategy, the focus has been on innovation in

57. See Netanel, *supra* note 26, at 349 (discussing popular media's ability to "make up the primary space in our society where public opinion is forged and social norms are contested and elaborated").

58. See, e.g., BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 329–33 (2007) (outlining China's post-reform economic development).

59. See *id.* at 329; Yao Yang, *China's Economic Growth in Retrospect*, in *CHINA 2049: ECONOMIC CHALLENGES OF A RISING GLOBAL POWER*, *supra* note 36, at 7–9.

60. See NAUGHTON, *supra* note 58, at 329.

61. C. FRED BERGSTEN, CHARLES FREEMAN, NICHOLAS R. LARDY & DEREK J. MITCHELL, *CHINA'S RISE: CHALLENGES AND OPPORTUNITIES* 105–10 (2009) (stating that China's "net exports of goods and services" and "[e]xpanding investment ha[ve] been a major and increasingly important driver of China's growth").

62. NAUGHTON, *supra* note 58, at 349.

science, technology, and manufacturing, not cultural creativity.⁶³

Emphasizing development through technological innovation is not an approach unique to China, of course.⁶⁴ Academics and policymakers typically focus on technological capacity and know-how because “development is generally viewed as a function of productivity growth, further industrialization, and greater technological acumen.”⁶⁵ A development strategy focused on technology and industry seems especially compelling in China’s case, however, because China is perceived as having a high capacity for technological competence.⁶⁶

2. Modern China Is Perceived as a Cultural Minnow

Moreover, unlike its Asian neighbors—India, Korea, and Japan—modern China is not known for its cultural innovation.⁶⁷ Although China boasts one of the richest and most influential cultural traditions in history, its modern cultural works have failed to rouse overseas and domestic audiences alike. For example, although China produces more television shows than any other country, it imports far more television content than it exports because the overseas audience for its shows is small.⁶⁸ Even contemporary Chinese works that receive attention overseas have been blasted, often by Chinese artists

63. See, e.g., DAN BREZNITZ & MICHAEL MURPHREE, *RUN OF THE RED QUEEN: GOVERNMENT, INNOVATION, GLOBALIZATION, AND ECONOMIC GROWTH IN CHINA 10–20* (2011). See generally STEVEN W. POPPER ET AL., *CHINA’S PROPENSITY FOR INNOVATION IN THE 21ST CENTURY* (2020).

64. See James Broughel & Adam Thierer, *Technological Innovation and Economic Growth*, GEO. MASON UNIV.: MERCATUS CTR. (Mar. 4, 2019), <https://www.mercatus.org/publications/entrepreneurship/technological-innovation-and-economic-growth> (“Most economists agree that technological innovation is a key driver of economic growth and human well-being.”).

65. Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 84–85 (2008).

66. See WORLD BANK, *CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND CREATIVE HIGH-INCOME SOCIETY* 163–68 (2012), <https://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf>.

67. See Peter Neville-Hadley, *How China Shoots Itself in the Foot in Soft Power Game and Why Its Films and TV Dramas Are Unlikely To Be a Match for South Korea’s—Think Parasite and Squid Game*, S. CHINA MORNING POST (Feb. 11, 2022), <https://www.scmp.com/magazines/post-magazine/books/article/3166505/how-china-shoots-itself-foot-soft-power-game-and-why>; George Gao, *Why Is China So . . . Uncool?*, FOREIGN POLICY (Mar. 8, 2017), <https://foreignpolicy.com/2017/03/08/why-is-china-so-uncool-soft-power-beijing-censorship-generation-gap/>; Michael Keane, *Keeping Up with the Neighbors: China’s Soft Power Ambitions*, 3 CINEMA J. 130 (2010) (outlining China’s desire to keep up with the cultural progress of its neighboring countries and highlighting the cultural accomplishments of Korea and Japan).

68. OSNOS, *supra* note 36, at 320.

themselves, for lacking substance or authenticity. Famous Chinese director Zhang Yimou, for example, has been accused of making films that pander to Western tastes in order to attract the validation and money brought by foreign audiences and investors.⁶⁹ Renowned Chinese artist and dissident Ai Weiwei, commenting on an exhibit of contemporary Chinese art in London, likened modern Chinese art to sweet and sour pork and other Westernized “Chinese” dishes: “People will eat it and say it is Chinese, but it is simply a consumerist offering, providing little in the way of a genuine experience of life in China today.”⁷⁰ Because Chinese artists lack freedom to criticize the government and openly reflect many pressing social concerns, Ai contends, works of contemporary Chinese art are little better than traveling acrobatic shows and other “vehicles of propaganda that showcase skills with no substance, and crafts with no meaning.”⁷¹

3. Chinese Culture Industries Are Encumbered by Operating in a Highly Sensitive and Regulated Sector

Many Chinese artists share Ai’s view that rigid state cultural policies and oppressive censorship inhibit China from being a modern cultural power.⁷² Director Feng Xiaogang—sometimes called “China’s Spielberg”—famously used a nationally televised award acceptance speech to openly blast state censorship practices that “torment” Chinese directors and weaken Chinese cinema, asking: “Are Hollywood directors tormented the same way?”⁷³ Some Chinese artists even give a name to the creative hamstringing wrought by state interference in the creative process: the “*Kung Fu Panda* problem.”⁷⁴ The “problem” refers to the fact that “the most successful film ever made about two of China’s national symbols, kung fu and pandas, had to be made by a

69. See Sheldon Hsiao-peng Lu, *National Cinema, Cultural Critique, Transnational Capital: The Films of Zhang Yimou*, in *TRANSNATIONAL CHINESE CINEMAS: IDENTITY, NATIONHOOD, GENDER* 105–07 (Sheldon Hsiao-peng Lu ed., 1997).

70. Ai Weiwei, *Ai Weiwei: ‘China’s Art World Does Not Exist,’* *GUARDIAN* (Sept. 10, 2012, 2:00 PM), <http://www.theguardian.com/artanddesign/2012/sep/10/ai-weiwei-china-art-world>.

71. *Id.*

72. See *id.*; see also OSNOS, *supra* note 36, at 320–21.

73. Rachel Lu, *Chinese Film Director: ‘Censorship is Torment,’* *ATLANTIC* (Apr. 18, 2013), <https://www.theatlantic.com/china/archive/2013/04/chinese-film-director-censorship-is-torment/275114/> (quoting director Feng Xiaogang).

74. OSNOS, *supra* note 36, at 320 (“[F]ilm director Lu Chan once agreed to produce a short film for the Beijing Olympics, but . . . was inundated with so many official ‘directions and orders’ that he simply abandoned the project and coined a new term: the Kung Fu Panda problem.”).

foreign studio (DreamWorks), because no Chinese filmmaker would ever have been allowed to have fun with such solemn subjects.⁷⁵

Censors have interfered in cultural production since at least the Tang dynasty (618–907 A.D.), when printing was invented.⁷⁶ In the Communist Party era, mass culture has been especially scrutinized.⁷⁷ Marxism regards bourgeois co-optation of culture as a persistent and profound threat to the proletarian revolution.⁷⁸ To Mao, therefore, Party control of mass culture was a political imperative.⁷⁹ Indeed, friction between Mao and other officials over the extent of the Party’s cultural influence helped ignite the Cultural Revolution, which shook Chinese society to its core in the 1960s and ’70s.⁸⁰ Decades later, strict control over cultural production, importation, and dissemination persists even in the face of evolving Party objectives and values.⁸¹ Pervasive, broad censorship policies profoundly affect creative production in China.⁸² China’s internet censorship apparatus pressures creators and platforms to self-censor⁸³ and clouds all manner of creative expression with uncertainty and risk.⁸⁴

75. *Id.*

76. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 13 (1995).

77. See Junhao Hong, *Mao Zedong’s Cultural Theory and China’s Three Mass-Culture Debates: A Tentative Study of Culture, Society, and Politics*, 4 *INTERCULTURAL COMMUN. STUDS.* 87, 88 (1994).

78. *Id.* at 95–96.

79. *Id.*

80. *Id.* at 97. Decades later, such tensions still reverberate, as was demonstrated in 2011 when a statue of Confucius was unveiled in Tiananmen square to great fanfare and with state sanction, only to be removed months later in the middle of the night without warning or explanation. See Andrew Jacobs, *Confucian Statue Vanishes Near Tiananmen Square*, N.Y. TIMES (Apr. 22, 2011), http://www.nytimes.com/2011/04/23/world/asia/23confucius.html?_r=0.

81. See, e.g., Oliver Holmes, *No Cults, No Politics, No Ghouls: How China Censors the Video Game World*, GUARDIAN (July 15, 2021), https://www.theguardian.com/news/2021/jul/15/china-video-game-censorship-tencent-netease-blizzard?mc_cid=efb1e46707&mc_eid=9947ff9602.

82. See, e.g., *id.* (showing how Chinese censorship affects the videogame industry); Sara Fischer & Bethany Allen-Ebrahimian, *China Builds Its Own Movie Empire*, AXIOS (Jan. 22, 2022), https://www.axios.com/china-builds-its-own-movie-empire-f22b9298-b592-405e-a83c-c2ee99878abf.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axioschina&stream=china (“The Chinese Communist Party is using domestic films as a key conduit for mass messaging aimed at achieving political goals, leaving little room for foreign views.”).

83. See MACKINNON, *supra* note 37, at 31–50; RONALD DEIBERT ET AL., *ACCESS CONTROLLED: THE SHAPING OF POWER, RIGHTS, AND RULE IN CYBERSPACE* 449–73 (2010); Holmes, *supra* note 81.

84. See, e.g., MACKINNON, *supra* note 37, at 36 (stating that “[m]any thousands of Chinese websites and dozens of companies have been shuttered because they failed to control their content adequately”).

4. Piracy Has Long Plagued Creators in China and Inhibited Investment in Domestic Cultural Production

China has long been perceived as a pirate outlaw that copies *other countries'* cultural expression rather than producing its own.⁸⁵ Piracy used to be pervasive throughout China.⁸⁶ Indeed, Western producers complained that Chinese factories export pirated content to the entire world.⁸⁷

Endemic piracy in China has exerted a significant drag on domestic cultural production.⁸⁸ Domestic creators have long complained that their works get ripped off without remedy.⁸⁹ For example, in 2012, piracy was so debilitating to the music industry that China's most prominent music executive, Song Ke, abruptly quit his job as CEO of the Mainland's most successful record company to launch a Peking duck restaurant.⁹⁰ "When I make good roast duck," Song lamented, "people pay and thank me. When I make good music, nobody pays me and some even ridicule me."⁹¹ Piracy was such a serious problem in China that, in 2012, China's entire market for legitimate music CDs was a mere \$17 million—accounting for only 0.002% of the global music industry's physical-format sales.⁹² In the film industry, the inability to stem offline and online piracy to a point that would permit development of a viable market for physical media, or legitimate online movie distribution (until a few years ago), left copyright owners of audiovisual works with virtually no

85. See Oliver Ting, *Pirates of the Orient: China, Film Piracy, and Hollywood*, 14 VILL. SPORTS & ENT. L.J. 399, 401 (2007) (citations omitted) ("The current state of Chinese piracy presents a fairly bleak picture for Hollywood. Despite China's WTO membership, its updated copyright laws, and its general assurances of combating piracy . . . [piracy] is still rampant in the country.").

86. See Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 795–800 (2006) [hereinafter Priest, *The Future of Music and Film Piracy in China*].

87. See, e.g., OFF. OF THE U.S. TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT 19 (2010) (noting that "optical discs [manufactured in China] are exported to markets across the region, impacting legitimate sales outside of China as well").

88. See Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 511–34 (2014) (detailing how piracy in China harms domestic content industries) [hereinafter Priest, *Copyright Extremophiles*].

89. See Priest, *The Future of Music and Film Piracy in China*, *supra* note 86, at 798–99; Dan Levin & John Horn, *DVD Pirates Running Rampant in China*, L.A. TIMES (Mar. 22, 2011, 12:00 AM), <https://www.latimes.com/la-et-china-piracy-20110322-story.html> ("Zhang Yimou, who directed 'Raise the Red Lantern,' . . . has called film theft 'rampant' and said that 'boosting copyright protection is key to the healthy development of [the] film industry.'").

90. See Mu Qian, *Music Isn't a Dead Duck*, CHINA DAILY (Feb. 24, 2012, 7:48 AM), http://usa.chinadaily.com.cn/epaper/2012-02/24/content_14687081.htm.

91. *Id.*

92. Priest, *Copyright Extremophiles*, *supra* note 88, at 496.

aftermarket revenue from physical media such as DVD or Blu-ray.⁹³ This represented a significant loss, since in the United States at the time, aftermarket revenue from DVD sales and television distribution rights exceeded one hundred million dollars for a *single* major film.⁹⁴ For countless years in a row, China has appeared on the U.S. Trade Representative's (USTR) Special 301 Report "priority watch list," a list of a handful of countries that the USTR believes are the worst intellectual property offenders in the world.⁹⁵

Piracy remains a significant challenge in China.⁹⁶ As discussed below, however, piracy is considerably less problematic today than it was a decade ago.

B. Views that China's Copyright Industries Are Poorly Suited for China's Development Strategy Are Outdated

While the above account of China's development policy and its social, political, and cultural trajectory has some force, it is incomplete and outmoded. Cultural production is increasingly important to China's economy and society.⁹⁷ Since the early 2000s, the Chinese government has identified the cultural industries as "pillar industries" of the Chinese economy.⁹⁸ For some time China's copyright industries have been positive contributors to the nation's economic development.⁹⁹ The World Intellectual Property Organization (WIPO) estimates that as early as 2004 the added value of all the

93. *Id.* at 485.

94. *Id.* at 485–86.

95. See, e.g., OFF. OF THE U.S. TRADE REPRESENTATIVE, 2021 SPECIAL 301 REPORT 40–49 (2021), [https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf).

96. See *id.* at 45.

97. See Gan Li & Weiqing Song, *Cultural Production in Contemporary China: The Struggle Between Political Dogmatism and Economic Pragmatism*, 19 *TRAMES* 355, 356 (2015), https://kirj.ee/public/trames_pdf/2015/issue_4/Trames-2015-4-355-366.pdf (citations omitted) ("Similar to previous economic reforms in other sectors, the CCP set a number of objectives for the cultural sector, including 'to become a pillar sector of the national economy, with overall strength and enhanced international competitiveness' . . . and 'to render the cultural sector into an economic engine, contributing to the overall economic structural readjustment and more sustainable development.' Notably, the CCP also officially adopted the strategy of 'national revitalisation through culture' (wenhua xingguo). This strategy is seen as a further step in the revitalisation of China, as it provides an important link between the economic reforms and China's opening up policy.")

98. See Xiaoming Zhang, *The Cultural Industries in China: A Historical Overview*, in *HANDBOOK OF CULTURAL AND CREATIVE INDUSTRIES IN CHINA* 107–08 (Michael Keane ed., 2016).

99. WORLD INT'L COPYRIGHT ASS'N, *THE ECONOMIC CONTRIBUTION OF COPYRIGHT-BASED INDUSTRIES IN CHINA* 13 (2009) [hereinafter *WIPO ECONOMIC CONTRIBUTIONS OF COPYRIGHT*].

copyright-based industries in China combined accounted for nearly 5% of national GDP.¹⁰⁰ China's core copyright industries—including literary publishing, film, television, entertainment software, and music—amounted to far less than that, however, leaving substantial room for growth.¹⁰¹ Indeed, China has witnessed a boom in several of its culture industries over the past decade.¹⁰²

Film is the most vivid example.¹⁰³ Chinese box office receipts have soared steadily in recent years from \$248 million in 2005¹⁰⁴ to \$9.2 billion in 2019.¹⁰⁵ China is now the world's largest box office,¹⁰⁶ and domestic films account for nearly 85% of China's box office revenues.¹⁰⁷

Other cultural industries are also impressive economic contributors. China is the largest video game market in the world, topping \$44 billion in 2020.¹⁰⁸ China's animation industry, once moribund, generated \$26 billion in 2018 and appears set to be “a creative and economic force” rivaling animation industries in Japan and the United States.¹⁰⁹ Internet giant Tencent, which dominates China's streaming-music market, earned revenues of \$4.5 billion in 2020,¹¹⁰ and China's recorded-music market is now the seventh largest in

100. *Id.* According to WIPO, “core copyright industries are industries that are wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter.” WORLD INT'L COPYRIGHT ASS'N, GUIDE ON SURVEYING THE ECONOMIC CONTRIBUTION OF THE COPYRIGHT-BASED INDUSTRIES 29 (2003).

101. *Id.*

102. See, e.g., Priest, *Copyright Extremophiles*, *supra* note 88, at 484–86, 495–502 (discussing the substantial economic growth of China's music and film industries in recent years).

103. See Priest, *Copyright Extremophiles*, *supra* note 88, at 484.

104. See *id.*

105. Jon Jackson, *What China's Rise to Global Box Office Champs Means for Hollywood's Future*, NEWSWEEK (Apr. 29, 2021, 11:30 AM), <https://www.newsweek.com/china-box-office-hollywood-worried-1580572>.

106. *Id.*

107. See Rebecca Davis, *Foreign Films Account for Just 16% of Total China Box Office, Worth \$3 Billion in 2020*, VARIETY (Jan. 4, 2021, 7:21 PM), <https://variety.com/2021/film/news/china-box-office-2020-annual-total-maoyan-1234878626/#!>

108. *Top 10 Countries/Markets by Game Revenues*, NEWZOO, <https://newzoo.com/insights/rankings/top-10-countries-by-game-revenues/> (last visited Oct. 23, 2021).

109. Charley Lanyon & Elaine Yau, *Will a Chinese Disney or Studio Ghibli Emerge? As Appetite for Animation in China Grows, Quality of Domestic Production Improves*, S. CHINA MORNING POST (Jan. 24, 2020, 5:00 AM), <https://www.scmp.com/lifestyle/entertainment/article/3047179/will-chinese-disney-or-studio-ghibli-emerge-appetite> (citing RSCH. IN CHINA, GLOBAL AND CHINA ANIMATION INDUSTRY REPORT, 2019–2025 (2019)).

110. Glenn Peoples, *Tencent Music Improves Revenues 15% in 2020, Equals Spotify's Market Cap*, BILLBOARD (Mar. 23, 2021), <https://www.billboard.com/articles/news/9544650/tencent-music-improves-revenues-2020>.

the world.¹¹¹

China has also emerged as a formidable book-publishing market.¹¹² By 2012, it was already the world's largest book-publishing industry by volume.¹¹³ In 2020, book publishing generated an estimated \$10 billion.¹¹⁴ Nearly ten million Chinese authors now upload their books for online distribution, hoping for a piece of China's \$5 billion digital-reading market.¹¹⁵ The wealth and discretionary income of Chinese consumers have risen steadily.¹¹⁶ Chinese consumers have more money to spend on movies, books, music, art, software, and video games than ever before, and are willing to spend it.¹¹⁷

State censorship in China remains a significant obstacle to China's cultural industry development.¹¹⁸ Nevertheless, Chinese censorship is not absolute.¹¹⁹ Rather, it is a "three-way dialogue" between the audience, creators, and the state.¹²⁰ "Censors wield great power over [creators] but relatively little direct power over the audience, which has the option of simply avoiding" content it dislikes.¹²¹ Creators are incentivized to push the envelope—within limits—to appeal to audiences, and censors must show some flexibility in order to avoid stifling the creative industries.¹²² Thus, while censorship is a drag on China's cultural industry development, it is not an insurmountable

111. INT'L FED'N OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2021 11 (2021).

112. See generally PWC, BOOK PUBLISHING: KEY INSIGHTS AT A GLANCE 1 (2014), <https://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/assets/PDF/book-publishing-key-insights-at-a-glance.pdf>.

113. Helen Gao, *Why Aren't Chinese People Reading Books Anymore?*, ATLANTIC (Aug. 15, 2013), <http://www.theatlantic.com/china/archive/2013/08/why-arent-chinese-people-reading-books-any-more/278729/>.

114. See OPENBOOK, 2019 ANNUAL REPORT OF CHINA'S BOOK MARKET: ANNUAL BESTSELLERS AND MARKET TRENDS 4–6 (2020), <http://boyanllc.com/wp-content/uploads/2020/01/2019-China-Book-Market.pdf>. We derived this estimate (70 billion RMB) from reported annual sales figures based on list price less reported average discounts by brick-and-mortar and online book retailers. *Id.*

115. Lai Lin Thomala, *Digital Publishing Industry in China—Statistics & Facts*, STATISTA (Oct. 19, 2021), <https://www.statista.com/topics/4603/digital-publishing-industry/> (estimating the value as 35 billion RMB).

116. JONNY HO ET AL., MCKINSEY & CO., CHINA CONSUMER REPORT 2020: THE MANY FACES OF THE CHINESE CONSUMER 3–4 (2020).

117. *Id.* (noting that "well to-do households" in particular have disposable income that allows them to spend more money on these types of discretionary purchases).

118. See, e.g., Priest, *Copyright and Free Expression*, *supra* note 33, at 41–43.

119. See *id.* at 58.

120. *Id.*

121. *Id.*

122. *Id.* at 58–60.

obstacle.¹²³

Piracy is ebbing. It remains a threat to creative industries in China, but far less so today than in previous decades. Online copyright enforcement in China, particularly regarding music and audiovisual works, has been quite effective in recent years as major Chinese internet companies have purchased exclusive content and used their political clout and war chests to root out much smaller, infringing competitors.¹²⁴ Skyrocketing licensure rates have spurred an explosion of creativity, with unprecedented investment pouring into domestic production of music, serials, and films.¹²⁵

Any lingering perception of China as a one-dimensional, low-innovation manufacturing economy is likewise tremendously outdated. China's leaders have realized for some time that a development strategy myopically focused on industrial development is economically and environmentally unsustainable.¹²⁶ In 2007, then-Premier Wen Jiabao admitted that "China's economic growth is unsteady, unbalanced, uncoordinated, and unsustainable."¹²⁷ China's Twelfth Five-Year Plan explicitly acknowledged the dangers of a one-dimensional growth model.¹²⁸ It called for a shift from development reliant on labor cost advantages and export-oriented, environmentally taxing industrial production to innovation-based development that yields higher margins, domestic intellectual property, and lower energy consumption and emissions.¹²⁹ An emphasis on cultural production dovetails with these objectives.¹³⁰ Cultural production is comparatively "green," especially in the digital age of decreasing reliance on physical media and its accompanying waste. It also results in domestically owned and controlled information-based properties. The government has expressly identified "cultural innovation" as an area for strategic growth and has called for accelerated development of

123. See, e.g., *id.* at 62–64.

124. Lucy Montgomery & Eric Priest, *Copyright in China's Digital Cultural Industries*, in HANDBOOK OF CULTURAL AND CREATIVE INDUSTRIES IN CHINA, *supra* note 98, at 339–56.

125. See *id.* at 345–56; Eric Priest, *Meet the New Media, Same as the Old Media: Real Lessons from China's Digital Copyright Industries*, 23 GEO. MASON L. REV. 1079, 1083–89 (2016) [hereinafter Priest, *Meet the New Media*].

126. See Henry S. Rowen, *Introduction*, in GREATER CHINA'S QUEST FOR INNOVATION 29–30 (Rowen et al. eds., 2008).

127. BERGSTEN ET AL., *supra* note 61, at 105.

128. See JOSEPH CASEY & KATHERINE KOLESKI, U.S.–CHINA ECON. & SECURITY REV. COMMISSION, BACKGROUNDER: CHINA'S 12TH FIVE-YEAR PLAN 8 (2011).

129. See *id.*

130. See Li & Song, *supra* note 97, at 356.

China's culture industries.¹³¹ The rise of China's animation industry is cited as a successful example of aggressive government policy support.¹³²

China always seeks to exercise global influence and leadership, but officials recognize that economic and military might alone are insufficient.¹³³ Indeed, China's aggressive military posturing has alarmed and alienated its neighbors in recent years, reviving defensive alliances with the United States, and thereby exacerbating longstanding fears that the country remains exposed and vulnerable to encirclement.¹³⁴ Recent diplomatic imbroglios, including China's defensiveness regarding origins of the Covid-19 pandemic and provocations incited by its "wolf warrior" diplomats, have further contributed to a negative global image of the country.¹³⁵ China's human rights abuses of Uyghur Muslims in Xinjiang and its crackdowns on pro-democracy demonstrators in Hong Kong have led to widespread condemnation, including a diplomatic boycott by the United States and others of the 2022 Winter Olympics in

131. See Guojia "Shi Er Wu" Shiqi Wenhua Gaige Fazhan Guihua Gangyao (国家“十二五”时期文化改革发展规划纲要), CENT. PROPAGANDA DEPT. OF THE CHINESE COMMUNIST PARTY, *translated in Outline of the Cultural Reform and Development Plan During the National "12th Five Year Plan" Period*, CHINA COPYRIGHT & MEDIA, <http://chinacopyrightandmedia.wordpress.com/2012/02/16/outline-of-the-cultural-reform-and-development-plan-during-the-national-12th-five-year-plan-period> (Apr. 4, 2012).

132. See Clifford Coonan, *Cannes: Big Projects, Bigger Government Help China's Animation Industry Advance*, HOLLYWOOD REP. (May 14, 2014, 9:00 PM), <http://www.hollywoodreporter.com/news/cannes-big-projects-bigger-government-704077>. Government support of the animation industries includes provision of millions of dollars in subsidies and preferential financing, banning foreign cartoons from prime-time television broadcasts, and a broadcast quota of seven domestic cartoons broadcast for every three foreign cartoons aired. Mark Magnier, *China Had To Import 'Kung Fu Panda'*, L.A. TIMES (July 28, 2008, 12:00 PM), www.latimes.com/world/asia/la-et-panda28-2008jul28-story.html.

133. See generally TARUN CHHABRA ET AL., *GLOBAL CHINA: REGIONAL INFLUENCE AND STRATEGY* 1-4 (2020), https://www.brookings.edu/wp-content/uploads/2020/07/FP_20200720_regional_chapeau.pdf (noting that China has many avenues through which it seeks to build global influence).

134. See Felix K. Chang, *China's Encirclement Concerns*, FOREIGN POL'Y RSCH. INST. (June 24, 2016), <https://www.fpri.org/2016/06/chinas-encirclement-concerns/>; see also, e.g., Derek Grossman, *Duterte's Dalliance with China Is Over*, FOREIGN POLICY (Nov. 2, 2021, 11:38 AM), <https://foreignpolicy.com/2021/11/02/duterte-china-philippines-united-states-defense-military-geopolitics/> (describing how tensions over China's military expansion in the South China Sea, among other things, has caused Philippine President Duterte to abandon his "China-friendly policy" and "align the Philippines with the United States again").

135. Ben Westcott & Nectar Gan, *Xi Jinping Wants To 'Make Friends' with the World. But Beijing Can't Kick its Wolf Warrior Habits*, CNN (June 2, 2021, 3:19 AM), <https://www.cnn.com/2021/06/02/china/xi-jinping-beijing-diplomacy-wolf-warriors-intl-mic-hnk/index.html>.

Beijing.¹³⁶ President Xi Jinping recently sought to rein in such self-inflicted wounds, emphasizing the need to present “the image of a ‘credible, lovable, and respectable China.’”¹³⁷

China has therefore sought to enhance its global status through “soft power”—attaining desired outcomes through attraction and persuasion rather than force.¹³⁸ Xi himself has recognized the importance of soft power as a prerequisite to realizing the Chinese Dream of national rejuvenation.¹³⁹ Education, cultural dissemination, and the shaping of discourse through public relations are key strategies for attaining soft power.¹⁴⁰ China has invested tens of billions of dollars into global educational and media initiatives designed to increase understanding of and appreciation for Chinese culture.¹⁴¹ This includes more than five hundred Confucius Institutes China has funded at universities globally to promote Chinese language and cultural education.¹⁴² The idea of influencing and attracting its neighbors through culture is natural for China; it enjoyed a period of cultural hegemony in East and Southeast Asia that lasted for two millennia.¹⁴³ Nonetheless, China’s recent soft power initiatives—and its cultural policy generally—has too often been marred by top-down controls that prove counterproductive.¹⁴⁴

136. Zolan Kanno-Youngs, *U.S. Will Not Send Government Officials to Beijing Olympics*, N.Y. TIMES (Dec. 6, 2021), <https://www.nytimes.com/2021/12/06/us/politics/olympics-boycott-us.html>.

137. Westcott & Gan, *supra* note 135.

138. JOSEPH S. NYE, JR., *THE FUTURE OF POWER 20–22* (2011) [hereinafter NYE, JR., *THE FUTURE OF POWER*].

139. See *China Is Spending Billions To Make the World Love It*, *supra* note 15. China’s 2021 five-year plan expressly calls for soft power initiatives.

140. See generally Joseph S. Nye, Jr., *China’s Soft Power Deficit*, WALL ST. J. (May 8, 2012, 6:24 PM), <http://online.wsj.com/news/articles/SB10001424052702304451104577389923098678842> [hereinafter Nye, Jr., *China’s Soft Power Deficit*].

141. *Id.*

142. See Pratik Jakhar, *Confucius Institutes: The Growth of China’s Controversial Cultural Branch*, BBC (Sept. 7, 2019), <https://www.bbc.com/news/world-asia-china-49511231>.

143. *China’s Culture Once Influenced the World, and It Can Again*, PEOPLE’S DAILY ONLINE (Dec. 4, 2012, 8:37 AM), <http://en.people.cn/90782/8044241.html> (suggesting that, prior to the twentieth century, China’s cultural influence was much broader).

144. See *China Is Spending Billions To Make the World Love It*, *supra* note 15 (criticizing China’s attempt to purchase goodwill overseas through cultural initiatives as undermined by a heavy-handed, top-down implementation). For example, Confucius Institutes at universities across the United States have come under fire by the U.S. State Department and ultimately closed over reports that the Chinese government censored programming or induced faculty to self-censor to avoid losing funding by broaching politically sensitive topics. See Elizabeth Redden, *Closing Confucius Institutes*, INSIDE HIGHER ED (Jan. 9, 2019), <https://www.insidehighered.com/news/2019/01/09/colleges-move-close-chinese-government-funded-confucius-institutes-amid-increasing>; Naima Green-Riley, *The State Department Labeled China’s Confucius Programs a Bad Influence on U.S. Students. What’s the Story?*,

Despite its cultural ambitions, China has remained a frustrated observer in recent decades as Japan's manga, anime, and J-Pop, India's Bollywood movies, and South Korea's K-Pop and films became regionally and globally celebrated, greatly enhancing those countries' international status.¹⁴⁵ Indeed, when Korean rap artist Psy became a global sensation in 2012 with the hit song *Gangnam Style*, supercharging foreign interest in Korean cultural products, many Chinese wondered: "Why couldn't we come up with that?"¹⁴⁶ Psy was hardly a one-off success for South Korea's cultural industries: Korean cultural industries have produced a torrent of global sensations from musical superstars such as BTS and Blackpink to highly acclaimed films such as *OldBoy* and *Parasite* (the 2020 Academy Award for Best Picture winner) to reams of popular television "K-dramas"—including the global sensation *Squid Game*—on Netflix and similar streaming services.¹⁴⁷ This has led to a

WASH. POST (Aug. 25, 2020), <https://www.washingtonpost.com/politics/2020/08/24/state-department-labeled-chinas-confucius-programs-bad-influence-us-students-whats-story/>. Australia and New Zealand similarly clapped back at allegedly widespread, Chinese-government-backed influence campaigns in those countries targeting politicians, media, and universities. See Joshua Kurlantzick, *Australia, New Zealand Face China's Influence*, COUNCIL ON FOREIGN RELS. (Dec. 13, 2017, 1:04 PM), <https://www.cfr.org/expert-brief/australia-new-zealand-face-chinas-influence>.

145. See Chee Yik-wai, *For Chinese Culture To Be a Global Hit, Beijing Has To Learn from Japan's J-Pop and South Korea's Hallyu*, S. CHINA MORNING POST (Oct. 21, 2021), https://www.scmp.com/comment/opinion/asia/article/3152926/chinese-culture-be-global-hit-beijing-has-learn-japans-j-pop?utm_medium=email&utm_source=cm&utm_campaign=enlz-globalim-pact&utm_content=20211112&tpcc=enlz-globalim-pact&UUIID=%5BUUID%5D&next_article_id=3147354&module=tc_12; Victoria Kim, *How South Korea's Music, TV, and Films Were Primed for the Viral Moment*, L.A. TIMES (Feb. 10, 2022), <https://www.latimes.com/world-nation/story/2022-02-10/how-south-koreas-cultural-exports-were-primed-for-the-viral-moment>. Mainland China similarly remained largely on the sidelines as Hong Kong dominated regional film markets in the 1970s and 1980s and launched global stars such as Bruce Lee and Jackie Chan, and Taiwan's "Second New Age" directors, such as Ang Lee, won global audiences in the 1990s, culminating in the commercial and critical triumph of *Crouching Tiger, Hidden Dragon* (2000), which shattered U.S. box office records for a foreign-language film and garnered a bevy of international prizes, including four Oscars. See Richard James Havis, *Hong Kong Martial Arts Cinema, Starring Bruce Lee, Jackie Chan, Jet Li and Donna Yen: Everything You Need To Know*, S. CHINA MORNING POST (May 28, 2020, 7:00 PM), <https://www.scmp.com/lifestyle/entertainment/article/3086541/hong-kong-martial-arts-cinema-starring-bruce-lee-jackie> (highlighting the accomplishments of Hong Kong martial art films, especially wuxia films); Justin Chang & Glenn Whipp, *'Gladiator' Was About To Win the Oscar 20 Years Ago. What Those Awards Foretold*, L.A. TIMES (Mar. 21, 2021, 4:03 AM), <https://www.latimes.com/entertainment-arts/movies/story/2021-03-21/oscars-2001-critics-gladiator-traffic-crouching-tiger-hidden-dragon>.

146. Evan Osnos, *Why China Lacks Gangnam Style*, NEW YORKER (Oct. 3, 2012), <http://www.newyorker.com/news/evan-osnos/why-china-lacks-gangnam-style>.

147. See Kim, *supra* note 145; Eun-Young Jeong, *Why BTS Runs the World*, WALL ST. J. (Nov. 12, 2020, 7:47 AM), <https://www.wsj.com/articles/bts-cover-story-interview-be-new-album-dynamite-11605114374>; Lucas Shaw, *Blackpink Is the Biggest Pop Band in the World, A First For South Korea*,

soft-power bonanza for South Korea that China can only dream of. As one powerful South Korean entertainment executive put it, “Korea’s always been obsessed with soft power, with having a voice in the world. After ‘Parasite,’ we thought, it’s our time.”¹⁴⁸

Equally galling has been the success of foreign filmmakers presenting stories based on Chinese folklore, including Disney’s *Mulan* and Dream-Works’s *Kung Fu Panda*.¹⁴⁹ Once again, many Chinese wondered, “Why couldn’t we have done that? Can’t we tell our own stories better than Hollywood can?”¹⁵⁰ Why did it take a foreigner to tell China’s stories to the world?¹⁵¹

It is no secret that many in China believe China can, and should, be restored to its golden days as a dominant cultural force exerting hegemonic influence over the region and beyond.¹⁵² Many recognize the importance of achieving this outcome, including top-level leaders in China’s government,

BLOOMBERG (Nov. 10, 2020), <https://www.bloomberg.com/graphics/pop-star-ranking/2020-november/blackpink-is-the-biggest-pop-band-in-the-world-a-first-for-south-korea.html>; Andrew R. Chow, *Parasite’s Best Picture Oscar Is Historic. Is This the Beginning of a New Era in Film?*, TIME (Feb. 9, 2020, 11:57 PM), <https://time.com/5779940/parasite-best-picture-oscar/>; Kat Moon, *Best Korean Dramas To Watch on Netflix*, TIME (May 12, 2020, 10:19 AM), <https://time.com/5835519/best-korean-dramas-netflix/>.

148. Kim, *supra* note 145 (quoting Hyun Park of Studio Dragon).

149. See Maureen Fan, ‘Kung-Fu Panda’ Hits a Sore Spot in China, WASH. POST (July 12, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/07/11/AR2008071103281.html> (“The blockbuster success of an American animated movie that’s set in ancient China, highlights Chinese culture, mythology, and architecture, and stars a kung fu fighting panda has filmmakers and ordinary Chinese wondering: Why wasn’t this hit made . . . in China?”).

150. See *id.*; Amy Qin & Amy Chang Chien, *Imagined as a Blockbuster in China, ‘Mulan’ Fizzles*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/world/asia/mulan-china-debut.html> (noting the film *Mulan* had a poor box office reception in China and was criticized by Chinese audiences and the state press for historical inaccuracies and being “too Westernized”).

151. See, e.g., Fan, *supra* note 149. Even *Crouching Tiger, Hidden Dragon*’s selection for Best Foreign Language Film at the 2001 Academy Awards was only a partial win for China’s soft power ambitions, since the Oscar was awarded to Taiwan despite the film being a collaboration with Mainland Chinese actors and production companies and based on a novel by a Beijing-born author. See *Awards: Crouching Tiger, Hidden Dragon*, IMDB.COM, https://www.imdb.com/title/tt0190332/awards/?ref=tt_awd (last visited Mar. 10, 2022).

152. See Ondřej Klimeš, *China’s Cultural Soft Power: The Central Concept in the Early Xi Jinping Era (2012–2017)*, 2017 AUC PHILOLOGICA 127, 131–32 (2017) (“The interrelation of culture, ideology, and propaganda in the contemporary Chinese party-state is not new in Chinese politics. The idea that political power derives from cultural and moral authority has been present in China’s diplomacy and governance since its early beginnings. A constructed cultural, political, and historical identity of Chinese civilization (*Huaxia* 华夏) generated a sense of superiority over surrounding states, which were expected to ‘come and be transformed’ (*lathua* 來化) by the superior culture of the central polity.”); *China Is Spending Billions To Make the World Love It*, *supra* note 15.

yet much consternation remains over how it can be done.¹⁵³

C. Why Emphasize Copyright as an Instrument of Development in China?

Copyright might be a less-than-obvious policy tool for helping China achieve its forward-looking development goals. Developing countries often regard intellectual property with suspicion.¹⁵⁴ They view it as a tool of economic and cultural imperialism developed by and biased toward the interests of rich nations; thus, they see it as likely to hinder rather than help development.¹⁵⁵ To the extent development strategies do emphasize intellectual property, they usually focus on technological innovation and development of patentable technologies.¹⁵⁶ One might question, therefore, the benefit of diverting attention and resources to copyright industries, which are often regarded as producing frivolous entertainment goods rather than anything at the vanguard of global development.

These views reflect outdated assumptions about copyright's contributions to economic development.¹⁵⁷ IP and innovation-oriented development strategies need not be constrained to technological development and patents.¹⁵⁸ In many ways, cultural industries provide a more advantageous and efficient instrument of development—copyright protection is immediately available worldwide without the entry barriers (cost and time) associated with obtaining patent protection.¹⁵⁹ The technologies required for cultural innovation also impose a lower bar.¹⁶⁰ Digital tools have radically lowered the entry barriers

153. See, e.g., Westcott & Gan, *supra* note 135; Michael Keane, *Introduction*, in HANDBOOK OF CULTURAL AND CREATIVE INDUSTRIES IN CHINA, *supra* note 98, at 4–5.

154. See, e.g., Ruth L. Okediji, *The Limits of International Copyright Exceptions for Developing Countries*, 21 VAND. J. ENT. & TECH. L. 689, 697–99 (2019).

155. See Sean A. Pager, *The Role of Copyright in Creative Industry Development*, 10 L. & DEV. REV. 521, 523–24 (2017) (stating that “[c]opyright skeptics . . . see copyright enforcement as both a futile endeavor and one that imposes unacceptable costs on speech, innovation, and information flows”).

156. See Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT’L L. REV. 223, 240 (2012).

157. See *id.* at 240–47.

158. *Id.* at 241–42 (citations omitted) (“Even developing countries that do not stand to benefit from patent protection should therefore consider alternative means to foster [] innovation, whether through utility model protection, trade secret law, or *sui generis* schemes. Even trademark law and geographic indications protection have a place in innovation policy.”).

159. *Id.* at 240–43.

160. See *id.* at 240–41.

to cultural production.¹⁶¹ Digital distribution enables producers in developing nations to reach a global audience with speed and affordability unimaginable in previous decades.¹⁶²

Cultural industries based on copyright have been important economic drivers in developing countries.¹⁶³ Equally important, strong cultural industries generate noneconomic benefits as well.¹⁶⁴ They, and their cultural end-products, become sources of pride, identity, and shared meaning that enhance national unity.¹⁶⁵ As noted, successful cultural exports can serve as vehicles for the “soft power” influence that China desperately seeks.¹⁶⁶ Finally, investing in vibrant cultural industries can stimulate democratic discourse and popular imagination that confers the broader benefits discussed above in helping China dream its national dream.

Some might accept these benefits of domestic cultural industries but doubt the wisdom of relying on copyright as a policy tool to sustain them. Many in the West perceive copyright as anything but forward-looking, considering it an obsolete relic rooted in scarcity economics with little to contribute to a networked world based on openness, not exclusion.¹⁶⁷ Lastly, even if copyright were a valid and significant development tool for the twenty-first century, China, with its reputation for poor intellectual property rights enforcement, may seem an especially poor fit for such a strategy.¹⁶⁸ Indeed, some posit that China’s own culture industries, which have long contended with widespread disregard for their copyrights, are already at the bleeding edge of what cultural production will look like in a post-scarcity world.¹⁶⁹

161. *See id.* at 242–43.

162. *Id.* at 245.

163. *Id.* at 244–45.

164. *Cf. id.* at 265–66 (outlining the noneconomic costs of rampant piracy in countries with limited copyright protections).

165. *See id.* at 244; Priest, *Copyright Extremophiles*, *supra* note 88, at 526–29.

166. *See supra* notes 138–47 and accompanying text.

167. *See, e.g.*, Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 482–510 (2015) (arguing that the justifications for intellectual property, including copyright, are far weaker in a post-scarcity, digitally networked world); Eric R. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2011) (arguing that there is no longer any “broad necessity for incentives for intellectual labor” and that “innovative and creative activity [can] thrive without artificial support” from copyright laws).

168. *See* Priest, *Copyright Extremophiles*, *supra* note 88, at 472–81; *see also* ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* (2005).

169. *See, e.g.*, LUCY MONTGOMERY, *CHINA’S CREATIVE INDUSTRIES: COPYRIGHT, SOCIAL NETWORK MARKETS AND THE BUSINESS OF CULTURE IN THE DIGITAL AGE* (2010); CHRIS ANDERSON, *FREE: THE FUTURE OF A RADICAL PRICE* (2009); Priest, *Copyright Extremophiles*, *supra* note 88, at

Why would China take a putative step backwards and foreground copyright law as a development strategy?¹⁷⁰

Yet, such copy-skeptical accounts overstate the extent to which China's content industries actually thrive in a high-piracy environment.¹⁷¹ Even as observers around the world extol China's supposed success at innovating in copyright's absence,¹⁷² many in China have already moved beyond its pirate past and embraced copyright. Chinese stakeholders have made copyright their business model on which to build future growth.¹⁷³ "China is already the most IP-litigious society in the world," with the highest number of annual copyright lawsuits filed per capita.¹⁷⁴ Notably, only 2% of intellectual property cases in China involve foreign parties.¹⁷⁵ Far from viewing copyright as an outmoded regime imposed by rent-seeking foreigners, local stakeholders see value in obtaining and enforcing these rights.¹⁷⁶ Major Chinese technology companies such as Tencent, Alibaba, Baidu, and Huawei view copyright ownership as central to their business models going forward.¹⁷⁷ In recent years, major Chinese video-streaming sites have spent up to half their total annual budgets on

506–11 (canvassing arguments that endemic piracy is actually aiding the Chinese music and film industries); Glyn Moody, *E-Publishing The Chinese Way: Very Fast And Very Cheap*, TECHDIRT: CASE STUDIES (Nov. 18, 2011, 5:36 PM), <https://www.techdirt.com/blog/casestudies/articles/20111108/11225716681/e-publishing-chinese-way-very-fast-very-cheap.shtml> [hereinafter Moody, *E-Publishing the Chinese Way*] (asserting that it is "great to see publishers moving on from tired arguments about piracy" and beginning to spend money on investing in "new business models" rather than "lobbying for new laws to defend old monopolies").

170. See Moody, *E-Publishing the Chinese Way*, *supra* note 169 ("Increasingly, publishers are joining the music and film industries in bemoaning the effects of piracy on the sales of digital products and some are even starting to sue people for alleged copyright infringement (because that has worked so well elsewhere[]). Perhaps they should take a look at what is happening in China: instead of whining about e-book sales 'lost' to piracy[,] publishers there have come up with a business model that embraces the possibilities of the [i]nternet."); Glyn Moody, *One Area Where China Should Definitely Stop Ripping Off the West: Copyright Law*, TECHDIRT (May 18, 2012, 5:27 PM), https://www.techdirt.com/articles/20120511/03080718876/one-area-where-china-should-definitely-stop-ripping-off-west-copyright-law.shtml#_jmp0_ [hereinafter Moody, *China Should Stop Ripping Off the West*].

171. See generally Priest, *Copyright Extremophiles*, *supra* note 88 (arguing that although some creators in markets with weak copyright enforcement, such as China, may become adept at surviving economically, surviving is not the same as thriving).

172. See, e.g., MONTGOMERY, *supra* note 169; Moody, *China Should Stop Ripping Off the West*, *supra* note 170; ANDERSON, *supra* note 169, at 199–201.

173. See Priest, *Meet the New Media*, *supra* note 125, at 1089–92.

174. Priest, *Copyright Extremophiles*, *supra* note 88, at 479–80.

175. *Id.* at 480.

176. See *id.* at 479–81.

177. See Priest, *Meet the New Media*, *supra* note 125, at 1090.

acquiring exclusive licenses for professionally produced films and television programs in order to attract the most lucrative advertising contracts and distinguish their services from, and gain an advantage over, competitors.¹⁷⁸ As exclusive rights holders, these entities have become stakeholders aligned with content producers in the copyright ecosystem, purging their sites of unlicensed content in the process.¹⁷⁹ Cutting-edge e-publishing platforms, such as Cloudary.com, are also sold on copyright.¹⁸⁰ As soon as they identify an author with promise, they acquire her copyrights in order to license them to film and video game producers.¹⁸¹

Many in China—including many (but not all) in the government—recognize that the nation’s cultural narratives and identity are sorely lacking at a time when they have never been more important to China’s international and domestic affairs.¹⁸² As noted above, improving and managing China’s international reputation by cultivating soft power has become a key government strategy in recent years.¹⁸³ Improving domestic morale and quality of life has become equally important.¹⁸⁴ As China’s economy matures and the standard of living rises, the society’s persistent obsession with financial success and material acquisition¹⁸⁵ has sown feelings of confusion and purposelessness among many in Chinese society—particularly youth.¹⁸⁶ China has reached a stage of development at which materialism ceases to be a compelling national narrative, and many seek more enriched cultural narratives and a more

178. See Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 SMU L. REV. 169, 171 (2015).

179. *Id.* at 226.

180. See Priest, *Meet the New Media*, *supra* note 125, at 1090.

181. See Liu Xiangrui, *Big-Screen Dreams for Online Novelists*, CHINA DAILY USA (July 9, 2014, 7:26 AM), http://usa.chinadaily.com.cn/epaper/2014-07/09/content_17688897.htm; Helen Sun, *How Freemium Self-Published Fiction Is Taking over China*, PUBL’G PERSPS. (Nov. 1, 2011), <http://publishingperspectives.com/2011/11/freemium-self-published-fiction-china/>.

182. See SCHELL & DELURY, *supra* note 16, at 398–99; Nye, Jr., *China’s Soft Power Deficit*, *supra* note 140.

183. See Eleanor Albert, *China’s Big Bet on Soft Power*, COUNCIL ON FOREIGN RELS. (Feb. 9, 2018, 7:00 AM), <https://www.cfr.org/backgrounder/chinas-big-bet-soft-power>.

184. See CARL MINZNER, *END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 53–66 (2018).

185. *See id.*

186. See, e.g., FENGSHU LIU, *URBAN YOUTH IN CHINA: MODERNITY, THE INTERNET AND THE SELF* 192–93 (2010); Evan Osnos, *A Collage of Chinese Values*, NEW YORKER (Mar. 21, 2012), <https://www.newyorker.com/news/evan-osnos/a-collage-of-chinese-values>; David Pilling, *Modern China Yearns for New Moral Code*, FIN. TIMES (Nov. 2, 2011), <http://www.ft.com/intl/cms/s/0/513c85a2-0544-11e1-b8f4-00144feabdc0.html#axzz38VxAh2KV>.

meaningful cultural identity.¹⁸⁷

China's creative industries could fill this void. Yet, to date, domestic production has fallen short of meeting the challenge of the moment. A primary response of the creative industries has been to recover and repurpose Chinese classics or produce Chinese historical dramas because they are unambiguously and reassuringly "Chinese" and are seen as ideologically and politically "safer" than stories rooted in modern Chinese society.¹⁸⁸ Thus, seemingly endless Chinese video games, films, and television series reimagine "The Three Kingdoms," "Journey to the West," stories about Tang Dynasty magistrate Di Renjie, and other staples of Chinese traditional culture.¹⁸⁹ Domestically, such themes still resonate.¹⁹⁰ Domestic film franchises based on classical literature and historical source material have been box-office smashes.¹⁹¹ Of course, there is nothing inherently wrong with going back to the well of dependable favorites; Hollywood is equally fond of superhero reboots.¹⁹² But it is problematic when the repurposing arises not for creative or commercial reasons but because creators are restricted to a narrow sphere of politically orthodox subject matter.¹⁹³ When a system constrains creators so, it is less

187. See generally Pilling, *supra* note 186; Li Yuan, 'Who Are Our Enemies?': China's Bitter Youth Embrace Mao, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/2021/07/08/business/china-mao.html> (describing how many Chinese young people, disenchanted with materialism, have turned to Maoism as a form of "spiritual relief").

188. See Javier C. Hernández & Joy Dong, *China's Communist Party Turns 100. Cue the (State-Approved) Music*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/arts/china-communist-party-music-theater-dance.html> ("Many artists have little choice but to comply with the government's demands for more patriotic art, with officials in China's top-down system wielding considerable influence over decisions about financing and programming.").

189. See, e.g., Coonan, *supra* note 132 ("Sporting a \$40 million budget, *Kong*, [a Chinese-produced feature-length animation], is the latest movie or television property to be adapted from the classical Chinese novel *Journey to the West*. The film will tell the origin story of the titular character, who was born from molten rock in the Earth's core, but will also feature sci-fi elements, including aliens and robots.").

190. See *Remakes of Classics—Salute to Original Story or Lack of Creativity?*, CHINADAILY.COM.CN (Mar. 15, 2018, 3:24 PM), <https://www.china-daily.com.cn/a/201803/15/WS5aaa1faba3106e7dcc141e10.html>.

191. See *id.* ("Recent years have seen literary classics such as *Journey to the West* being frequently remade. The adaptations, relying on the popularity of the former series, usually churn[] out good ratings.").

192. See Melia Robinson, *James Franco Explains Why Studios Keep Remaking Superhero Films*, BUSINESS INSIDER (June 19, 2013, 10:15 AM), <https://www.businessinsider.com/why-studios-keep-remaking-superhero-films-2013-6>.

193. See Klimeš, *supra* note 152, at 145–46 ("The credibility of the CPC's cultural rhetoric is . . . compromised by the fact that the party keeps exerting concerted efforts at curtailing cultural expression that conflicts with its political interests. . . . Despite all its assertions of innovation and reform in

likely to yield the ambitious, pioneering creativity that heralds a country's arrival as a global cultural power.¹⁹⁴ In the words of one Chinese diplomat-turned-professor, continually repurposing traditional culture under such circumstances demonstrates a "poverty of thought" in China.¹⁹⁵

For China to actualize its Dream, its cultural gaze needs to be directed at least partly forward, not backwards, and its storytellers need to confront unflinchingly the realities of its present, rather than finding refuge in escapism.¹⁹⁶ As noted, censorship poses an obstacle to realizing these ideals, but it need not pose an insuperable one. As we explain below, the problems with China's creative industries are partly structural, and developing a state-of-the-art copyright system could help to overcome them.¹⁹⁷

For all the enthusiasm surrounding China's newfound embrace of copyright law, its institutions, infrastructure, and norms in this domain remain comparatively underdeveloped.¹⁹⁸ Yet, as we elaborate below, herein also lies an opportunity: freed from the outdated baggage that hampers copyright regimes in other countries, China has a chance to "leapfrog" the status quo and pioneer a twenty-first century copyright system that would advance China's national goals while serving as a model for the entire world.

III. OUTLINING A CHINESE COPYRIGHT DREAM

Accordingly, so long as China is dreaming up a vision of its future, we suggest part of the Dream should include a dream of a reinvigorated Chinese copyright law that sustains a vibrant copyright ecosystem. What would the contours of such a Chinese copyright dream look like?

For many copyright owners outside of China, ever eager to further

the cultural sphere, the reality is that in the twenty-first century the Chinese party-state continues to ban inconvenient artistic works and persecute critical artists in much the same way it has done since the beginnings of its cultural governance.").

194. See *id.* at 138 (arguing that the Party "sees legitimization as the most important function of culture, . . . [that] this legitimization is used to justify an unattractive non-democratic regime, and . . . [that] the party monopolizes domestic visions of national culture and history, while simultaneously suppressing alternative interpretations").

195. Nye, Jr., *China's Soft Power Deficit*, *supra* note 140 (quoting Renmin University professor Pang Zhongying).

196. Cf. Keane, *supra* note 67, at 132 (noting that Mainland television producers, for example, "have a propensity to generate historical dramas, usually with a political message," to the point where producing such dramas has become China's "niche").

197. See *infra* Section III.C.

198. See Peter K. Yu, *Third Amendment to the Chinese Copyright Law*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2022).

monetize that notoriously-hard-to-monetize market, the dream Chinese copyright system would doubtless start with higher damage awards for copyright infringement, stricter enforcement, and far greater market access.¹⁹⁹ These goals have merit, but we argue that Chinese policymakers and copyright stakeholders should look beyond such incremental adjustments.²⁰⁰ Moreover, China need not take its copyright cues from foreign advocates who have their own agendas. Instead, China has a chance to dream for itself a bold vision of Chinese copyright in the twenty-first century.

As the previous Part outlines, China has signaled lofty aspirations for its copyright industries.²⁰¹ Chinese leaders recognize that strong, productive copyright industries can help achieve numerous domestic and global policy goals, including increasing domestic consumption; further facilitating a transition to a green, sustainable, and high-value knowledge-based economy; and enhancing China's global cultural influence and soft power.²⁰²

Unfortunately, China's current cultural and copyright policy lacks the horsepower and vision to lift its creative industries to the heights necessary to achieve these goals.²⁰³ Historically, international pressures and treaty obligations, and not China's own needs and circumstances, have predominantly shaped China's copyright law.²⁰⁴ While this has helped China develop a sophisticated legal infrastructure in a short time, there has not been the time or impetus for China to develop a copyright law optimized to its peculiar needs, aspirations, and strengths.²⁰⁵

Further, Chinese cultural policy has long been hamstrung by ideological control and censorship.²⁰⁶ China's fourteenth five-year plan aspires broadly to reach new heights in the production and global dissemination of Chinese cultural products and the development of digital markets.²⁰⁷ However,

199. See OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 87, at 44–45.

200. See *infra* Part IV.

201. See *supra* Section II.B.

202. See *supra* Section II.C (discussing how strong copyright industries can help achieve these goals).

203. See Suzanne Cords, *China Introduces New Rule of Conduct for Artists*, DW (Aug. 3, 2021), <https://www.dw.com/en/china-introducesnew-rules-of-conduct-for-artists/a-56772344> (showing how the current restrictions on artists do not promote innovation in the creative industries, particularly in the film industry).

204. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in Post-WTO China*, 50 AM. U. L. REV. 131, 136–54 (2000).

205. See *id.*

206. See, e.g., Priest, *Copyright and Free Expression*, *supra* note 33, at 6.

207. See *Outline of the 14th Five-Year Plan (2021–2025) for National Economic and Social*

implementation plans lack specificity and vision.²⁰⁸ Moreover, China's leadership still views cultural industries as destabilizing loose cannons to be reined in rather than as drivers of economic growth and soft power to be unleashed.²⁰⁹ Indeed, at the time of this writing, Chinese cultural policy is more repressive and inward-looking than it has been for decades.²¹⁰

A cultural policy that threatens to discourage or stifle marginalized voices dooms itself to mediocrity.²¹¹ The development of a strong cultural sector requires voices on the margins as well as the mainstream, factory cultural producers.²¹² Often, the most disruptive cultural innovations that drive progress come from marginalized groups on the fringes who, in an almost Schumpeterian sense, think outside the box, criticize and undermine the mainstream paradigm, and found the new paradigm.²¹³ China's leaders should view such expressive diversity as a source of strength rather than a threat to be subdued. As we explain below, embracing a bottom-up conception of culture does not mean that China needs to abandon its censorship regime or enforcement of moral standards.²¹⁴ However, it does require an acceptance that culture can emerge through decentralized processes outside of the Party's direct control and the recognition that copyright provides the key to unlock this

Development and Vision 2035 of the People's Republic of China, CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 13, 2021, 7:16 AM), http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm [hereinafter *China's 14th Five-Year Plan*].

208. See 国家知识产权局, 2020 年深入实施国家知识产权战略加快建设知识产权强国推进计划 [In-Depth Implementation Plan of the National Intellectual Property Strategy in 2020 To Accelerate the Building of an Intellectual Property Power], CHINA NAT'L INTELL. PROP. ADMIN., (May 2020) [hereinafter *In-Depth Implementation Plan*] (mentioning copyright in just eight out of one hundred action items relating to implementing China's national intellectual property strategy). Several of the copyright-related items in the 2020 national IP strategy implementation plan are standard fare, such as "cooperate with the revision of the Copyright Law." See *id.* at art. 23. However, as discussed in more detail below, some entries are intriguing, such as Article 76 ("build an international copyright protection trading platform") and Article 81 ("promote the application of new technologies such as artificial intelligence"). *Id.* at art. 76, 81.

209. See 中华人民共和国国民经济和社会发展第十四个五年规划和 2035 年远景目标纲要 [Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035], art. 36, Sec. 3 (2021).

210. See, e.g., Fischer & Allen-Ebrahimian, *supra* note 82 (asserting that Chinese leadership's aim to make China a "strong film power" is now motivated more by a desire to keep out foreign culture and control mass messaging than by a desire to foster global soft power).

211. See Sean A. Pager, *Does Copyright Help or Hurt Cultural Diversity in the Digital Age?*, 32 KRITIKA KULTURA 397, 400–01 (2019).

212. See *id.* at 402.

213. See *id.* at 401.

214. See *infra* Part V.

decentralized paradigm.

Beyond this threshold commitment, China must develop a copyright law tailored to its peculiar needs. To guide that process, we propose that modern economic development theory—particularly the notions of leapfrog development and frugal innovation—provides a framework for articulating such a vision.²¹⁵ Although by many measures China is not a developing country, its copyright industries and copyright law are still developing. After all, at the time of this writing, the PRC Copyright Law has existed for just thirty years (as compared with England and the United States, for example, where it has existed for centuries).²¹⁶ Many aspects of Chinese copyright doctrine are still in the early stages of development.²¹⁷ And while China's creative industry growth over the past decade has been impressive, many of China's copyright industries remain undersized compared to those of smaller regional markets such as South Korea and Japan, not to mention Western markets.²¹⁸

215. See generally KEUN LEE, *ECONOMICS OF TECHNOLOGICAL LEAPFROGGING* (2019), <https://www.unido.org/api/opentext/documents/download/16414872/unido-file-16414872>.

216. See Priest, *The Future of Music and Film Piracy in China*, *supra* note 86, at 808 (noting that the PRC promulgated its first Copyright Law in 1990).

217. See, e.g., Seagull Haiyan Song, *Chinese Entertainment Law Year in Review, 2015: Is It Converging with U.S. Practice?*, 49 *GEO. WASH. INT'L L. REV.* 259, 262–67 (2016) (discussing important copyright doctrines, such as substantial similarity and copyrightability of characters, that were heretofore underdeveloped in Chinese jurisprudence).

218. For example, China's domestic recording industry revenue is a small fraction of South Korea's, despite that South Korea's population is less than 4% of China's. In 2019, China's domestic recording industry earned an estimated \$490 million in revenues. See MUSIC:)ALLY, *MARKET PROFILE: CHINA 1* (2020) (reporting estimated recording industry revenues of \$591 in the Chinese market, of which about 17% accrued to foreign copyright owners). This is substantially less than the annual revenues of a single South Korean record label, Big Hit Entertainment, which earned \$717 million in 2020. See Glenn Peoples, *Breaking Down BTS Label Big Hit's 2020 Earnings*, *BILLBOARD* (Feb. 23, 2021), <https://www.billboard.com/pro/big-hit-entertainment-bts-label-2020-earnings/>. South Korea's total recorded music market is ten times greater than China's. See *Music Industry Sales Revenue South Korea 2014-2019*, *STATISTA* (reporting 2019 music industry sales revenues in South Korea of approximately 6.81 trillion South Korean won, or \$5.7 billion). China's domestic film industry revenue (excluding exports) exceeds that of South Korea but is much smaller on a per-capita basis. See Patrick Brzeski, *China Retains Global Box Office Crown with \$7.5B in 2021, Down 26 Percent from 2019*, *HOLLYWOOD REP.* (Jan. 3, 2022) (reporting \$6 billion in 2019 domestic box office revenues for Chinese-made films); *The Rise of the South Korean Film Industry*, *STATISTA* (Feb. 11, 2020), <https://www.statista.com/chart/20781/south-korean-film-industry-rapid-growth/> (reporting \$823 million in 2019 domestic box office revenue for South Korean-made films). Of course, export revenues from Korean, Japanese, and Indian content industries, including television programs, films, comics, and music, far outstrip China's content industry export revenues.

A. Leapfrogging and Frugal Innovation

Development theorists long believed that the road to development necessitates emulating all the steps developed nations took on their path to prosperity.²¹⁹ Today, however, it is well recognized that emerging economies need not play catch up in such a rote manner; they can tailor their development strategies to their unique circumstances and leverage their distinctive strengths.²²⁰ New technologies present opportunities to streamline development and leapfrog over costly, obligatory stages that developed countries passed through in bygone eras.²²¹ New business models and technologies may be adapted to local circumstances, making them more useful and accessible to local entrepreneurs and consumers.²²²

Developing countries can accelerate development by leveraging new technologies to leapfrog traditional capacity-building and investment stages (stage-skipping) and leveraging domestic innovation to forge novel, superior solutions (path-creating).²²³ For example, some countries have successfully used mobile technologies to skip the high-cost, resource-intensive stage of building outmoded land-line telecommunications networks.²²⁴ The mobile payment and banking solutions proliferating across the developing world exemplify path-creating leapfrogging by popularizing financial services that outclass the aging credit card-based payment systems that dominate the developed-world financial industries. Path-creating leapfrogging enables governments to utilize latecomer advantages—a lack of entrenched interests and no sunk costs in legacy infrastructure—to gain a competitive advantage over developed markets.²²⁵ The Rwandan government, for example, “[r]ecognizing the opportunity to take advantage of the lack of legacy infrastructure or incumbent [telecommunications] operators,” partnered with Korea Telecom

219. See Sandra Halperin, *Development Theory: Economics and Political Science*, BRITANNICA (Dec. 17, 2018), <https://www.britannica.com/topic/development-theory> (explaining that the modernization theory of economic development held that development is a “sequence of stages through which all societies must pass”).

220. See Jeffrey James, *Leapfrogging in Mobile Telephony: A Measure for Comparing Country Performance*, 76 *TECH. FORECASTING & SOC. CHANGE* 991, 991 (2009).

221. *Id.*

222. *Id.* at 993.

223. See Erol Yayboke et al., *The Need for a Leapfrog Strategy*, *CTR. FOR STRATEGIC & INT’L STUD.* (Apr. 10, 2020), <https://www.csis.org/analysis/need-leapfrog-strategy>; WORLD BANK GRP., *LEAPFROGGING: THE KEY TO AFRICA’S DEVELOPMENT?* xvii (2017).

224. See KEUN LEE, *CHINA’S TECHNOLOGICAL LEAPFROGGING AND ECONOMIC CATCH-UP: A SCHUMPETERIAN PERSPECTIVE* 33 (2021); Yayboke et al., *supra* note 223.

225. Yayboke et al., *supra* note 223.

to deliver inexpensive, nationwide 4G mobile service in one-fifth of the time it would have taken private industry alone.²²⁶ Latecomer flexibility allows developing nations to build their policies, innovation ecosystems, and infrastructure around emerging technologies and advantageously position their entrepreneurs in the value chain that evolves around those innovations.²²⁷

States foster leapfrogging by adopting permissive regulatory policies and a willingness to embrace experimentation.²²⁸ Policymakers should recognize when they are uniquely positioned to take advantage of leapfrogging opportunities and bring their resources and regulatory power to bear.²²⁹ This may involve promoting a bottom-up approach through public-private partnerships and state investments in infrastructure and human capital.²³⁰ Such an approach may call for a light regulatory touch to “ensure that growth in new technologies isn’t stunted by regulations meant for a different age.”²³¹ For example, the high cost and limited accessibility of banking services in Kenya created an opportunity for Africa’s first mobile money service, M-PESA, whose rise was aided by the Kenyan government’s deliberately hands-off regulatory stance.²³² Alternatively, the state might use a heavy-handed, top-down regulatory approach to steer the transition from sunset industry to new paradigm.²³³ For example, to accelerate the growth of China’s electric vehicle (EV) market, the Chinese government has imposed strict sales quotas on all automobile manufacturers in China, with the goal of having EVs make up 40% of all car sales in China by 2030.²³⁴

226. *Id.*

227. *Id.*; LEE, *supra* note 224, at 33.

228. See WORLD BANK GRP., *supra* note 223, at 108.

229. See *id.* (stating that retaining “flexibility” allows developing countries to capitalize on new opportunities that are often outside of traditional development approaches).

230. Yayboke et al., *supra* note 223.

231. *Id.*

232. See WORLD BANK GRP., *supra* note 223, at 12, 99. Rwanda’s rise as a pioneer in drone technology is another example of experimentation and regulatory flexibility facilitating a leapfrogging strategy. Yayboke et al., *supra* note 223 (“Rwanda has also been a pioneer in the adoption of drone technology Rwanda’s policymakers helped to support the deployment of drone technology in the country by ensuring that the nation’s regulatory systems remained flexible to accommodate the needs of drone operators. . . . This more agile approach to regulation has reduced barriers for operators and has given drone companies an open environment for testing and deployment.”).

233. See, e.g., Nancy W. Stauffer, *China’s Transition to Electric Vehicles*, MIT NEWS (Apr. 29, 2021), <https://news.mit.edu/2021/chinas-transition-electric-vehicles-0429> (noting that to accelerate electric vehicle adoption, Chinese regulators have imposed strict mandates on car manufacturers, requiring that a certain percentage of all vehicles sold by each manufacturer be battery powered).

234. *Id.*

A related concept is “frugal innovation.”²³⁵ Actors in emerging economies faced with severe resource constraints often redesign business models and technologies to reduce costs while increasing compatibility with local needs and budgets.²³⁶ Like leapfrogging, frugal innovation involves eliminating extraneous features to optimize the innovation for local consumption.²³⁷ These efficiency gains can even result in net improvements to the original innovation design by reducing needless complexity and increasing accessibility.²³⁸

B. Leapfrogging in China

Leapfrogging strategies are well-suited to advance the Chinese Dream because, by definition, they involve looking beyond the well-trodden path and embracing visionary possibilities. Indeed, China is no stranger to leapfrog development. China’s mobile communications revolution is one oft-cited example. In the 1980s, China’s landline infrastructure lagged behind that of the West, making it relatively easy to invest early and economically in the next generation of telephony.²³⁹ Similarly, China’s lack of credit card systems and providers allowed it to skip credit cards entirely, propelling the development and adoption of next-generation mobile payment solutions.²⁴⁰ China has also pulled out all the stops to promote leapfrogging in the green technology space. Determined to reverse its growing environmental crisis, “China is well on its way to leapfrogging the rest of the world in everything to do with a cleaner environment,” including developing green technologies from electric vehicles to renewable energy and enacting aggressive, pioneering policies designed to transform polluting industries and stimulate new clean industries.²⁴¹

235. See generally Timo Weyrauch & Cornelius Herstatt, *What Is Frugal Innovation? Three Defining Criteria*, 2 J. FRUGAL INNOVATION 1 (2016) (defining “frugal innovation” as the “develop[ment] of products and services that fit [developing countries’] special needs and requirements” while remaining “cheap enough to give non-affluent customers opportunities for consumption”).

236. See Rebecca Richards-Kortum & Theresa Mkwandawire, *‘Frugal Design’ Brings Medical Innovations to Communities that Lack Resources During the Pandemic*, THE CONVERSATION (Mar. 29, 2021, 8:07 AM), <https://theconversation.com/frugal-design-brings-medical-innovations-to-communities-that-lack-resources-during-the-pandemic-147896>.

237. See Weyrauch & Herstatt, *supra* note 235, at 2.

238. See *id.* at 5.

239. LEE, *supra* note 224, at 35; Kaveh Waddell, *China Is Playing Next-Generation Leapfrog with the West*, AXIOS (Feb. 9, 2019), <https://www.axios.com/china-ai-leapfrog-eba53d3b-1f47-49d9-bb4c-e638d96bfc2.html>.

240. Waddell, *supra* note 239.

241. Henny Sender, *China Is Leapfrogging the World When It Comes to the Environment*, NIKKEI

China is, of course, famously willing to use its powerful central authority and economic planning to drive top-down innovation. As one observer notes: “One of Beijing’s most powerful tools is . . . forcing companies to focus on environmental, social[,] and corporate governance, which has become a major catalyst for higher-quality growth, improving the standard of living for its people”²⁴² The Chinese government also frequently exhorts a unified push by both state and private actors to leapfrog in areas of stated strategic importance, such as artificial intelligence (AI) and big data development, through the use of awards and subsidies.²⁴³

At the same time, the Chinese government has a history of taking a hands-off approach to facilitate bottom-up experimentation with new policies or economic models.²⁴⁴ Indeed, as Kellee Tsai argues, China’s transition in the 1980s from a purely planned economy to one with free market elements was driven primarily by local actors whose grassroots experiments with capitalism were tolerated though they contravened formal law.²⁴⁵ Over time, as the experiments yielded positive results, formal market-oriented policies were adopted and legal institutions changed accordingly.²⁴⁶

Several lessons can be drawn from this history. First, it shows the essential pragmatism of China’s leaders, who have embraced different policy approaches in different contexts. Second, it shows China’s willingness to experiment. Maria Repnikova observes that “Chinese governance involves a lot of experimentation in policymaking processes. . . . [T]here’s no coherent toolkit, no single textbook you could write on ‘how China governs.’”²⁴⁷

ASIA (May 19, 2021, 12:05 PM), <https://asia.nikkei.com/Opinion/China-is-leapfrogging-the-world-when-it-comes-to-the-environment>; see also JOANNA I. LEWIS, GREEN INNOVATION IN CHINA: CHINA’S WIND POWER INDUSTRY AND THE GLOBAL TRANSITION TO A LOW-CARBON ECONOMY 145–67 (2012); Patrick M. Schroeder & Ralph B. Chapman, *Renewable Energy Leapfrogging in China’s Urban Development? Current Status and Outlook*, 11 SUSTAINABLE CITIES & SOC’Y 31, 31–39 (2014); Stauffer, *supra* note 233.

242. Sender, *supra* note 241.

243. See, e.g., DEREK GROSSMAN ET AL., RAND CORP., CHINESE VIEWS OF BIG DATA ANALYTICS 6 (2020); Rachel E. Stern et al., *Automating Fairness? Artificial Intelligence in the Chinese Courts*, 59 COLUM. J. TRANSNAT’L L. 515, 518–20 (2021) (chronicling China’s top-down push to integrate advanced AI in the judiciary, and observing that “Chinese courts are plainly leapfrogging efforts elsewhere when it comes to AI, moving rapidly to a world where computers suggest legal outcomes to judges, either by analyzing millions of past cases or through a decision-tree designed to match the fact pattern in the case with the correct legal solution”).

244. See generally KELLEE S. TSAI, CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA (2007).

245. *Id.* at 50–60.

246. *Id.*; see also Priest, *Copyright and Free Expression*, *supra* note 33, at 62–63.

247. Freymann, *supra* note 39.

Third, it shows a tolerance for internal contradictions that runs widely throughout Chinese policy.²⁴⁸ Despite its widespread embrace of capitalist policies, China has never abandoned its revolutionary commitment to communism. It continues to prop up state-owned enterprises and promulgate five-year central plans. China's favored euphemism for its free market reforms is telling: it refers to them as pursuing "Socialism with Chinese characteristics."²⁴⁹

We argue that pursuing "copyright with Chinese characteristics" could involve a similarly pragmatic accommodation of contradictory policies. China is not about to abandon its censorship regime, and its authorities will continue to occupy the commanding heights of cultural policy, issuing edicts and enforcing red lines. At the same time, by loosening controls over cultural production and encouraging grassroots experimentation by diverse voices through a reinvigorated, more accessible, transparent, and fair copyright regime, China could arrive at a dialectical balance between top-down and bottom-up culture. Over time, as China's cultural industries grow in confidence and prestige and China gradually embraces decentralized markets for expression, the terms of this balance will continue to be renegotiated.

C. Sketching the Chinese Copyright Dream

So what would our dream of copyright with Chinese characteristics look like? And how does it relate to our leapfrogging and frugal innovation framework?²⁵⁰ To begin with, we note that our vision calls for "legal leapfrogging,"

248. See Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J., 261 (2016) ("Contradictions pervade the Chinese economy today. While one might think of the economy as state-dominated, private enterprises drive much of China's dynamic growth. In addition, economic intervention does not always flow through the state. Alongside the state is the Chinese Communist Party, a separate political actor that plays an active role in the management of state-owned enterprises. The economy embraces market-oriented dynamics, yet it is not strictly a free-market capitalist system."). Similar contradictions operate in China's approaches to its past as well, as current leaders struggle to reconcile their commitment to revolutionary ideologies that rejected Confucianism with a renewed reverence for China's ancient heritage. See Wasserstrom, *supra* note 18. Such tolerance for internal contradictions is deeply rooted in Chinese philosophical traditions. See FUCHEN HU & ZHONGHOU YAN, *THE GENERAL THEORY OF TAOISM* 97 (2013) (describing the Taoist philosophical tradition of embracing complementary opposites: "Contradictions exist everywhere; these contradictions oppose and complement each other; this is the unity of the opposites."); SCHELL & DELURY, *supra* note 16, at 216 (describing Mao's 1937 discourse, "On Contradiction," in which he argued that contradictions permeate the universe and it is this pervasive dialectical tension—a constant clash of opposites—that drives progress).

249. SCHELL & DELURY, *supra* note 16, at 295 (quoting Deng Xiaoping's famous formulation).

250. See *supra* Sections III.A, III.B (defining leapfrogging and frugal innovation).

which differs in some ways from the physical infrastructure that development economics typically focuses on. Modernizing China’s copyright law partly requires enacting new law, an intangible good. However, other aspects of a “dream” copyright system would require implementing technological systems not that different from mobile payment or communications.²⁵¹ Moreover, short of amending the Copyright Law, administrative and judicial officials can effect broad, forward-looking changes to law and policy through Copyright Law implementing regulations, “precedential” guiding cases, and judicial interpretations by the Supreme People’s Court.

1. Applying the Leapfrogging and Frugal Innovation Framework Described Above

Stage-skipping: China is often perceived as playing catch-up to countries with more developed copyright regimes. However, China’s industry and policymakers need not slavishly follow previous copyright development paths. Legacy copyright regimes are beset with inefficient industry customs, rent seeking, and path dependencies, much of which China still has an opportunity to bypass. China can leverage its technological and political strengths to catch up to “developed” copyright systems in other countries. Indeed, China’s technological strengths position it well to play a leadership role in reinventing twenty-first century copyright.

Path-creating: China need not settle for “catching up” to other countries’ copyright regimes.²⁵² It can leverage its unique strengths and capabilities to surpass them in many areas and redefine the cutting edge of twenty-first century copyright.

Frugal innovation: Western copyright systems are plagued by baroque complexities that have resulted from decades of incremental accretions ossified through a combination of path-dependency and vested interests. China has an opportunity to streamline copyright law by reconfiguring it around the needs of the present day.

China enjoys a combination of factors that position it to leapfrog and reinvent. First, despite recent growth, China’s copyright ecosystem has comparatively few entrenched stakeholders. Industry and the state thus enjoy

251. See Stern et al., *supra* note 243, at 520–33 (chronicling China’s cutting-edge use of AI in the judicial system).

252. Cf. Yayboke et al., *supra* note 223 (defining “path-creating” development as “bypass[ing] traditional stages of development to . . . explore an alternative path of technological development involving emerging technologies with new benefits and new opportunities”).

greater freedom to reimagine and reinvent copyright policy, practice, and doctrine without provoking opposition from vested interests. Second, China's powerful central government has the capacity to push a reimagined copyright agenda. Third, China already boasts world-leading technological capabilities in copyright-adjacent fields such as micropayments, blockchain, and smart contracts.²⁵³

IV. SOME MODEST PROPOSALS FOR COMPONENTS OF THE CHINESE COPYRIGHT DREAM

Central to our argument is that China's next-generation copyright law and policy should be for China and not dictated by foreign interests. In that spirit, we do not presume to articulate what that law should look like. Nevertheless, we make some proposals below, based on the aforementioned framework for dreaming about a copyright law that would leverage China's circumstances and unique strengths to position its law and cultural industries at the global vanguard.²⁵⁴

A. Be Bold in Reinventing and Reimagining Copyright Law for the Digital Age

The Dream allegory is meant to inspire thinking beyond mundane, immediate constraints. The most recent Copyright Law amendments, issued in 2020, took eight years from first draft to promulgation but were probably most notable for how little change they wrought.²⁵⁵ To be sure, the amendments included several noteworthy substantive changes, including adding protection for "audiovisual works" (to ensure live broadcasts are covered by copyright),²⁵⁶ a broadcasting right for sound recordings (something which still does not exist in the United States),²⁵⁷ and provisions for increased damages awards

253. See *China Using Blockchain Evidence for Copyright Infringement*, LEDGER INSIGHTS (Nov. 29, 2019), <https://www.ledgerinsights.com/blockchain-intellectual-property-protection-china/> (showing that China has recently been willing to use the "blockchain to protect writers and creative content creators").

254. See *infra* Sections IV.A–E.

255. See Yu, *supra* note 198 (noting the amendment was "quite conservative and not particularly forward-looking" and "does not reveal much about the positions China will take in future international norm-setting exercises").

256. See 2020 Copyright Law, *supra* note 23, at art. 3.

257. See *id.* at art. 45.

in infringement actions.²⁵⁸ Most of the amendments in the new law are welcome changes but are in the nature of tidying up the law (by codifying a smattering of intervening regulations) and catching up to global standards. Put in the framing of leapfrog development, such catch-up strategies at heart

still assume that the economic configuration of developed nations is the target to aim for. . . . These strategies rarely show signs of considering whether developing countries may have unique competitive advantages that would allow them to forge their own development path via their own unique version of leapfrogging. As a result, policymakers are never prompted to explore how they might create an enabling environment for more disruptive, path-creating forms of leapfrogging that allow new, alternative . . . systems to take root.²⁵⁹

The 2020 Copyright Law amendments seem like a missed opportunity to leapfrog and frugally innovate (that is, strip the law of unnecessary complexity). For example, finally recognizing a broadcast performance right for sound recordings rectifies an important omission in the law, but the law still retains the vestigial and discriminatory treatment of sound recordings as a lesser form of work capable of protection only through neighboring rights, not copyright.²⁶⁰ This is completely disconnected from the commercial reality; sound recording copyrights are far more valuable than composition copyrights that receive full protection, but in China, the composition copyright has “always been a misunderstood tag-along of the master recording” copyright.²⁶¹ Indeed, as Robert Brauneis has argued, there are strong arguments for doing away entirely with the archaic distinction between copyrights in sound recordings and musical compositions, and instead recognizing a unitary copyright in music audio works.²⁶² Because the sound recording right is already

258. *See id.* at art. 54.

259. Yayboke et al., *supra* note 223.

260. *See* 2020 Copyright Law, *supra* note 23, at art. 42, 45.

261. *See* Rhian Jones, ‘Accessing Publishing Money in China Is Incredibly Complex. This is the Beginning of a Marathon, Not a Gold Rush,’ MUSIC BUS. WORLDWIDE (July 16, 2020), <https://www.musicbusinessworldwide.com/accessing-publishing-money-in-china-is-incredibly-complex-this-is-the-beginning-of-a-marathon-not-a-gold-rush/> (quoting Chinese music industry expert Ed Peto and noting that publishing revenues account for just 8% of music streaming royalties in China).

262. Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 55–59 (2014).

economically preeminent in China and the music publishing industry remains underdeveloped there, China is ideally positioned to pioneer the creation of a unitary copyright in music audio works. This leapfrog innovation would formally discard the complexities and transaction costs associated with having to acquire two separate licenses for most sound recordings.²⁶³

There are other opportunities for leapfrogging through frugal innovation, as well. For example, the PRC Copyright Law recognizes *thirteen* discrete economic rights.²⁶⁴ By comparison, U.S. copyright law has been criticized as needlessly complex in this regard, and it recognizes just five economic rights.²⁶⁵ Some commentators argue that replacing the vestigial, baroque complexity of numerous overlapping rights with just a single, unitary economic right—the right of commercial exploitation—is a better approach for a digital age in which technological change far outstrips the law’s capacity to keep up.²⁶⁶ This approach would abandon categorization of rights based on the nature of the use of technology enabling the use, and instead focus on the act’s *effect*: is the use within the ambit of the copyright owner’s expected commercial exploitation?²⁶⁷ This would at the very least sweep away overlapping, antiquated distinctions that are confusing in the digital age: is a digital stream a reproduction, a distribution, a performance, a transmission, and a communication?²⁶⁸ If different licensees have control over the various rights, would a potential user need to obtain a license from all of these overlapping licensees?²⁶⁹ As Daniel Gervais observes, “[p]rofessional users . . . want to be authorized to perform commercial operations, (for example, a certain form of broadcasting at a certain date) independently of what the actual technical requirements are for this operation to be successfully performed. Yet, today

263. *See id.*

264. *See* 2020 Copyright Law, *supra* note 23, at art. 10 (providing the rights of publication, reproduction, distribution, rental, exhibition, performance, presentation, broadcasting, communication through an information network, filming, adaptation, translation, and compilation).

265. *See, e.g.*, Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 43 (2010).

266. *Id.* at 43–48; Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

267. Gervais, *supra* note 266, at 11 (“What the rightsholder in a film wants is to control and presumably be paid for the broadcasting of the film, not the number of transient, ephemeral, other reproductions made, or the fact that the work is performed, communicated or transmitted by Hertzian waves, wire, wireless networks or otherwise. Rightsholders care about such distinctions to the extent that they represent or affect markets. Otherwise, the technical requirements for the use of their content are irrelevant.”).

268. *See* 2020 Copyright Law, *supra* note 23, at art. 10.

269. *See id.*

copyright focuses instead only on the technical nature of the use.²⁷⁰ This is not to suggest that a move to a unitary commercial exploitation right would be easy or frictionless.²⁷¹ The biggest challenge is to ensure that the definition of “commercial use” is sufficiently broad to capture all uses that are commercially significant to the copyright owner.²⁷² Commentators suggest, however, that pursuing such an approach would reduce the burden of copyright on users while safeguarding the commercial interests of copyright owners and simplifying the law.²⁷³

Of course, these might not be the right suggestions for the copyright ecosystem Chinese stakeholders wish to build. The point here is not to advocate specific proposals but rather to highlight the breadth of options available given China’s comparative advantage due to the combination of a strong central authority and a lack of entrenched incumbents, vested interests, and path dependencies.

While China is not devoid of copyright industry power players, they are far fewer and less entrenched than their counterparts in developed copyright systems. Recall that the PRC Copyright Law is just three decades old, and the most powerful companies in China’s creative industries during that period have been plodding state-owned enterprises.²⁷⁴ Private film and music company development is about a century behind the West.²⁷⁵ No “major” private studios or record labels have emerged in China that could come close to rivaling the size and political clout of the Western majors. Where behemoths have emerged in China—on the digital distribution side rather than on the content side—regulators have shown the political will to impose drastic top-down regulation when necessary to improve the copyright ecosystem. For example, when the State Administration for Market Regulation (SAMR) deemed Tencent Music’s stockpile of exclusive music licenses anticompetitive in the music streaming space, it fined the company and forced it to nullify the exclusivity provisions in its agreements with record labels.²⁷⁶

270. Gervais, *supra* note 266, at 11.

271. See Litman, *supra* note 265, at 45.

272. See *id.* at 46.

273. *Id.* at 43–45.

274. See Keane, *supra* note 153, at 6.

275. See Zhang, *supra* note 98, at 107–08 (discussing policy reforms of the early 2000s that finally enabled the lawful development of private enterprise in China’s culture industries).

276. Patrick Frater, *Tencent Music Ordered To Unwind Exclusive Content Deals with Global Labels*, VARIETY (July 24, 2021, 1:31 AM), <https://variety.com/2021/global/asia/tencent-music-ordered-to-unwind-exclusive-content-deals-1235026760/#1>.

B. Leapfrog into a Robust, Transparent Digital Licensing Environment

When people think about copyright challenges in China, enforcement is usually the first thing that comes to mind. While endemic piracy has long been an enormous drag on the copyright industries, equally problematic in China is the relative lack of a licensing ecosystem that facilitates continuous, diversified copyright revenue streams. Enforcement does not generate value. Licensing, on the other hand, is copyright's economic wellspring. Without the infrastructure and business culture to support a sophisticated licensing ecosystem, copyright owners will underrealize the value of their works regardless of how well enforced copyright is.²⁷⁷

Copyright's ability to facilitate licensing is perhaps its greatest superpower. Licensing allows the copyright owner to give others the right to exploit the work while the owner shares in the economic value the work generates on an ongoing basis. It is a powerful and important arrangement because it allocates rights to those in a better position than the copyright owner to commercialize the work while ensuring the owner shares in the work's economic upside.²⁷⁸ Absent the ability to license, the creator must either sell the rights to the work outright, thus ending the creator's economic relationship with the work (often before the work's value is known), or else attempt to exploit the work herself—something creators are often not well equipped to do.

Copyright licensing in China is still a relatively new concept. The traditional approach—and one that remains common—is *maiduan* (买断), that is, the upfront, outright sale of a work's copyright to the commercializing intermediary. Licenses historically generated little income because pirated content, which competed with and undercut lawfully licensed content, was

277. See Keith E. Maskus, *Intellectual Property Challenges for Developing Countries: An Economic Perspective*, 2001 ILL. L. REV. 457, 462 (2001) ("Copyrights do more than deter piratical copying. They provide a contractual framework within which ownership rights may be organized and transacted. This framework is particularly important for building modern creative industries . . . [that] emerge from the artistic efforts of numerous participants Allocating rights to each of these activities is a complex phenomenon that cannot readily be managed in the absence of a legal framework for copyrights. Therefore, even though developing countries may enjoy an abundance of creative musicians and performers, they may not be able to convert that abundance into widely marketable products without policy intervention.").

278. Cf. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 45, 57–58 (2000) (arguing that a functioning, formal property system enables an asset's economic potential to be unlocked and controlled through commercial exploitation via networks of individuals).

ubiquitous.²⁷⁹ It also often makes little sense for creators to license content with the expectation of generating royalties, because transactions occur in a low-trust, low-transparency environment.²⁸⁰ Creators do not believe they will be paid accurately, if at all, once the work is exploited.²⁸¹ Thus music, for example, is largely viewed as a product with little intrinsic value because of historic endemic piracy and the attendant monetization problems. In terms of its economic value, music is viewed primarily as a platform to boost the artist's celebrity, which can be monetized through appearances, endorsements, and increasingly through online "tipping."²⁸² Music's value as an asset that generates ongoing revenue is of secondary importance. It has only been in the past decade or so that licensing practices have begun to mature in some Chinese copyright industries, such as streaming video, spurred by improved online copyright enforcement.²⁸³ Still, licensing practices in Chinese copyright industries remain underdeveloped overall due to persistent transparency issues and copyright industry players' continuing discomfort with arrangements that involve ongoing royalty obligations.

While licensing practice has markedly matured in China over the past decade, most of the licenses for valuable content have been acquired on an exclusive basis.²⁸⁴ Exclusive licensing as it is presently practiced in China is essentially an extension of the *maiduan* philosophy.²⁸⁵ Large online platforms purchase an exclusive license with a single advance payment typically in lieu of royalties.²⁸⁶ In music, for example, much-ballyhooed licensing deals struck

279. See Jones, *supra* note 261 (stating that, because of "the historical ubiquity of piracy in China, [] licensing deals [aren't] an easy win and getting royalty reports isn't a given").

280. See *id.*

281. One of the authors of this Article, when working some years ago as a producer in the Chinese music industry, was advised by a friend and record label executive to never do a deal for royalties in China. "Record labels will happily do such a deal with you," the executive advised, "because they know they'll never pay you. You're better off selling the copyright outright because it's the only time you'll ever see any money."

282. See Jiarui Liu, *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 CARDOZO ARTS & ENT. 621, 623 (2010); Jones, *supra* note 261.

283. Montgomery & Priest, *supra* note 124, at 346–54.

284. See *id.*

285. See Priest, *Meet the New Media*, *supra* note 125, at 1090 (discussing China's emphasis on exclusive licensing and how it is "also quite unique to China").

286. Matthew Alderson, *Music Royalties in China: Let Those Without Sin Cast the First Stone*, HARRIS BRICKEN (July 25, 2020), <https://harrisbricken.com/chinalawblog/music-royalties-in-china-let-those-without-sin-cast-the-first-stone/> ("China's market for foreign music has been dominated by exclusive deals granted to Chinese [digital service providers] in return for big advances for the major labels.").

between the major Western record labels and Chinese internet giant Tencent were exclusive licenses granted in exchange for “‘minimum guarantee’ advances instead of royalties.”²⁸⁷ Because much copyright licensing in China’s music industry is still just a single-transaction affair, streaming services lack basic capabilities and infrastructure for usage tracking, reporting, and copyright owner data matching.²⁸⁸ Not surprisingly, the data transparency and usage-reporting adequacy of even major streaming services in China are reportedly a mess or nonexistent.²⁸⁹

This combination of exclusive licenses and *maiduan* philosophy leads to numerous problems. First, creators and copyright owners are cut off from the ongoing economic upside of their works’ exploitation. Second, copyright owners lose the opportunity to disseminate their works widely through multiple distribution channels. Streaming services pay more for exclusive than nonexclusive licenses, and because copyright owners are unable to make up the difference in royalties down the road, their most economically rational choice is usually to grant an exclusive license to one provider. Third, the accumulation of exclusive licenses confers tremendous market power on one or a handful of monopsonist intermediaries, as we discuss in more detail below.²⁹⁰ Fourth, music licensees have little incentive to improve their usage tracking, reporting, and ownership-matching capabilities that would enable royalty-based licensing, causing the present circumstances to be self-perpetuating.

Fifth, a lack of royalty income is partly driving many emerging music stars to turn to virtual gifting—in effect, online tipping.²⁹¹ It has become a far bigger revenue source for most than any sort of licensing.²⁹² Currently, Tencent’s music properties make over \$1 billion per year, but two-thirds of this revenue comes not from ad- or subscription-supported streaming music but from virtual gifting during live-streamed performances, especially on

287. Jones, *supra* note 261.

288. *See id.*

289. *Id.*

290. *See infra* Section IV.E.

291. *See* Cherie Hu, *Tencent Music Uses ‘Tipping’ To Rack Up Revenues. Why Aren’t Western Music Streaming Platforms Doing the Same?*, MUSIC BUS. WORLDWIDE (Oct. 3, 2018), <https://www.musicbusinessworldwide.com/tencent-music-uses-tipping-to-rack-up-revenues-why-arent-western-music-streaming-platforms-doing-the-same/> (stating that Tencent’s “growing profit margins are riding the wave of China’s exploding media micropayment economy—which allows users to ‘tip’ their favorite . . . artists”).

292. *See id.*

platforms such as WeSing (a popular karaoke app).²⁹³ The meteoric rise of gifting solutions for artists is an example of leapfrogging, leveraging China’s advanced mobile payment technologies to bond audiences to artists more closely and allow fans to directly pay the artist rather than an opaque layer of intermediaries.²⁹⁴ However, an industry whose revenue streams are dominated by virtual gifting—and average per-user revenue for music gifting platforms is presently twelve times higher than that of streaming subscription services in China²⁹⁵—faces serious limitations. Creator burn-out, born of the legitimate fear of losing fickle fans if one is not constantly producing to remain atop social media feeds, takes a mental health and long-term productivity toll on artists.²⁹⁶ Moreover, tip-based models tend to pander to audience heartstrings by focusing on star personalities rather than intrinsic content quality. This aligns poorly with China’s ambitions of creating globally appealing culture. Nor does a plethora of attractive social media stars raking in millions singing karaoke online do much to stimulate democratic discourse. Virtual gifting thus cannot form the basis of a sound, forward-thinking cultural policy. It evokes, rather, Ai Weiwei’s lament that too much modern Chinese art lacks substance.²⁹⁷

A “dream” copyright environment would be structured instead to encourage the production of high-quality works by monetizing them directly through transparent, sophisticated licensing that would obviate the need to rely on online busking for income. Western copyright regimes are far from dream systems, but it is nevertheless no surprise that most major regionally and globally successful artists hail from countries with strong copyright regimes (such as the United States, the United Kingdom, South Korea, Japan, and Sweden) that reward long-term development of artists and investment in high-quality works.

This is not to suggest that copyright licensing in developed nations is the *beau idéal*. In the West, music copyright licensing in particular is an infamous imbroglio littered with entrenched stakeholders and legal vestiges from the analog age. A century of legislative sausage-making has resulted in arcane music-licensing rules in the U.S. Copyright Act that a former Register of Copyrights called “utterly incomprehensible to most people, because over the

293. *See id.*

294. *See id.*

295. *See Jones, supra note 261.*

296. *See Taylor Lorenz, Young Creators Are Burning Out and Breaking Down*, N.Y. TIMES (June 8, 2021), <https://www.nytimes.com/2021/06/08/style/creator-burnout-social-media.html>.

297. *See supra note 70 and accompanying text.*

years Congress has spliced and diced them, and then hemstitched them back together.”²⁹⁸ There are *seven* different licensing collectives in the United States with which digital music streaming services must work.²⁹⁹ Each of these adds an intermediary layer that introduces inefficiencies, delays, the potential for errors or corruption, and in most cases, administrative fees.³⁰⁰ To make matters worse, none of them has an authoritative database that can be used to match all sound recordings with the proper right holders of the underlying compositions.³⁰¹ Therefore, music-streaming services such as Spotify have delivered millions of streams for recordings that they licensed but for which they had incorrect, incomplete, or nonexistent ownership information for the underlying composition.³⁰² This inefficiency led to years of litigation, unpaid publishing royalties of tens of millions of dollars, and ultimately a major copyright law amendment that finally directed the establishment of a centralized database of music-composition-ownership information.³⁰³ Antediluvian concepts such as “mechanical royalties” (dating back to the time of player pianos and gramophones) remain in the U.S. Copyright Act and must be paid by digital-streaming companies for no reason other than that entrenched intermediaries exist to collect such royalties.³⁰⁴ The U.S. Department of Justice, wielding eighty-year-old consent decrees, dictates every aspect of licensing

298. Ralph Oman, *Going Back to First Principles: The Exclusive Rights of Authors Reborn*, 8 J. HIGH TECH. L. 169, 173 (2008).

299. See Eric Priest, *The Future of Music Copyright Collectives in the Digital Streaming Age*, 45 COLUM. J.L. & ARTS 1, 3 (2021) [hereinafter Priest, *The Future of Music Copyright Collectives*]. These are ASCAP, BMI, SESAC, and GMR (which collect royalties for the public performance of a song, which occurs each time a user streams a copyrighted song), SoundExchange (which administers compulsory licenses for digital radio and webcasting), the Mechanical Licensing Collective (MLC) (a newly established collective under the Copyright Act that collects compulsory license royalties for the “mechanical” right implicated in every stream), and the Harry Fox Agency (which administered streaming mechanical royalties before establishment of the MLC and still does as a contractor for the MLC). *Id.*

300. See *id.* at 29–36.

301. See *id.* at 12.

302. See *id.*

303. *Id.* at 13–14.

304. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 231–32 (10th ed. 2019). U.S. music-streaming services currently pay mechanical and performance royalties to music publishers, that is, the owners of the underlying musical compositions. *Id.* at 232. However, current practice effectively merges mechanical and performance royalties because the royalties owed for mechanicals are determined by subtracting performance royalties paid from an “all-in” rate that includes both mechanicals and performance rights. See Priest, *The Future of Music Copyright Collectives*, *supra* note 299, at 41. Thus, in effect, streaming services could be paying one all-in “publishing” rate, but instead pay that amount as two royalties to support the collectives that developed around those revenue streams. *Id.*

and price setting by the two largest music licensing collectives, ASCAP and BMI.³⁰⁵ And the United States is not the only territory in which music licensing is broken.³⁰⁶ No authoritative rights database exists anywhere to facilitate payments by matching usage and ownership data for recordings and compositions.³⁰⁷ Moreover, performance rights organizations around the world, which collect royalties for the public performance of music on radio and television, via digital streaming services, and in live venues, are notoriously inefficient and nontransparent.³⁰⁸ It is not uncommon for it to take several years for copyright owners to receive their due royalties.³⁰⁹ Moreover, lack of transparency in accounting and royalty reporting is endemic industry-wide, not just in the collective licensing area.³¹⁰

China, with virtually no such baggage, can leapfrog to the head of the class and set the global gold standard for technology-enabled, twenty-first century copyright licensing capabilities. With China's advanced capabilities in mobile payment systems, data management, analytics, and AI,³¹¹ it is positioned to develop the world's first truly intermediary-free, smart, and transparent copyright registration, licensing, and royalty distribution system.

As long as we are dreaming, imagine the following dream scenario for an independent music artist. She writes and records a song. To register and begin monetizing it immediately, she uploads a digital file of the recording together with basic ownership and identifying information to a free national copyright registry via WeChat (China's most popular social networking app that is now

305. See Priest, *The Future of Music Copyright Collectives*, *supra* note 299, at 20.

306. See Giuseppe Mazziotti, *The Politics of European Online Music Rights*, BERKLEE COLL. OF MUSIC: MUSIC BUS. J., <http://www.thembj.org/2011/12/the-politics-of-european-online-music-rights/> (last visited Nov. 14, 2021) (stating that the European Union's "situation is more complex than [that of the United States] since [the EU] does not have a single copyright system and the enforcement and management of exclusive rights in musical compositions, music performances[,] and sound recordings still take place mostly on a country-by-country basis—despite the international reach of the internet").

307. See Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 310, 319–20 (2018).

308. See Priest, *The Future of Music Copyright Collectives*, *supra* note 299, at 29–30, 39; Tran Ngoc Linh Tam, *Music Copyright Management on Blockchain: Advantages and Challenges*, 29 ALB. L.J. SCI. & TECH. 201, 210–12 (2019).

309. See Tam, *supra* note 308, at 211–12.

310. See Griffin Davis, *Transparency in the Music Business*, BERKLEE COLL. OF MUSIC: MUSIC BUS. J., <http://www.thembj.org/2015/08/transparency-in-the-music-industry/> (last visited Nov. 14, 2021) ("Of the issues that have bedeviled the music industry, perhaps the most insidious has been that of transparency, or, more accurately, a lack thereof. In fact there really has not ever been a time when the modern music industry, meaning the industry that developed around the distribution and use of sound recordings, has been truly transparent.").

311. See GROSSMAN ET AL., *supra* note 243, at 5–10.

used in all facets of Chinese life from personal to professional to governmental).³¹² The registry uses blockchain technology to permanently record the registration and creates a hash of the file for identification and antifraud purposes.³¹³ The app asks her to select the streaming services through which she wishes to make her content available.³¹⁴ The work is now registered with the National Copyright Administration of China and is simultaneously registered with and made immediately available on all the artist's selected digital platforms. A dashboard in WeChat allows her to monitor uses of the work in real-time. Platforms would know exactly whom to pay for the content and would make micropayments directly to the artist's app in real time every time the work is consumed.³¹⁵ If the artist has negotiated a bespoke deal with a platform, a blockchain-recorded smart contract containing those terms would be appended to the registration, and royalties would be distributed accordingly.³¹⁶ If there are multiple copyright owners, the system would distribute royalties on a pro rata basis to each owner.³¹⁷ To ensure the actual creators of the work—and not just their record labels and publishers—are paid, the system could automatically impose a 50% split to creators akin to the 50% “writer's share” imposed by the ASCAP and BMI consent decrees in the United States, or the guaranteed author's share provided for in Indian law.³¹⁸ The National Copyright Administration would enforce service-provider accountability and investigate anomalies. It would use AI to detect fraud on both the registrant and platform sides. In this system, there is no intermediary taking a fee,

312. See Paul Mozur, *Forget TikTok. China's Powerhouse App Is WeChat, and Its Power Is Sweeping*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/04/technology/wechat-china-united-states.html> (discussing the cultural prevalence of WeChat in China and the significant role it plays in people's everyday lives).

313. See *China Using Blockchain Evidence for Copyright Infringement*, *supra* note 253. Courts in Hangzhou, Beijing, and Guangzhou are already experimenting with a similar technology, which allows copyright owners to upload and register their literary works or articles to a blockchain-based database that automatically generates a string or electronic identification for the content. *Id.* The blockchain record can then be used to definitively identify the work and owner for enforcement purposes. *Id.*

314. Cf. Sebastian Pech, *Copyright Unchained: How Blockchain Technology Can Change the Administration and Distribution of Copyright Protected Works*, 14 NW. J. TECH. & INTELL. PROP. 1, 10–11 (2020) (explaining how a blockchain-based licensing registry could allow owners to clear rights for access by potential users).

315. See Tam, *supra* note 308, at 220–21.

316. See *id.* at 221 (illustrating how artists and creators can negotiate deals and allocate distributions directly through a blockchain-based system without the hindrance of “middlemen”).

317. See *id.*

318. See Sean A. Pager, *Making Copyright Work for Creative Upstarts*, 22 GEO. MASON. L. REV. 1021, 1044–45, 1044 n.142 (2015) [hereinafter Pager, *Creative Upstarts*].

withholding payment, or applying skewed, black-box distribution formulas. The system is frictionless, immediate, free, and totally transparent. Moreover, in one leap it creates a viable, trustworthy licensing model. Indeed, it transforms China from a predominantly *maiduan* copyright culture to the most advanced music-licensing system in the world—a model for every other country to follow.³¹⁹

A state-of-the-art digital licensing ecosystem would advance the public interest by more effectively and efficiently doing what copyright is designed to do—support creative endeavors and thereby promote the progress of culture and knowledge by enabling creators to extract the value of their works from the marketplace. But it could also advance the public interest by formally embedding into the system a public use licensing regime. Imagine if, in the system described above, the creator could also optionally indicate open access and public use permissions, similar to Creative Commons (CC) licenses, as part of the registration process.³²⁰ These permissions would be definitively recorded in the registration blockchain and automatically signal use permissions to all platforms and users web-wide—far more definitively than the ad hoc CC tagging functionality built into some Western search engines and video sites.³²¹ Guan Tang has argued that, although knowledge sharing is an important aspect of both Confucian and socialist tradition in China, CC and open access have failed in China largely because of a lack of top-down state support.³²² Including CC-like permissions in a national registration and rights database would in one stroke embed open access more deeply and visibly in Chinese copyright law than in any other copyright system in the world.

China clearly already has ambitions in this general direction. The 2020 implementation plan for the National Intellectual Property Strategy directs the

319. We understand that our simplistic example glosses over many complexities, including complexities arising from transnational licensing of works with one or more non-Chinese copyright owners. See Tam, *supra* note 308, at 215–17. We have little doubt these issues will be resolved eventually. But more to the point, our objective is to inspire policymakers to dream without getting bogged down in technical complexities, as doing so early on kills dreams. China can tackle these issues piecemeal, focusing on domestic licensing first and then expanding later. The perfect should not be the enemy of the good.

320. *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about/> (last visited Mar. 10, 2022) (“Creative Commons licenses . . . give every person and organization in the world a free, simple, and standardized way to grant copyright permissions for creative and academic works; ensure proper attribution; and allow others to copy, distribute, and make use of those works.”).

321. *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> (last visited Mar. 10, 2022) (detailing how web service providers including Google and Wikipedia use “machine readable” CC licenses).

322. GUAN H. TANG, COPYRIGHT AND THE PUBLIC INTEREST IN CHINA 36–37 (2011).

State Administration of Radio, Film and Television to research, develop, and implement AI and blockchain standards and technology in the copyright “industrial ecosystem.”³²³ It also directs the Central Propaganda Department to develop a convenient national digital copyright registration system.³²⁴ The extent to which the end result ultimately resembles the system we have sketched above is unimportant. Our point, once again, is not to advocate a specific solution but to inspire Chinese policymakers and industry to dream up the ideal copyright system on their terms, with the knowledge that China already has unique strengths and capabilities to build something close to that ideal.

C. Make Copyright More Friendly and Accessible to Small Creators

China has an outstanding opportunity to lead globally in developing a copyright system that works for small creators as well as big media. As one of us has observed, “the copyright system has grown into an edifice of daunting complexity. Such complexity caters to sophisticated operators while systematically disadvantaging those who lack information and resources. For those in the disadvantaged camp, transaction costs, rather than substantive rights, often dictate outcomes.”³²⁵ That observation, though made about copyright in the United States, applies to copyright systems everywhere, including China. Because of the law’s intimidating complexity, small creators without legal expertise are easily taken advantage of and miss out on many of copyright’s benefits, including access to justice when rights are infringed.³²⁶ The costs of copyright litigation to enforce one’s rights can be far too much for a smaller creator to bear, making copyright’s benefits illusory.³²⁷ A severe shortage of lawyers in China exacerbates the access to justice problem, underscoring the urgency to innovate frugally to streamline legal processes and to develop leapfrog solutions that harness technology to increase access to justice.³²⁸ And indeed, just the burden of having to take off time to physically

323. See *In-Depth Implementation Plan*, *supra* note 208, at art. 81.

324. *Id.* at art. 18.

325. Pager, *Creative Upstarts*, *supra* note 318, at 1022.

326. See *id.* at 1024 (“[U]ndemanding formal entry requirements mask the reality of a copyright system that is far from welcoming to the uninitiated.”).

327. *Id.* at 1029.

328. See Tianyu Yuan & Michael Wang, *Where Is China Heading With Legal Tech?*, ARTIFICIAL LAW. (Oct. 21, 2019), <https://www.artificiallawyer.com/2019/10/21/where-is-china-heading-with-legal-tech/> (“Because China’s legal services market is quite young, it suffers from a shortage of legal professionals. As opposed to one lawyer for every 300 citizens in the US, there is only one lawyer for

appear in court, the commute to which may take hours, can be a deterrence for busy, struggling small creators. A copyright system that is prohibitively complex, expensive, or inconvenient for small creators excludes an important constituency in contravention of fundamental copyright goals.

China can leapfrog development of the law and the copyright ecosystem in numerous ways to improve the lot of small creators. As noted in Section IV.A, radically simplifying copyright law could have wide-ranging benefits. The easier it is for ordinary creators to understand the law without the aid of a lawyer, the more empowered they are and the more accessible justice becomes.³²⁹ Small creators would enormously benefit from simplified legal rules combined with an easily accessible, online registration system of the type outlined in the previous Section. Such a system would be frugally innovative, bypassing the needless complexity of Western systems. In the United States, copyright registration is deceptively complex—the two-page registration form belies the complexity of the doctrinal knowledge needed to avoid pitfalls. Moreover, registration fees, which can range from \$45 to \$125 per work in the United States, can impose a significant burden on struggling artists.³³⁰ China could leapfrog the U.S. registration system easily with a simple, intuitive copyright registration form hosted in WeChat, which is installed on virtually every phone in China and is exceedingly familiar to every user. This would greatly lower the barriers for independent creators to formally participate in the copyright system. Moreover, the digital registration process could be fully automated, with registrations examined *pro forma* by AI software, eliminating the need for a fee and further easing the burden on creators.³³¹

Building a state-of-the-art digital registration and licensing system would also significantly ease the burdens that clearing copyright imposes on small creators.³³² Many forms of creativity build on and incorporate preexisting copyrighted expression. Negotiating licenses for such preexisting works can be a costly, time-consuming process. Indeed, the transaction costs entailed merely to identify the relevant rightsholders to approach can be daunting. As commentators have noted, because registration is not required in most

every 4,500 citizens in China. Thus, a major application of LawTech is to use technology to make legal advice and proceedings accessible and affordable for ordinary citizens.”).

329. See Litman, *supra* note 265, at 43.

330. See Pager, *Creative Upstarts*, *supra* note 318, at 1029.

331. See generally Pech, *supra* note 314, at 22 (discussing potential AI applications for an online copyright registration system).

332. See Litman, *supra* note 265, at 33 (detailing how “ordinary people” are burdened by arcane copyright regulations and access barriers in the United States).

countries, basic information as to who owns what is often hard to find.³³³ Even in the United States, which does incentivize registration more than most countries, the primitive nature of the U.S. Copyright Office database makes clearing rights a perilous exercise.³³⁴ Accordingly, copyright law often fails the basic notice function that an efficient property law is supposed to ensure.³³⁵

A modern Chinese copyright registration system built around state-of-the-art, AI-enhanced search capabilities would represent a vast improvement over the status quo. If such a system incorporated the smart licensing and payment distribution functionality envisaged in the previous Section, it would leapfrog global rivals—and the U.S. registration system specifically—by light years in terms of functionality and benefit to creators—small creators particularly.³³⁶

China also has an opportunity to leapfrog the West regarding access to copyright justice.³³⁷ To have value as property rights, copyrights must be enforceable. However, for many individual creators and small creative businesses, the costs of copyright litigation—which can run in the tens to hundreds of thousands of dollars or more—are prohibitive.³³⁸ Given that even in successful copyright litigation in China the average damages awarded are under \$10,000, the effort for the small creator seems fruitless.³³⁹ Awarding attorney fees to prevailing plaintiffs in cases of clear-cut infringement could partly remedy this defect.³⁴⁰ However, a more complete solution would require reducing litigation costs to begin with by streamlining the process.³⁴¹ Since we are dreaming, it is worth imagining the ideal system.

333. See, e.g., LaFrance, *supra* note 307, at 319–20.

334. See John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1428 (2009).

335. Peter S. Menell, *Economic Analysis of Intellectual Property Notice and Disclosure*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 424 (Ben Depoorter & Peter S. Menell eds., 2018).

336. See *supra* Section IV.B.

337. See Pager, *Creative Upstarts*, *supra* note 318, at 1029 (observing that the “the high cost of litigating copyright cases in federal court disadvantages under-resourced creators”).

338. See Tehranian, *supra* note 334, at 1409.

339. See Priest, *Copyright Extremophiles*, *supra* note 88, at 477–78.

340. China’s Supreme People’s Court has recently authorized attorney fee awards to IP defendants in certain cases. See Aaron Wininger, *China’s Supreme People’s Court Clarifies That Defendants May Be Entitled to Attorney Fees and Expenses in IP Litigation*, NAT’L L. REV. (June 4, 2021), <https://www.natlawreview.com/article/china-s-supreme-people-s-court-clarifies-defendant-may-be-entitled-to-attorney-fees>. The availability of *plaintiff* awards remains unsettled. *Id.*

341. See Litman, *supra* note 265, at 40.

The United States attempted to address this problem with the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), which establishes a small claims administrative tribunal system within the U.S. Copyright Office for copyright owners who seek damages under \$30,000 for copyright violations.³⁴² The CASE Act combines frugal innovation with leapfrog elements that benefit creators. It provides for simplified procedures that the average person could navigate without an attorney, greatly reducing costs.³⁴³ It also contains a progressive feature critical for access to justice: cases are handled remotely, further reducing the cost and burden for both parties.³⁴⁴ However, the CASE Act contains a fatal flaw that greatly undermines its utility to small creators: due to concerns that an extrajudicial small claims tribunal might be unconstitutional, the defendant cannot be compelled to participate; her participation in the proceedings is completely voluntary.³⁴⁵

China is ideally positioned to take and improve upon the best features of the CASE Act, while jettisoning its fatal flaw. China has experimented extensively with ways to increase access to justice, including “internet courts”: virtual courts with proceedings held entirely online for matters arising from e-commerce and other online activity, including online copyright infringement.³⁴⁶ Indeed, the first virtual court app, by which users could attend trials

342. 17 U.S.C. § 1504(e)(1)(D) (enabling a tribunal to hear claims for matters totaling \$30,000 or less).

343. See § 1504(a) (allowing voluntary participation in the proceedings in a wide range of courts and forums).

344. See 17 U.S.C. § 1506(c) (“Proceedings before the Copyright Claims Board Shall—(1) be conducted at the offices of the Copyright Claims Board without the requirement of in-person appearances by parties or others . . .”).

345. Despite that participation is voluntary for CASE Act defendants, concern over CASE proceedings’ constitutionality remains and recent Supreme Court case rulings have heightened such doubts. See Pamela Samuelson & Kathryn Hashimoto, *Scholarly Concerns About a Proposed Small Copyright Claims Tribunal*, 33 BERKELEY TECH. L.J. 689, 691–97 (2018).

346. See Sandra M. Aistars, *Ensuring Only Good Claims Come in Small Packages: A Response to Scholarly Concerns About a Small Copyright Claims Tribunal*, 26 GEO. MASON L. REV. 65, 83–85 (2018) (arguing that China’s existing Hangzhou Internet Court provides an instructive example for the viability of CASE Act tribunals); Jason Tashea, *China’s All-Virtual Specialty Internet Courts Look Set To Expand into Other Areas of the Law*, ABA J. (Nov. 1, 2019, 2:00 AM), <https://www.abajournal.com/magazine/article/china-all-virtual-specialty-internet-courts>. We note that although Professor Aistars asserts that in the Hangzhou Internet Court a defendant’s participation is voluntary, it appears from our research that that may not be the case. See 杭州互联网法院诉讼平台审理规程 [*Hangzhou Internet Court Litigation Platform Trial Rules*], at art. 16, <https://www.netcourt.gov.cn/#lassen/litigationDocuments> (providing that the defendant “may” within a specified period provide a response, but the failure to answer “does not affect the law,” suggesting that upon the defendant’s failure to respond the case proceeds ex parte and the court’s decision is binding on the defendant).

from home via video call, submit court files, and give testimony all by WeChat, originated in the Beijing Intellectual Property Court and has been used in millions of trials, including, frequently, intellectual property trials.³⁴⁷ China is even experimenting with virtual AI judges who preside over remote, app-based proceedings to address the shortage of judges in the legal system and expedite relatively simple cases.³⁴⁸ The Hangzhou Internet Court already provides a limited virtual tribunal for online copyright infringement disputes.³⁴⁹ But China could go further to create a specialized, national, virtual copyright court incorporating the kinds of innovations we have discussed, and in which participation by defendants would be mandatory and judgments binding. All of these innovations would serve a copyright small claims court well to facilitate expeditious, affordable, convenient justice. Moreover, as the existence of the aforementioned cyber courts demonstrates, there is no constitutional or other legal obstacle to establishing new, specialized courts in China.³⁵⁰ Such a court has the potential to be dream-like to a small creator whose modest livelihood is threatened by infringement, offering precisely the kind of accessible justice independent creators need to make their rights meaningful.³⁵¹

347. See Tashea, *supra* note 346.

348. CGTN, *AI Judges via Chat App: The Brave New World of China's Digital Courts*, YOUTUBE (Dec. 6, 2019), <https://www.youtube.com/watch?v=yuUN6VWF-Q>.

349. Aistars, *supra* note 346, at 83–85; Dani Deahl, *China Launches Cyber-Court To handle Internet-Related Disputes*, THE VERGE (Aug. 18, 2017), <https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes>.

350. See Cao Yin, *World's First Internet Court Goes Online in Hangzhou*, CHINADAILY (Aug. 18, 2017), https://www.chinadaily.com.cn/china/2017-08/18/content_30770108.htm (noting the court's approval by “central leadership”).

351. We acknowledge that the use of AI in the context of the judiciary raises significant concerns, including the reduction of judicial autonomy and discretion; the use of algorithms and context-poor dashboard indicators to guide frontline decision-making; the exacerbation of access-to-justice inequalities that arise when only richer litigants have access to legal big-data consultants; and general concerns about the rise of an omniscient “techno-tatorship.” See Stern et al., *supra* note 243, at 547–53. Nevertheless, the number of copyright cases filed annually in China is gobsmacking. In 2018 alone, for example, a whopping 195,408 civil copyright cases were filed in China. See LIAOTENG WANG, A JURISDICTIONAL VIEW OF CHINESE IP LITIGATION (Oct. 22, 2019), <https://www.law.berkeley.edu/wp-content/uploads/2019/10/Liaoteng-Wang.pdf#:~:text=Among%20the%20newly%20accepted%20cases%2C%20there%20were%2021%2C699,Has%20Been%20Experiencing%20An%20IP%20Litigation%20Boom%20www.beijingeastip.com>. Many of these cases involve simple copyright issues that are relatively easily adjudicated but clog up the judicial system. Using AI algorithms to help resolve the simple cases, while human judges’ bandwidth is reserved for more complex or higher stakes cases, could greatly increase judicial efficiency. Furthermore, the use of AI in straightforward civil copyright cases raises fewer of the aforementioned concerns than, for example, using AI in criminal cases of any kind.

Finally, making copyright accessible to small creators may also require developing additional support systems that empower creators to exercise their rights effectively outside the courtroom.³⁵² As noted, China suffers from a shortage of lawyers, and legal fees, in any case, are beyond the budget of many upstart creators.³⁵³ Even in a simplified copyright system, small creators may struggle to negotiate and draft licenses or work-for-hire agreements.³⁵⁴ Here too, technology can help. Computerized expert systems could guide creators through a menu of choices, offering simple explanations as to the tradeoffs between standardized options, helping them arrive at a solution tailored to their needs while performing the legwork to implement the requisite language.³⁵⁵ China already has a wealth of legal technology companies who are developing systems of this kind for high-frequency scenarios such as traffic accidents and employee disputes.³⁵⁶

D. Embrace Leapfrog Technologies for Next-Generation Copyright Enforcement

The area in which China seems most intentional about technological leapfrogging at present is enforcement. This is unsurprising since ineffective copyright enforcement has long been number one on the list of complaints by both international and domestic copyright owners. In the 2000s, most content, whether online or in physical form, was piratical. Today, virtually all content is distributed and consumed online, and far more is authorized than ever before.³⁵⁷

The improved enforcement environment, however, has partially come at a steep long-term cost to the copyright ecosystem. As noted in Section IV.B above, most content licenses in China are exclusive. This practice has the

352. See Pager, *Creative Upstarts*, *supra* note 318, at 1021–23.

353. See Jun Mai, *Xi Jinping Says China Has a Legal Problem: Finding the Lawyers To Defend Its Interests Abroad*, S. CHINA MORNING POST (Mar. 1, 2021, 9:00 AM), https://www.scmp.com/news/china/politics/article/3123130/xi-jinping-says-china-has-legal-problem-finding-lawyers-defend?module=perpetual_scroll&pgtype=article&campaign=3123130 (noting China’s “lack of legal talent”).

354. See Pager, *Creative Upstarts*, *supra* note 318, at 1027–28.

355. See *id.* at 1051–52 (stating that the “next step” in establishing an effective and equitable copyright system is “to design software that goes beyond offering advice and actively assists [inexperienced creators] with copyright transactions”).

356. See Yuan & Wang, *supra* note 328.

357. See Priest, *Meet the New Media*, *supra* note 125, at 1082–92 (discussing the rapid acceleration of digital content licensing and copyright enforcement in China).

drawbacks discussed above but one short-term, major benefit: it aligns the interests of copyright owners with distribution platforms (e.g., music streaming services, streaming video platforms, and e-publishing platforms) who are predominantly exclusive licensees.³⁵⁸ Because exclusive licensees invest steep, sunk, upfront costs to acquire exclusive rights in attractive content that they expect to give them a competitive edge, they are motivated to scour the web for infringements and have the legal resources to eliminate them.³⁵⁹ These exclusive licensees—mostly Chinese internet behemoths—can marshal in their enforcement efforts technical expertise, war chests, and political clout that copyright owners could only dream of.³⁶⁰ Many copyright owners have celebrated the fact that they finally have major internet companies as enforcement agents in China. But as noted above, a copyright ecosystem dominated by exclusive licenses will ultimately suffer from stunted development.³⁶¹ Eventually, China’s copyright system must transition to a nonexclusive-license-dominant system—indeed, regulators have already moved to quash exclusive licensing in the music space.³⁶² At that time, much of the enforcement burden will fall back on copyright owners, who will have to rely on an enforcement environment capable of delivering consistent, meaningful results without the aid of internet behemoths. Moreover, even in the age of exclusive licensing and digital platform enforcement efforts, stubborn pockets of infringement that cost copyright owners billions still pepper the Chinese web.³⁶³ Accordingly, a dream enforcement environment still remains an important aspiration in China.³⁶⁴

China has made technological leapfrogging in the enforcement space a strategic priority tied to broader state efforts to advance capabilities in blockchain, smart contracts, and AI.³⁶⁵ The 2020 Implementation Plan for the

358. See Montgomery & Priest, *supra* note 124, at 347–48.

359. *Id.*

360. See *id.* at 348.

361. See *supra* Section IV.B.

362. See *supra* note 276 and accompanying text; see also Frater, *supra* note 276.

363. See Qian Chen, *Plagiarism Is Rampant in China, and Its Media Companies Are Raking in Billions*, CNBC (Jan. 23, 2018, 9:27 PM), <https://www.cnbc.com/2018/01/23/ip-plagiarism-is-rampant-in-china-and-media-companies-profit-from-it.html>.

364. See *id.* (pointing out that “[c]urrent Chinese laws . . . are relatively lenient towards online plagiarism—with a maximum compensation of . . . about \$76,700[] for lawsuits”—and suggesting that “changes” to these enforcement mechanisms “may be on the horizon”).

365. See *China Uses Blockchain Technology To Shore Up Copyright Protections for Digital Works*, CHINA BANKING NEWS (June 3, 2021), <https://www.chinabankingnews.com/2021/06/03/china-uses-blockchain-technology-to-shore-up-copyright-protections-for-digital-works/> (noting that the

National Intellectual Property Strategy calls for the “establishment of national standards for China’s digital copyright protection technology” and use of “new technologies such as artificial intelligence and blockchain in the field of radio, television[,] and network audiovisual copyright protection.”³⁶⁶ Experimentation with such technologies is already well underway in copyright litigation scenarios.³⁶⁷ A blockchain-enabled registry (not unlike the national registry envisioned in Section IV.B above) is already accepting submissions from authors to create tamper-proof, permanent records of their work and ownership information.³⁶⁸ This enables authors to prove copyright ownership in court—a far-too-burdensome and expensive procedural hurdle in Chinese copyright infringement litigation that can significantly impede enforcement efforts.³⁶⁹ The use of blockchain for evidentiary purposes is a meaningful improvement in civil and administrative copyright enforcement.³⁷⁰

However, if China aims for a truly leapfrog enforcement system, these and related technologies have the potential for much broader application than just evidentiary and procedural uses in litigation.³⁷¹ A registration system such as the one described in Section IV.B above could be used to identify potential infringements across the web. One imagines that with a secure record of ownership and a work ID on record, a state-run copyright monitoring system, akin to YouTube’s private Content ID program except web-wide on China’s internet, could constantly scan the web for piratical instances of the registrant’s work and notify the copyright owner through the WeChat copyright app dashboard of potential infringements.³⁷² The copyright owner could,

“Chinese judicial system already actively makes use of blockchain solutions, with the [i]nternet courts of Beijing, Hangzhou[,] and Guangzhou using the technology for the processing of evidence”).

366. See *In-Depth Implementation Plan*, *supra* note 208, at art. 81.

367. See *China Uses Blockchain Technology To Shore Up Copyright Protections for Digital Works*, *supra* note 365.

368. See Miranda Wood, *Chinese Court First To Use Blockchain Secured Evidence for Criminal Conviction*, LEDGER INSIGHTS (Nov. 4, 2019), <https://www.ledgerinsights.com/china-court-conviction-blockchain-secured-evidence/>.

369. See *China Uses Blockchain Technology To Shore Up Copyright Protections for Digital Works*, *supra* note 365 (noting how blockchain gives a path for the registration, trading, and maintenance of online copyrights).

370. See *id.* (calling blockchain a “natural fit” with copyright enforcement and noting its use for processing evidence in internet courts).

371. See *id.* (suggesting that blockchain technology can be used for much more than the “processing of evidence,” such as infringement monitoring, letter delisting, and copyright mediation).

372. Leading Chinese content platforms already deploy filtering technologies to detect and root out infringing content on their sites. And, of course, the Chinese government notoriously engages in far more intrusive monitoring of online content for other purposes. We acknowledge the risk that free

with a click of a button on the app, issue takedown notices to all sites identified. If such a system were combined with a notice-and-stay-down regime akin to the framework established by Article 17 of the European Union Copyright Directive, the platforms that host the infringing content would be required to remove it and use best efforts to prevent its reappearance or face liability.³⁷³ Because the infringement notices would be issued in conjunction with the ownership data in the blockchain, the notice would be automatically verified, removing the evidentiary hurdle some platforms impose on copyright owners to delay procedures. Combined, these technologies and provisions would enable large and independent copyright owners alike to achieve a level of efficiency and simplicity in their enforcement efforts that would be unrivaled in the world.

As noted above, enforcement by itself is not a value add. Our dream copyright system, therefore, would not just streamline and improve enforcement; it would provide an effortless solution to instantly convert infringement into licensed use. The WeChat copyright app could provide the copyright owner with the option of including with the takedown notice an offer to license her content. With the click of a button, the site hosting the infringing content could then disable the takedown request, continue making the content available, and begin issuing micropayments according to the terms of the offer, which would presumably be default, industry-standard terms in most cases. The platform would always have the option to decline the license and remove the content. But if the platform ignores the license option and takedown request after a specified period of time, the copyright owner could launch a virtual infringement action directly through the app.³⁷⁴

E. Ensure a Competitive Marketplace for Distribution of Copyrighted Works

China's recent history demonstrates why its dream copyright regime needs to be situated in a robust competitive content distribution marketplace.³⁷⁵ As one of us has noted elsewhere, revenue stream diversity is critical

speech, civil liberties, and secondary innovation could be impinged through expanded use of filtering technologies. Striking the appropriate balance requires a broader discussion beyond the present scope. Our point here is only that such capabilities already exist and, appropriately calibrated to target unambiguous instances of infringing content, could potentially deliver substantial benefits.

373. See Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 Relating to Copyright on the Digital Single Market, 2019 O.J. (L 130) 92.

374. See Tashea, *supra* note 346 (discussing litigation hosted via WeChat app).

375. See Priest, *Copyright Extremophiles*, *supra* note 88, at 520, 539 (“[T]he optimal environment for cultivating high quality creative production is one that supports a stable, economically robust

to develop and sustain vibrant content industries in China.³⁷⁶ Having multiple viable distribution channels is a key condition for copyright revenue stream diversity.³⁷⁷ In a two-sided market, in which the intermediary is both the buyer and seller of content, market dominance is harmful not only for competitors and consumers but also for copyright owners because that intermediary becomes a monopsony (the dominant buyer) and has enormous negotiating leverage to put downward pressure on licensing fees.³⁷⁸ In 2011, China's mobile phone providers controlled the \$4 billion market for ring-back tones (that is, "hold music" a subscriber chooses for callers to listen to as they await the subscriber's answer).³⁷⁹ The mobile companies used their dominance to keep 98% of the revenues for themselves.³⁸⁰

The pervasiveness of exclusive licensing described in Section IV.B has helped drive an extreme winner-takes-all market for digital distribution services, especially in China's music-streaming industry.³⁸¹ Starting around 2014, Tencent obtained exclusive licenses from the major international record companies, most large regional record companies, and many independent labels.³⁸² This made some sense at the time because the deals were lucrative and were essentially "found money" for copyright owners in a market that had yielded little before. Moreover, as noted above, Tencent was welcomed as a well-funded, well-connected partner in the fight against rampant online piracy in China.

The plan was that Tencent would act as copyright owners' exclusive agent in China and sublicense the rights to Tencent's competitors. In other words, Tencent became a de facto licensing collective with exclusive licenses for sound recordings and underlying compositions.³⁸³ Notably, this practice is

professional creative ecosystem.”).

376. *See id.* at 514–20.

377. *See id.* at 518–20.

378. *Id.*

379. *Id.* at 501–02.

380. *Id.* at 540.

381. *See supra* Section IV.B.

382. *See, e.g.,* Cate Cadell, *China's Tencent Seals Exclusive Music Licensing Deal with UMG*, REUTERS (May 16, 2017, 3:58 AM), <https://www.reuters.com/article/us-tencent-umg-idUSKCN18C16A>; *Sony Music Inks New Exclusive China Deal with Tencent for Digital Catalogue*, MUSIC BUS. WORLDWIDE (Oct. 3, 2016), <https://www.musicbusinessworldwide.com/sony-music-re-signs-china-deal-tencent-digital-catalogue/> (noting that Tencent had signed exclusive licensing deals with Warner, Sony, and other Western labels beginning in 2014).

383. *See Priest, Meet the New Media, supra* note 125, at 1086–87 (describing the exclusive copyright agent model and how this system has played out in the Chinese music industry).

largely unique to China.³⁸⁴ Exclusive content licenses in developed markets are rare, especially in the music context; nonexclusive licensing is the norm. This explains why music-streaming services from Apple, Spotify, Amazon, and Tidal have largely the same catalog offerings.³⁸⁵ Copyright owners believe that content is best monetized—and consumers best served—when a plethora of outlets distribute the content.³⁸⁶ Moreover, they always worry about conferring too much market power on one intermediary through exclusive licensing, so any exclusive licensing deals tend to be very limited in scope and duration.³⁸⁷ Network effects make online intermediaries tremendously powerful. If that power is compounded with the market power that comes from holding a vast portfolio of long-term exclusive licenses to the most popular content, the intermediary’s dominance is all but assured.³⁸⁸ Predictably, therefore, Tencent achieved a 73% market share.³⁸⁹ Tencent’s nearest competitor, NetEase, has just 21% of the market.³⁹⁰

To appreciate how dominant Tencent has been, consider that, in the United States, performance rights societies ASCAP and BMI have been under the aforementioned Department of Justice consent decrees for eighty years because of concerns about their market power and effects on competition.³⁹¹ ASCAP and BMI are forbidden from acquiring exclusive licenses because of

384. *Id.* at 1083.

385. See Ty Pendlebury, *Best Music Streaming Service for 2021*, CNET (Oct. 19, 2021, 9:27 AM), <https://www.cnet.com/tech/services-and-software/best-music-streaming-service/> (noting that most music streaming services “offer [similar] music catalogs of over 60 million songs”). Because of differences in how music and video are consumed, exclusive licenses in the video-streaming context are more common, even in the United States where video-streaming providers tend to use exclusive content deals—and ownership of originally produced content in vertical integration models—as ways to establish market dominance. See Julia Alexander, *NBC and CBS’s New Peacock Deal Highlights How Complicated Keeping up with Streaming Will Become*, THE VERGE (July 1, 2020, 12:14 PM), <https://www.theverge.com/2020/7/1/21309854/peacock-nbc-universalviacomcbs-paramount-show-time-streaming-licensing>. Hence, we see platform wars between Netflix, Disney Plus, Apple TV+, and so on. *Id.*

386. See Dan Schechter, *Why TV Content Owners Should Stream on Multiple Platforms*, THE WRAP (Aug. 24, 2016, 8:30 AM), <https://www.thewrap.com/why-tv-content-owners-should-stream-multiple-platforms/>.

387. See Priest, *Meet the New Media*, *supra* note 125, at 1090 (explaining that, in the United States, exclusive content deals are “less common” and are typically only used as part of a limited, windowed retail release strategy for a handful of blockbuster titles).

388. See *id.* at 1090–91.

389. See Zhanhang Ye, *ByteDance Reportedly Will Roll out Domestic Music Streaming App in 2021*, TECHNOD (Sept. 17, 2021), <https://technode.com/2021/09/17/bytedance-to-roll-out-china-music-streaming-app-in-2021/>.

390. See *id.*

391. See *supra* note 305 and accompanying text.

the formidable market power exclusive licenses confer.³⁹² Tencent, were it situated in the United States, would be akin to ASCAP and BMI rolled into one entity that controls exclusive rights to most sound recordings and compositions *and* happens to own Spotify and Apple Music, too. Predictably, competitors in China's streaming music space complained that Tencent abused its market power by offering sublicenses at extortionate prices.³⁹³ In 2020, SAMR imposed on Tencent something like a consent decree: Tencent must unwind its exclusive deals with record labels, and although it was allowed to retain exclusive licenses with individual artists, it must sublicense those rights under reasonable terms.³⁹⁴ The move was likely too little too late. Regulators were aware of complaints for years, but by the time they acted, Tencent had enjoyed ample opportunity to cement its dominance. As *Variety* reports,

While some commentary has pointed to the ruling as a landmark in which the SAMR is taking retrospective action against a merger deal that cannot be undone, its impact may in fact be smaller. One of Tencent Music's more serious music streaming rivals, the Alibaba-backed Xiami Music, shuttered in February.³⁹⁵

In early 2022, the National Copyright Administration of China entered the fray, promulgating a general ban on most exclusive licenses in the digital music space.³⁹⁶

392. See Michael A. Einhorn, *The ASCAP and BMI Consent Decrees: Is Partial Withdraw Wise?*, 62 J. COPYRIGHT SOC'Y U.S.A. 199, 200 (2014) (pointing out that "[l]icensing under the Consent Decree is non-exclusive").

393. Frater, *supra* note 276.

394. *Id.*

395. *Id.*

396. Eduardo Baptista, *China Bans Most Exclusive Copyright Deals for Digital Music Platforms*, REUTERS (Jan. 6, 2022), <https://finance.yahoo.com/news/chinas-copyright-authority-bans-digital-103557779.html>. Interestingly, the 2020 Draft Copyright Law Amendments proposed language that would prohibit copyright owners from "affect[ing] the normal communications of works by abusing their rights when exercising their copyright." See 中华人民共和国著作权法修正案(草案) [Draft Amendment to the Copyright Law of the People's Republic of China], art. 4 (Nat'l People's Cong., June 5, 2020), <https://npcobserver.files.wordpress.com/2020/04/copyright-law-draft-amendment.pdf>. There was some speculation that this language might have been intended to give the National Copyright Administration of China authority to penalize the use of copyright in ways that have anticompetitive effects. See Mark Cohen, *Public Interest and Private Rights in the Copyright Law Amendments*, CHINA IPR (June 7, 2020), <https://chinaipr.com/2020/06/07/public-interest-and-private-rights-in-the-copyright-law-amendments/>. The draft language never made it into the 2020 Copyright Law as promulgated, but that seems not to have deterred National Copyright Administration officials from exercising antitrust regulator-like authority over competition in the digital music market.

The regulatory action to rein in Tencent's market power was necessary, but it also exacerbates a problematic trend in China: approaching intellectual property as a regulatory regime in which top-down state control over markets for information goods displaces a decentralized market based on property rights.³⁹⁷ Price controls, compulsory licenses, and other tools of market regulators designed to level the competitive playing field for licensees can result in a host of problems that inhibit the development of the kind of vibrant cultural industry ecosystem we have argued is key to the Chinese Dream.³⁹⁸ Technological and legal innovations of the kinds we have outlined herein would allow China to leapfrog past such heavy-handed, inefficient twentieth-century managerial models and return to market-based solutions.

Thus, in our "dream" copyright system, the state's ideal role is supporting and facilitating a market infrastructure with the kinds of solutions we envision in previous Sections. Central regulation of information goods markets is unnecessary if the legal, administrative, and technological infrastructure is in place to facilitate and encourage a well-functioning market for private licensing transactions. Technological solutions that facilitate convenient and affordable nonexclusive licensing via multiple outlets network-wide and ensure a transparent, reliable, and efficient royalty distribution will eventually make the exclusive licensing and *maiduan* practices less attractive and less necessary for Chinese copyright owners. This discussion might seem academic, at least in the music streaming space, since Tencent's dominance is already well settled despite SAMR's belated clampdown.³⁹⁹ However, we think these principles still have tremendous currency. First, leveling the licensing landscape through market-oriented policies that promote nonexclusive licensing to diverse outlets can stimulate the development of more outlets and promote competition in the streaming space.⁴⁰⁰ Second, as Elton John once sang, "sooner

397. See, e.g., Mark Cohen, *Reviewing Recent Literature on the WTO and Antitrust in IP*, CHINA IPR (Aug. 9, 2021), <https://chinaipr.com/2021/08/09/reviewing-recent-literature-on-the-wto-and-antitrust-in-ip/>. China is not alone in the creep toward regulatory IP regimes; the trend is well-recognized by U.S. legal scholars. See, e.g., Joseph P. Liu, *Regulatory Copyright*, 83 N.C.L. REV. 87, 88 (2004); Mark A. Lemley, *The Regulatory Turn in IP*, 36 HARV. J.L. & PUB. POL'Y 109 (2013); ROBERT P. MERGES, CATO INSTITUTE, *COMPULSORY LICENSING VS. THE THREE "GOLDEN OLDIES": PROPERTY RIGHTS, CONTRACTS, AND MARKETS, POLICY ANALYSIS* (2004).

398. See e.g., MERGES, *supra* note 397, at 6–7.

399. See Frater, *supra* note 276 (speculating that SAMR's clampdown on Tencent might be too late to meaningfully alter the competitive landscape in China's music streaming market).

400. See Ye, *supra* note 389 (reporting that, as a result of SAMR's market intervention and invalidation of Tencent's exclusive licenses, another major Chinese internet player, Bytedance, sees an opening to launch a streaming music service that competes directly with Tencent).

or later everybody's kingdom must end."⁴⁰¹ Tencent's dominance will not last forever. New apps, and indeed new methods of delivering music via short-form video or models yet to be conceived, emerge daily to ultimately upend today's incumbents.⁴⁰² A new Chinese internet giant, Bytedance, has already emerged in recent years to challenge Tencent's dominance in China's online media and social networking sphere. Currently, Bytedance's Douyin app, which is the China-focused version of Bytedance's globally successful TikTok short-form video app, boasts 443 million Chinese users—more than half of China's enormous population of mobile internet users.⁴⁰³ Like Tik-Tok, Douyin has become a major destination for users to stream music and discover new artists and content, cutting into Tencent's music market.⁴⁰⁴ Now that Tencent no longer has exclusive rights to major content, Bytedance is planning to leverage its success in the short-form video market to launch a dedicated music-streaming platform in China to directly compete with Tencent's music services.⁴⁰⁵ At the same time, new rivals are already chipping away at Douyin's dominance in the socially networked video space with their own signature features that distinguish them from Douyin and other rivals.⁴⁰⁶ As new competitors and new paradigms ascend, they should arise into a licensing environment optimized to promote competition through market forces and nonexclusive licensing practices, lessening the need for top-down market controls.

VI. THE CHINESE COPYRIGHT DREAM REQUIRES EMBRACING BOTTOM-UP CREATIVITY

A last—and perhaps most important—component of the Chinese copyright dream is a commitment to embracing bottom-up creativity. We have argued—as have Chinese copyright officials—that copyright is a pillar of the

401. ELTON JOHN, *The King Must Die*, on ELTON JOHN (DJM Records 1969).

402. Cf. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 84 (Routledge 2003) (1943) (describing the cyclical economic process of “creative destruction” by which entrepreneurial startup firms undermine and ultimately replace successful incumbent firms).

403. Shawn Lim, *Can Douyin's Regional Rivals Challenge It for Top Dog in China's Short-Form Video Market?*, THE DRUM (June 22, 2021), <https://www.thedrum.com/news/2021/06/22/can-douyin-s-regional-rivals-challenge-it-top-dog-china-s-short-form-video-market>.

404. See Saheli Roy Choudhury, *The Chinese Version of TikTok Now Has 600 Million Daily Active Users*, CNBC, <https://www.cnbc.com/2020/09/15/bytedance-douyin-has-600-million-daily-active-users.html> (Sept. 16, 2020, 4:33 AM).

405. See Ye, *supra* note 389.

406. See Lim, *supra* note 403.

Chinese Dream and, thus, a pillar of China's economic and social development in the twenty-first century.⁴⁰⁷ But developing a copyright system that fulfills this promise will require a marked deviation from China's standard technocratic development playbook. The kind of creative "masterpieces" that Chinese officials recognize are necessary to undergird a world-class creative economy cannot be engineered top-down like poured concrete for a freeway. Modern propaganda works that reflect what central authorities want consumers to see, not what creatives conjure or the market demands, are bound to fall flat.⁴⁰⁸ And while today's savvily produced patriotic films featuring high production values and dazzling A-list stars look the part superficially, their novelty appeal will wane without a fresh infusion of new ideas. In the long run, compelling art and culture that connects deeply with audiences, has lasting value and global appeal, and indeed, inspires dreams, is most likely to arise from autonomous, decentralized processes.

Of course, even in a "dream" copyright ecosystem the state plays a critical role. That role, however, is ideally limited to developing and implementing the technical and legal infrastructure to support a world-leading ecosystem for the production and commercialization of cultural goods and then largely stepping back to allow cultural production to bubble up organically into a well-functioning free market. In China, of course, it is not just a dream but a pipe dream to imagine that in the foreseeable future the state would take a fundamentally hands-off approach to cultural production. This fact need not be fatal to China's copyright aspirations, however. While centralized control and decentralized production may seem contradictory, they are not zero-sum but rather coexist on a sliding scale.⁴⁰⁹ The state can provide infrastructure to support decentralized cultural production and still practice censorship and some measure of central control.⁴¹⁰ The key issue is the degree of control: the more

407. See Zhang Jianchun, *Comprehensively Strengthen Copyright Protection and Promote the Construction of a New Development Pattern*, NAT'L COPYRIGHT ADMINISTRATION (June 3, 2021), https://www.ncac.gov.cn.translate.googleusercontent.com/secure/cnacopyright/contents/12227/354439.shtml?_x_tr_sl=zh-CN&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=ajax,elem&_x_tr_sch=http (discussing and analyzing the keynote speech of the Vice Minister of China's Central Propaganda Department at the 2021 China Internet Copyright Protection and Development Conference). "It can be said that copyright has become the most important basic resource for the development of cultural industries, and the copyright industry has become an important pillar of my country's national economy." *Id.*

408. See, e.g., Priest, *Copyright Extremophiles*, *supra* note 88, at 491 n.133 (recounting the story of the high-profile 2013 propaganda film *Young Lei Feng* that closed on opening day, despite bullish expectations, after reportedly failing to sell "a single ticket" in several major cities).

409. See generally Priest, *Copyright and Free Expression*, *supra* note 33.

410. See e.g., Hongsong Song, *The Development of Copyright Law and the Transition of Press Control in China*, OR. REV. INT'L L. 249, 304 (2014) ("The evolution of copyright law in China reveals

top-down control the Party exercises over cultural production, the more fettered China's copyright dream and, consequently, we argue, the more fettered the Chinese Dream.⁴¹¹

Thus, reaching the heights we have imagined in this Article will require understanding of the value of strong cultural industries as being more than propaganda vessels. It will require acceptance that bottom-up processes, not central engineering, are the best way to get there. And it will require a deeper commitment within China's leadership to copyright law.

Copyright has long been half-heartedly embraced by Chinese officials.⁴¹² While understood as a necessary evil, the party has an internally contradictory disposition toward it.⁴¹³ On the one hand, copyright is necessary to comply with international commitments, and there is growing recognition of its importance to sustain cultural industries, whose growth is valued for many of the reasons we have highlighted above. On the other hand, because copyright transfers some measure of control over expressive communication—the medium of ideology—to private parties, it is viewed with suspicion.⁴¹⁴ Such internal ambivalence means that copyright is promoted while simultaneously restrained or even hamstrung by official recalcitrance.⁴¹⁵

Accordingly, a threshold requirement of any Chinese copyright dream arguably must be to overcome such ambivalence. Otherwise, official obstruction could render other reforms nugatory. What is needed is an unambiguous, full-throated endorsement from the top levels of government and assignment of concomitant priority to the copyright mission. To dream boldly, you have to commit. After all, you cannot dream with one eye open.

Thinking globally, China's aspirations of restoring itself to global cultural power status, with the coveted attendant soft-power benefits, will always remain unfulfilled so long as China's creators are shackled by censors. Authenticity is vitally important to media and art. If global audiences believe the speaker lacks the freedom to express herself, the speaker's ability to connect

that the reemergence, development, and improvement of China's copyright law positively correlates with the degree of relaxation of press control in these sectors. Without the various reforms and open door policies and the subsequent media commercialization, the reintroduction of copyright into China would have been impossible.”).

411. *See, e.g., id.* at 295.

412. *See id.* at 270 (noting that since its inception in the PRC, copyright law has been dogged by official concerns about putting information production and ownership in private hands).

413. *See id.*

414. *See id.*

415. *See id.* at 305.

with the audience is lost.⁴¹⁶ This dynamic has long undermined China's efforts to accumulate soft power. As Joseph Nye observes, governments cannot engineer soft power the way they engineer military or economic power because soft power emanates from culture and values, which are in the sphere of civil society rather than government.⁴¹⁷ Indeed, if audiences suspect the government's fingerprint is on the cultural production, its soft power potential is usually decimated.⁴¹⁸ "Soft power depends on credibility, and when governments are perceived as manipulative and information is seen as propaganda, credibility is destroyed."⁴¹⁹ Because of China's pervasive censorship, works that derive from the Mainland are believed to have been approved by censors and lack authenticity in the minds of audiences.⁴²⁰ Works produced outside the censorship apparatus are more likely to be viewed as authentic, especially if they are subversive.⁴²¹ But subversive works tend to have a tarnishing rather than burnishing effect on China's global image.

Today, it is hard to imagine a future when all artists in China enjoy unfettered creative freedom and China experiences a new golden age of cultural diversity and innovation. After all, nearly a decade after Xi heralded the Chinese Dream, his own dream for China's cultural industries appears to involve ever-tighter content controls, primacy placed on propaganda productions, and a backward-looking fixation on Mao-era revolutionary productions.⁴²²

Some speculate that Xi's regime has cast aside its aspirations to global soft power—that Xi's purpose for creating strong cultural industries is not to cultivate dreams or influence global views of China but rather to create a louder, more effective megaphone for Party messaging.⁴²³

Such claims seem overstated. China's historical legacy of cultural

416. See Robert Daly, *A Rise Without Shine: The Global Weakness of Chinese Culture*, WILSON CTR. (Sept. 13, 2016), <https://www.wilsoncenter.org/article/rise-without-shine-the-global-weakness-chinese-culture-qu-cheng-shui-bu-dao> (arguing that Chinese popular culture lacks global appeal because of a lack of artistic credibility resulting from pervasive censorship).

417. See Nye, Jr., *China's Soft Power Deficit*, *supra* note 140.

418. See *id.*; Daly, *supra* note 416.

419. NYE, JR., *THE FUTURE OF POWER*, *supra* note 138, at 83.

420. See Frey mann, *supra* note 39 ("Part of the lack of appeal [of Chinese-produced media designed for foreign audiences] is that foreign viewers know it's produced by the CCP. There's a legitimacy factor: if the audience outside China doesn't think Chinese state media is fair or objective or independent, their first instinct is to disbelieve whatever they're shown.") (quoting Maria Repnikova).

421. See *supra* note 71 and accompanying text.

422. See Rebecca Davis, *China's Film Authority Orders All Cinemas To Screen Propaganda Films at Least Twice a Week*, VARIETY (Apr. 2, 2021), <https://variety.com/2021/film/news/china-communist-party-100th-anniversary-propaganda-1234943360/>.

423. See, e.g., Fischer & Allen-Ebrahimian, *supra* note 82.

hegemony is deeply ingrained in its self-image: China's own name for itself—*Zhongguo*, or “Middle Kingdom”—underscores its aspirations to play a central role in all things, culture included. Therefore, any move away from China's soft power goals would seem at best a tactical retreat. It is also possible that Xi's global soft power aims remain intact, and that a simultaneous inward-focused emphasis on command-and-control culture reflects cognitive dissonance and contradictory impulses in Chinese cultural policy.

Even if we assume, however, that China has turned entirely inward and embraced a Dream of centralized control, it still does not follow that the current top-down approach to cultural production will achieve its intended result. Although China may enjoy temporary success pursuing such a heavy-handed, *dirigiste* approach, in the long run this path is a recipe for stagnation, apathy, and failure. Jingoistic nationalist culture will eventually grow stale, and the infusion of fresh talent and ideas needed to foment creativity will falter in a top-down, state-dominated cultural industry. Moreover, by shutting down a vital source of bottom-up expression, China's rulers will stifle the popular discourse that is essential to maintaining the Party's continued legitimacy.

In short: a strong culture is essential to realizing the Chinese dream. Top-down culture loses to bottom-up, just as command and control loses to free markets. China's people and its rulers will be the poorer for it.

In any case, while the present course may be toward more aggressive top-down control, no trend lasts forever, and the pendulum invariably swings the other way. Our argument for a Chinese Copyright Dream looks beyond the current political moment. Perhaps one day China's leadership will have the confidence to let China's artists speak unfettered. As one commentator observed: “The Chinese state today is robust, yet the country's leaders won't let fears of its being precariously weak die a natural death. If only they would. Then there would be space not just for their dreams but the often different ones of many individual Chinese.”⁴²⁴ Until Chinese leadership has the confidence to loosen its grip on cultural production and let Chinese artists communicate their dreams organically and authentically, China will remain frustrated, both in its unending quest to become a global cultural power and to realize the Chinese Dream at home.

VII. CONCLUSION

The Chinese Dream of national rejuvenation has many facets: prosperity,

424. Wasserstrom, *supra* note 18.

happiness, military strength, environmental sustainability, rule of law, and soft power all form plausible components. Determining appropriate policies to pursue them and assessing priorities, however, remains a challenging work in progress. We have argued that a modernized Chinese copyright law could play a key role in this process. A more effective copyright system would bolster China's creative industries, generating a diverse supply of high-quality expressive works, whose realization accords with many of these goals. More importantly, harnessing the collective imagination of China's authors and artists would, in turn, stimulate the robust democratic discourse that China needs to articulate and actualize its Dream.

Accordingly, we have argued that copyright law deserves a central place in the Chinese Dream. While the parameters of the Chinese copyright dream are something that China must determine for itself, we have offered some tentative suggestions as to the direction such reforms could take. In particular, we have stressed the opportunity for China to leapfrog existing global copyright regimes by harnessing its technological prowess to reimagine copyright in a more efficient, streamlined form. Candidates for such streamlining include simplified substantive rights, an automated, online registration and licensing platform, enhanced accessibility measures for small creators, low-cost enforcement mechanisms, and targeted use of competition law. Ultimately, China must devise its own copyright system that reflects its needs and priorities. Our main message, however, is to dream boldly. A state-of-the-art Chinese copyright system reflecting suitably ambitious reforms will pay lasting dividends, not only for China's creators and content industries, but ultimately for all of China.

The approach we advocate is admittedly not without risks. To succeed, China will have to adjust its current top-down approach to cultural policy and allow greater room for decentralized processes and experimentation. Unlike freeways and railroads, culture cannot be engineered. Creative inspiration—like dreams—emerges through mysterious processes. China should muster the confidence to dream boldly in copyright policy and reap the rewards in cultural vitality. Doing so will bring it closer to realizing the broader Chinese Dream.

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