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## Copyright and Free Expression in China's Film Industry

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## Copyright and Free Expression in China's Film Industry

### Cover Page Footnote

I am grateful to Justin Hughes, Lydia Loren, and Vince Chiappetta for their thoughtful comments on earlier drafts. This Article benefitted from numerous valuable comments and suggestions from participants in the Center for the Protection of Intellectual Property's Mark Twain Copyright Fellowship Program, participants at the April 2014 Symposium on Copyright and Media Pluralism at the University of Oregon School of Law, and participants at the 2015 Pacific Intellectual Property Scholars Conference. This Article was written with the generous support of the Mark Twain Copyright Fellowship Program at George Mason University School of Law's Center for the Protection of Intellectual Property. Lastly, I wish to thank Lili "Kevin" Zhan for his excellent research assistance.

# Copyright and Free Expression in China's Film Industry

By Eric Priest\*

*This Article analyzes whether copyright, which creates private rights in original expression and is therefore a legal tool for restricting the dissemination of information, exacerbates or undercuts state censorship in China's film industry. Recent scholarship suggests that copyright law reinforces China's oppressive censorship regime because both copyright and state censorship erect legal barriers around expressive works. The theory that copyright enhances censorship in China, however, overlooks the immense tension between state attempts at information control and market-supported information production made possible by copyright. This Article demonstrates that the Chinese government does not wield unchecked, top-down control over China's film industry because censorship policy and practice are profoundly influenced by complex interlocking power relationships between the audience, producers, and censoring authorities. These relationships result in a constant dialog between these groups that leads to concessions on all sides. Market-backed private producers meaningfully influence censorship policy because they are key players in this power dynamic with sufficient leverage to counter the censors' formidable heft. Drawing from political science literature on Chinese economic reform, this Article provides a theoretical basis for arguing that selective enforcement of censorship rules, combined with (or indeed*

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\* Assistant Professor, University of Oregon School of Law. I am grateful to Justin Hughes, Lydia Loren, and Vince Chiappetta for their thoughtful comments on earlier drafts. This Article benefitted from numerous valuable comments and suggestions from participants in the Center for the Protection of Intellectual Property's Mark Twain Copyright Fellowship Program, participants at the April 2014 Symposium on Copyright and Media Pluralism at the University of Oregon School of Law, and participants at the 2015 Pacific Intellectual Property Scholars Conference. This Article was written with the generous support of the Mark Twain Copyright Fellowship Program at George Mason University School of Law's Center for the Protection of Intellectual Property. Lastly, I wish to thank Lili "Kevin" Zhan for his excellent research assistance.

*driven by) market forces and economic realities, can lead to meaningful (albeit not absolute) liberalization and reform of the formal rules. The transformative power of copyright and commercialization is limited: it is not a panacea that will fully defang or obliterate censorship policies or trigger democratic reform. Nevertheless, market demands and filmmakers' need to satisfy those demands provide a counterbalance to state censorship that can, does, and will continue to erode censorship practices and increase expressive diversity in Chinese media.*

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## INTRODUCTION

Does copyright amplify or undermine state censorship in China's film industry? The question has global salience today: as China's importance in the global film market increases—it is already the world's second largest box office<sup>1</sup>—foreign producers seek more opportunities for preferential market access, resulting in foreign films and Chinese co-productions consciously targeting the Chinese market.<sup>2</sup> Pervasive censorship and creative interference by authorities, however, means no producer, whether a powerful Hollywood studio or a major domestic producer, enjoys complete creative control over a release in the Chinese market. Some observers rightly worry that in the film context, this will make China the tail that wags the global free-speech dog.<sup>3</sup> The fear is that as producers—both Chinese and international—increasingly and consciously avoid sensitive subject matter that may offend Chinese censors, China's domestic censorship regime will become the global de facto censorship regime.

An important nuance that this narrative misses, however, is that the influence works both ways. Films routinely violate numerous censorship rules—including regulations that ban the depiction

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<sup>1</sup> See Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 484 (2014).

<sup>2</sup> See, e.g., Frederik Balfour & Ronald Grover, *China and Hollywood Team Up for More Co-Productions*, BLOOMBERG BUSINESSWEEK (Sept. 8, 2011), <http://www.bloomberg.com/bw/magazine/china-and-hollywood-team-up-for-more-coproductions-09082011.html> [<http://perma.cc/R9HX-AEV5>].

<sup>3</sup> See, e.g., Cain Nunns, *Hollywood Bows to China Soft Power*, DIPLOMAT (Feb. 16, 2012), <http://thediplomat.com/2012/02/hollywood-bows-to-china-soft-power/> [<http://perma.cc/83BT-6TFS>].

of graphic violence, sexuality, criminal activity, and even time travel—but still manage to pass censorship review and be eligible for wide theatrical release.<sup>4</sup> Such films expose Chinese audiences to a much wider array of concepts, themes, characters, and visuals than the narrow, paternalistic socialist fare envisioned by state regulations.<sup>5</sup> Although the reasons behind the enforcement of censorship rules are complex and often opaque, the market for creative works, supported and enabled by copyright, is a significant factor in authorities' frequent decision to turn a blind eye to film producers' use of officially verboten speech.<sup>6</sup>

It might seem self-evident that market-driven content industries, underwritten and enabled by copyright, push the boundaries of officially permissible speech so long as audience tastes demand it. After all, if this were not the case, the Chinese government would continue to produce educational and propaganda films with little regard for audience preferences or market trends, as it did in the 1950s and 1960s.<sup>7</sup> One glance at a list of China's current sanctioned theatrical offerings, however, will assure any skeptic that Chinese authorities care about audience tastes, about the marketability of works, and about the financial well-being of private domestic film producers.<sup>8</sup> While pirated and “underground” films have long been available, Chinese consumers now have access to “aboveground” content representing more diverse subject matter, genres, and styles than ever before in China's history.<sup>9</sup>

Nevertheless, critics argue that copyright, as a legal tool for restricting the dissemination of information, may reinforce rather than undermine censorship. Professor Peter Yu, for example, cautions that strong copyright protection and free speech may represent “conflicting policy goals.”<sup>10</sup>

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<sup>4</sup> See *infra* Part III.B.2.

<sup>5</sup> See *infra* Part III.B.2.

<sup>6</sup> See *infra* Part III.B.2.

<sup>7</sup> See *infra* Part II.C.

<sup>8</sup> See *infra* Part II.C.

<sup>9</sup> See *infra* Part II.C.

<sup>10</sup> See Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 431 (2008).

From the standpoint of information control, . . . stronger copyright protection may help control the flow of information. From restrictions on the distribution of copyrighted materials developed by Chinese authorities to the ban on domestic distribution of sensitive materials that have been developed and copyrighted by foreign authors, copyright protection is likely to help legitimize China's information control policy.<sup>11</sup>

Likewise, Stephen McIntyre argues that “[n]ot only does the substance of Chinese copyright law support China's censorship system, but as [enforcement campaigns] illustrate[], copyright enforcement overlaps with and furthers the regime's efforts to control the content and exchange of ideas.”<sup>12</sup> Professor Jinying Li maintains that commercialized media and state censorship work in concert to marginalize alternative, outside-the-mainstream voices and viewpoints.<sup>13</sup> Recent antipiracy campaigns, Li argues, are “part of China's growing effort to suppress, regulate, or at least normalize the otherwise uncontrollable underground domain . . . . More importantly, this push to suppress piracy coincided with an uptick in the Chinese government's efforts to tighten its control over information circulation . . . .”<sup>14</sup> Because many unapproved films are only available in China via piracy (since they cannot be legally distributed), Li argues that effective copyright enforcement would deprive underground Chinese filmmakers of key creative resources—unapproved films—from which to draw for their own creations.<sup>15</sup> China's deficient copyright enforcement, however, has enabled a generation of underground filmmakers, weaned on pirated content, to foster “a vibrant cineaste culture creating cinematic forms and practices that present an alternative to the hegemony of commercial film industries and state censorship.”<sup>16</sup>

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<sup>11</sup> *Id.* at 429.

<sup>12</sup> Stephen McIntyre, *The Yang Obeys, but the Yin Ignores: Copyright Law and Speech Suppression in the People's Republic of China*, 29 UCLA PAC. BASIN L.J. 75, 79 (2011).

<sup>13</sup> Jinying Li, *From D-Buffs to the D-Generation: Piracy, Cinema, and an Alternative Public Sphere in Urban China*, 6 INT'L J. COMM. 542, 543, 560 (2012).

<sup>14</sup> *Id.* at 542.

<sup>15</sup> *Id.* at 552–55.

<sup>16</sup> *Id.* at 543.

Professor Li's critique raises an important question: under a strict state information control regime, is "approved" content inevitably complicit in censorship? Can approved content simultaneously be oppositional, or at least have the ability to erode power structures or bring fresh viewpoints on important, even sensitive topics? This Article argues, after examining the relationship between censors and commercial content producers in China's film industry, that sanctioned commercial media can counter the power of the sanctioning authority and can do so even more effectively than unsanctioned "outsider" media. This is because Communist Party (the "Party") censorship authorities—at least since the end of the Cultural Revolution in 1976—are not all-powerful in their ability to control content. In reality, censorship policy and practice are profoundly informed by complex interlocking power relationships—in particular between the audience, producers, and censoring authorities. These relationships result in a constant negotiation between the groups. This leads to concessions of varying degrees on all sides, with constant ebbs and flows as a result of changing political, social, and economic dynamics. To have a meaningful impact on censorship policy, therefore, one must be a key player in this power relationship with enough leverage to counter the censoring authorities' formidable heft.

This Article focuses its discussion of censorship and copyright in China's film industry for two reasons. First, film is among the three types of long-form cultural works most heavily censored by Chinese authorities; the other two are books and television programs.<sup>17</sup> Among these three industries, Chinese film has arguably had the deepest interaction with global commerce. It therefore provides a valuable case study for evaluating the effects of commercialization and copyright on censorship practices in China. Second, Professor Hongsong Song is undertaking an analogous study of copyright, commercialization, and censorship in the book publishing industry.<sup>18</sup> Professor Yu Zhao is doing valuable work on

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<sup>17</sup> Music is censored, but not as strictly as film, television, or books. See Priest, *supra* note 1, at 505. News media, of course, are heavily censored. See generally DANIELA STOCKMANN, *MEDIA COMMERCIALIZATION AND AUTHORITARIAN RULE IN CHINA* (2013).

<sup>18</sup> Hongsong Song, *Dancing in Shackles: Copyright in China's Highly Regulated Publishing Market*, 60 J. COPYRIGHT SOC'Y U.S.A. 285, 296–308 (2013) [hereinafter Song, *Dancing in Shackles*]; Hongsong Song, *Development of Copyright Law and the Transition of*

ensorship and commercialization in China's television industry.<sup>19</sup> To date, however, no one has closely analyzed the effect of copyright and commercialization on China's film censorship policy.

To critique claims that copyright bolsters censorship in China, this Article focuses its analysis on the *market's* role in shaping China's film industry and influencing censors. Admittedly, the market and copyright are not coextensive. For example, China had a relatively thriving film market in the 1920s, before any copyright law existed there.<sup>20</sup> Likewise, although China had a copyright law on the books by the 1930s,<sup>21</sup> when it experienced its first "golden age" of film production,<sup>22</sup> the law was rarely enforced and therefore unlikely to have significantly contributed to the boom.<sup>23</sup> Even today, film revenue in China is substantial but, due to lax copyright enforcement, it derives largely from box office receipts rather than sales of copies.<sup>24</sup> Nevertheless, it is appropriate to view the market's effects on state information control policy in China today as a proxy for copyright's effects, as the two are tightly intertwined. Copyright has long been recognized in the West as a robust market-making mechanism for works of creative expression, supporting non-state centers of information production.<sup>25</sup> The copyright regime provides the property rights framework that orders China's sophisticated modern film market and distinguishes it from the socialist, state-funded film production system in place for four decades from the 1950s until the 1990s.<sup>26</sup> Copyright provides the predictable allocation of rights necessary to secure the substantial private investment—often transnational in nature—that drives pro-

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*Press Control in China*, 16 OR. REV. INT'L L. 249 (2014) [hereinafter Song, *Development of Copyright Law*].

<sup>19</sup> Yu Zhao, Chinese Dream, Positive Energy, and TV Entertainment: The Tightrope Walking of Chinese Provincial Satellite TV Channels (April 2014) (unpublished manuscript) (on file with author).

<sup>20</sup> See *infra* Part II.A.

<sup>21</sup> See *infra* notes 70–76 and accompanying text.

<sup>22</sup> See *infra* Part II.B.

<sup>23</sup> See WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY IN CHINESE CIVILIZATION* 52 (1995).

<sup>24</sup> Priest, *supra* note 1, at 481 & n.70.

<sup>25</sup> See Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 289, 346–62 (1996).

<sup>26</sup> See *infra* Part II.E.

duction at the heart of China's modern film market. Lastly, as China's film market evolves and matures, business models directly based on copyright licensing, such as on-demand Internet and set-top box streaming, are an increasingly important revenue source for film producers.<sup>27</sup>

This Article proceeds as follows: Part I briefly highlights the historical ties between copyright and censorship in Anglo-American law and Chinese law. Part II describes the history of China's film market, with a particular emphasis on the interplay between political and commercial trends and censorship. Part III considers whether market-induced liberalizations of China's film censorship rules, discussed in Part II, have led to meaningful gains over time for expressive freedom in China's film market. It analyzes "freedom" along two dimensions: (1) plurality of voices and viewpoints in films lawfully distributed in China, and (2) diversity of approved film subject matter. Changes along these dimensions can be observed through the extent to which market pressures lead to formal liberalization of the rules, or to which sanctioned films technically violate censorship rules. Part III proceeds by providing a brief outline of pertinent censorship rules. It then analyzes how market pressures have changed the rules or influenced how they are applied in practice. It argues that the general trend is toward greater, not less, freedom of expression in China's film market, even if unbridled free expression is not in China's foreseeable future. It draws from political science literature on Chinese economic reform to provide a theoretical basis for arguing that selective enforcement of rules, combined with (or indeed driven by) market forces and economic realities, can lead to meaningful (albeit not absolute) liberalization and reform of formal rules.

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<sup>27</sup> See Priest, *supra* note 1, at 486–88 (noting that major Chinese online licensing platforms have purged their services of pirated content in recent years and paid copyright owners hundreds of millions of dollars for exclusive licenses to stream films and television content); see also Juro Osawa, *Tencent to Distribute HBO Dramas, Movies Online in China*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/tencent-partners-with-hbo-to-distribute-tv-dramas-movies-online-in-china-1416902891> [<http://perma.cc/M9UU-TRSM>] (discussing Chinese Internet giant Tencent's exclusive online licensing deal with HBO, noting competitor Alibaba's announced alliance with Lions Gate Entertainment to offer programs on set-top boxes in China, and noting that Xiaomi, China's largest smartphone maker by shipments, announced plans to invest \$1 billion in video content).

## I. A BRIEF HISTORY OF COPYRIGHT AND CENSORSHIP IN THE UNITED STATES AND CHINA

### A. *Copyright and Censorship in Anglo-American Law*

Copyright and press control have long been linked.<sup>28</sup> As a general matter, both copyright and state censorship erect legal barriers around certain works of expression, making it unlawful to publish them without proper privileges or permissions. Influential copyright historian L. Ray Patterson and others have argued that this is more than coincidence: the precursor to modern Anglo-American copyright was in fact born of the English monarchy's early censorship efforts.<sup>29</sup> Patterson points to Queen Mary's grant of a charter to the stationers' guild in 1557 as the inception of copyright and a simultaneous attempt at press control.<sup>30</sup> The charter gave Stationers' Company members the exclusive right to print and publish in exchange, ostensibly, for the stationers' compliance in suppressing seditious works.<sup>31</sup> Patterson argues that the Framers of the U.S. Constitution, when drafting the Copyright Clause,<sup>32</sup> were aware of this history and wary of copyright's censorship-like nature.<sup>33</sup> They therefore included the perambulatory phrase in Article I, Section 8, Clause 8 of the Constitution "to promote the Progress of Science" in part to establish that copyright is *not* to be used for censorship because its constitutional goal is to promote learning.<sup>34</sup> Nevertheless, the propensity persists for private actors to invoke copyright as a tool to suppress criticism or other uses of which the author dis-

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<sup>28</sup> See L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), printed in 46 HOUS. L. REV. 215 (2009); see also HARRY RANSOM, THE FIRST COPYRIGHT STATUTE 29 (1956).

<sup>29</sup> See, e.g., Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 326–27, 391 (2003); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 374 (2000); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 323–24 (2002); John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245, 294 (2015).

<sup>30</sup> PATTERSON & BIRCH, *supra* note 28, at 245.

<sup>31</sup> *Id.*; RANSOM, *supra* note 28, at 29.

<sup>32</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>33</sup> PATTERSON & BIRCH, *supra* note 28, at 376–77.

<sup>34</sup> *Id.* ("The Tudors and Stuarts used copyright to protect the populace from heretical, seditious, and schismatical material. The Framers (of the United States Constitution), drawing upon that experience, incorporated those lessons into the Copyright Clause and the First Amendment.").

approves.<sup>35</sup> Examples include political candidates seeking to prevent a challenger's use of their words,<sup>36</sup> religious groups seeking to stifle the dissemination of religious texts for the purpose of criticism,<sup>37</sup> companies seeking to scour leaked documents from the Web,<sup>38</sup> and public figures such as L. Ron Hubbard and J.D. Salinger seeking to suppress the publication of unauthorized biographies.<sup>39</sup>

The ties between copyright and censorship in Anglo-American jurisprudence can be overstated, however. For example, it is not even clear as a historical matter that censorship was the motivating factor behind the monarch's grant of the Stationers' charter.<sup>40</sup> Furthermore, the U.S. Supreme Court has argued that as a bulwark

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<sup>35</sup> See, e.g., Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 (2007); Stephen McIntyre, *Private Rights and Public Wrongs: Fair Use as a Remedy for Private Censorship*, 48 GONZ. L. REV. 61 (2012).

<sup>36</sup> See McIntyre, *supra* note 35, at 62–64 (describing a case in which one political candidate threatened to use copyright law to prevent a challenger from using the candidate's own words in a political campaign).

<sup>37</sup> See, e.g., *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995); see generally Cotter, *supra* note 29.

<sup>38</sup> See, e.g., Paul Resnikoff, *Sony Forces The Verge to Remove Its Spotify Contract...*, DIGITAL MUSIC NEWS (May 21, 2015), <http://www.digitalmusicnews.com/permalink/2015/05/21/breaking-spotify-forces-the-verge-to-remove-its-sony-contract> [<http://perma.cc/S2NM-MYQE>] (reporting that major record label Sony used a "copyright claim" to force online technology news site The Verge to take down a leaked contract between Sony Music and Internet music site Spotify).

<sup>39</sup> See, e.g., *New Era Publ'ns Int'l v. Carol Publ'g Grp.*, 904 F.2d 152 (2d Cir. 1990) (biography of L. Ron Hubbard); *New Era Publ'n Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989) (biography of L. Ron Hubbard); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) (biography of J.D. Salinger).

<sup>40</sup> Copyright historian Ronan Deazley, for example, concludes that numerous sources and histories indicate that although the Tudor period was marred with press censorship, it "remained an essentially ad hoc and reactive phenomenon" and "both Mary and Elizabeth relied, not primarily upon the Company of Stationers, but on the use of statutory instruments and royal proclamations to censure heretical and treasonous texts." Ronan Deazley, *Commentary on the Stationers' Royal Charter 1557*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), [http://www.copyrighthistory.org/cam/commentary/uk\\_1557/uk\\_1557\\_com\\_972007121517.html](http://www.copyrighthistory.org/cam/commentary/uk_1557/uk_1557_com_972007121517.html) [<http://perma.cc/P25S-UUXQ>]. Historian John Feather likewise maintains that "[f]ar from being a 'master-stroke of Elizabethan policy' . . . the grant of the [Stationers'] Charter was a perfectly regular transaction for the commercial benefit of the guild of stationers which we may take to have been initiated by them." JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 30 (2d ed. 2005).

against exercises of copyright that unduly burden speech, U.S. copyright law incorporates specific free-speech accommodations, in particular the fair use doctrine and the idea-expression dichotomy.<sup>41</sup> While these are often unwieldy in practice and hardly function perfectly to curb abusive uses of copyright,<sup>42</sup> they are still powerful doctrines on which creators and courts routinely rely to create space for the unauthorized reproduction, dissemination, and transformation of protected works—especially for purposes of critiquing the author or her work.

Lastly, and most importantly, although copyright law grants exclusive rights that allow the author to limit the reproduction and dissemination of original expression, the intended net effect is to enhance rather than diminish free speech. Thus the U.S. Supreme Court has dubbed copyright an “engine of free expression”<sup>43</sup> because copyright “establish[es] a marketable right to use one’s expression,” thereby supplying “the economic incentive to create and disseminate ideas.”<sup>44</sup> This market-making function is often viewed as the primary rationale for copyright in American jurisprudence.<sup>45</sup> According to commentators such as David Ladd and Neil Netanel, this function of copyright in fact does nothing less than undergird democracy.<sup>46</sup> Because copyright “supports a market-based sector of authors and publishers . . . who look to paying audiences (and advertisers) for financial sustenance,” authors need not look to government subsidies or elite or corporate patronage for financial support.<sup>47</sup> This promotes free discourse because authors

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<sup>41</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). For a discussion of the tension between copyright jurisprudence and the First Amendment, see Terry Hart, *Artistic Expression, the First Amendment, and Copyright*, COPYHYPE (Sept. 24, 2010), <http://www.copenhype.com/2010/09/artistic-expression-the-first-amendment-and-copyright/> [<http://perma.cc/3HJC-TJGW>].

<sup>42</sup> For a discussion of cases in which copyright was used primarily as a tool to suppress political or critical speech, see McIntyre, *supra* note 35.

<sup>43</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>44</sup> *Id.*

<sup>45</sup> See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 170 (Stephen R. Munzer ed., 2001).

<sup>46</sup> David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 421, 427–28 (1983); see also NEIL W. NETANEL, *COPYRIGHT'S PARADOX* 91 (2008); Netanel, *supra* note 25, at 341–64.

<sup>47</sup> NETANEL, *supra* note 46, at 91.

who are beholden to the government or elite or corporate patrons for their livelihoods are far more likely to self-censor, particularly with regard to speech that would undermine or offend the patron or benefactor. According to Netanel, this holds true even in an era of commercialized mass media for two reasons.<sup>48</sup> First, copyright still helps support many smaller, independent voices outside the commercial mainstream that contribute to democratic discourse.<sup>49</sup> Second, commercial mass media, for its many failings, possesses the platform, resources, and heft to be a watchdog over powerbrokers, shape and frame public discourse, and be a trusted, accountable intermediary.<sup>50</sup>

### *B. Copyright and Censorship in China*

The theory that copyright provides structural support to existing democracies prompts the more challenging question of whether copyright can help affirmatively advance the cause of democracy in non-democratic countries such as China. This echoes a wider body of literature on the role that private property plays in advancing democracy.<sup>51</sup> While a review of that literature is beyond the scope of this Article, it is worth noting the conclusions of property scholar Carol Rose.<sup>52</sup> After surveying numerous examples of privatization initiatives around the globe and their democratizing effects (or lack thereof), Rose concludes that the effect of privatization on democratic reform is less inevitable or predictable than some theorize, but it is still an important factor: “The take-away lesson is that privatization in a modern context is only one of a whole array of political reforms, though it is an important one.”<sup>53</sup> This rings true in China, where herculean state-initiated privatization efforts over the past three decades have failed (by design) to yield much demo-

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<sup>48</sup> *Id.* at 92–94.

<sup>49</sup> *Id.* at 93.

<sup>50</sup> *Id.* at 92–98.

<sup>51</sup> For an introduction, see generally Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691 (2006). For an intellectual property-focused comment on Professor Rose’s article, see Mark P. McKenna, *Intellectual Property, Privatization, and Democracy: A Response to Professor Rose*, 50 ST. LOUIS U. L.J. 829 (2006).

<sup>52</sup> See Rose, *supra* note 51, at 720.

<sup>53</sup> *Id.*

cratic reform.<sup>54</sup> Even if it fails to yield fundamental democratic reforms, however, introducing private incentives to the media and copyright industries distances them from the state, creating space for more voices and viewpoints. As Rose observes, following broad privatization efforts “[t]he Chinese press is not bold by Western standards, but it still is bolder than it was a few years ago.”<sup>55</sup> Neil Netanel similarly argues that public exposure even to commercial media “tends to erode passive acceptance of authoritarian power relations” by “imparting an appreciation for innovation, enhancing audience ability to imagine themselves outside prevailing roles, and engendering a sense that individuals can act on their environment to achieve their personal and political goals.”<sup>56</sup>

While copyright law is relatively new in China, censorship is not.<sup>57</sup> “[S]ubstantial, sustained efforts” to control publication and dissemination of politically sensitive works date at least to the advent of the printing press during the Tang Dynasty (618–907 A.D.), and have only increased in their intensity and extensiveness since.<sup>58</sup> Today, potent and pervasive press and media control in China is effected through a byzantine latticework of bureaucratic agencies, formal policies and regulations, and informal pressure tactics that breed self-censorship. China consistently ranks near the bottom of Reporters Without Borders’ World Press Freedom Index.<sup>59</sup>

Unsurprisingly, therefore, copyright—a form of private information control—sometimes appears bound up in state censorship policy and enforcement actions. Despite having among the world’s worst intellectual property enforcement records,<sup>60</sup> China is home

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<sup>54</sup> See generally KELLE S. TSAI, *CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA* (2007).

<sup>55</sup> Rose, *supra* note 51, at 706–07.

<sup>56</sup> Neil W. Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 *VAND. L. REV.* 217, 260 (1998).

<sup>57</sup> See ALFORD, *supra* note 23, at 9–29.

<sup>58</sup> See *id.* at 13–17.

<sup>59</sup> See *Press Freedom Index 2013*, REPORTERS WITHOUT BORDERS, <http://en.rsf.org/press-freedom-index-2013,1054.html> [<http://perma.cc/N87Q-4ZNE>] (last visited Oct. 11, 2015). In the 2013 index, for example, China ranked an ignominious 173rd out of 179 countries. *Id.*

<sup>60</sup> See generally Eric Priest, *The Future of Music and Film Piracy in China*, 21 *BERKELEY TECH. L.J.* 795, 801 (2006).

to the highest volume of intellectual property enforcement in the world, even when controlling for population.<sup>61</sup> Much of that enforcement on the copyright side is in the form of official campaigns that are notorious for producing grand enforcement spectacles, that have little meaningful effect on piracy.<sup>62</sup> At least one major copyright enforcement campaign arose out of a broader censorship campaign aimed at eradicating pornographic materials.<sup>63</sup> Stephen McIntyre therefore expresses concern that copyright infringement may provide Chinese authorities “with an opportunity—or, more cynically, an excuse—to crack down on expression that it considers threatening, such as political dissent, religious information, and other so-called ‘unhealthy’ media.”<sup>64</sup>

Modern copyright in China has in fact been tied to censorship from its inception. Mao Zedong understood well the power of media and cultural products and their ability to shape ideology. His famous address on art and literature at Yan’An in 1942 and the contemporaneous Rectification Campaign were designed to weed out intellectual dissension and unify party thinking on the role of art and culture.<sup>65</sup> Mao warned that proletarian co-optation of culture was a profound threat to the revolutionary cause, and espoused party control over cultural production.<sup>66</sup> In delineating art and literature’s “proper” role in society, Mao invoked Lenin’s metaphor of art and literature as the “cogs and wheels” of the revolutionary machinery.<sup>67</sup> He then deftly combined the Leninist view

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<sup>61</sup> See MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 33 (2011).

<sup>62</sup> *Id.* at 221–26.

<sup>63</sup> See McIntyre, *supra* note 12, at 79.

<sup>64</sup> *Id.*

<sup>65</sup> See Kirk A. Denton, *Literature and Politics: Mao Zedong’s “Talks at the Yan’an Forum on Art and Literature,”* in *THE COLUMBIA COMPANION TO MODERN EAST ASIAN LITERATURE* 463, 463–64 (Joshua S. Moscow ed., 2003).

<sup>66</sup> Junhao Hong, *Mao Zedong’s Cultural Theory and China’s Three Mass-Culture Debates: A Tentative Study of Culture, Society, and Politics*, 4 *INTERCULTURAL COMM. STUD.* 87, 96 (1994).

<sup>67</sup> See Denton, *supra* note 65, at 467; Alexander Des Forges, *The Uses of Fiction: Liang Qichao and His Contemporaries*, in *THE COLUMBIA COMPANION TO MODERN EAST ASIAN LITERATURE*, *supra* note 65, at 341, 341–45.

with the view of traditional Confucian scholars that literature should be morally edifying and politically subservient.<sup>68</sup>

Just as the Soviet model of information control blended well with traditional views on Chinese literature, the Soviet approach to intellectual property proved a better fit for the new People's Republic (founded in 1949) than did the copyright system of the preceding Republican era.<sup>69</sup> The nationalist government of the Republican era (1912–1949) viewed instituting intellectual property laws as critical to the establishment of a modern legal system, and the first intellectual property measure passed was the Copyright Law of 1928.<sup>70</sup> Highly influenced by German and Japanese copyright statutes,<sup>71</sup> the 1928 law granted economic and moral rights to authors for books, music, photographs, designs, sculpture, and other technical, literary, and artistic works for a term of the author's life plus thirty years.<sup>72</sup> The copyright law and related regulations contained overt censorship provisions prohibiting copyright registration and publication of works deemed to violate the Guomindang "party spirit" or harm the "public order."<sup>73</sup> Nevertheless, the 1928 copyright law was at its core premised on, in Professor Alford's words, "the existence of a marketplace of ideas."<sup>74</sup> Because Mao viewed information as subservient to Party policy and Confucian tradition emphasized emulation of past forms over novelty,<sup>75</sup> the notion of a marketplace of ideas was, in Professor Alford's view, "neither acceptable to the leadership of the Chinese Communist Party nor previously witnessed in the Middle Kingdom."<sup>76</sup>

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<sup>68</sup> Denton, *supra* note 65, at 467.

<sup>69</sup> See ALFORD, *supra* note 23, at 56–57.

<sup>70</sup> *Id.* at 50.

<sup>71</sup> *Id.*

<sup>72</sup> See *Zhonghua Minguo Shiqi Nian Zhuzuo Quanfa* (中华民国十七年著作权法) [Copyright Law of the Republic of China] (promulgated by the Nationalist Gov't, May 14, 1928), arts. 1, 4 (China), translated in *Copyright Law of the Republic of China*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1928/05/14/copyright-law-of-the-republic-of-china/> [<http://perma.cc/G3Z8-JRLH>] (last visited Sept. 28, 2015). Uncommissioned photographs were an exception to the term provision, receiving protection for just ten years. *Id.* art. 9.

<sup>73</sup> *Id.* art. 22; ALFORD, *supra* note 23, at 51.

<sup>74</sup> ALFORD, *supra* note 23, at 57.

<sup>75</sup> *Id.* at 9–29.

<sup>76</sup> *Id.* at 57.

In the early years of the People's Republic, the Party ensured substantive control of popular creative works by restricting their production to work units under Party supervision.<sup>77</sup> Following the Soviet example, Party policy recognized an author's right to basic remuneration (usually based on the number of copies printed) and the right to prevent unauthorized alteration of the work.<sup>78</sup> The Party-state fixed compensation levels that had little relationship to the market for the work.<sup>79</sup> The outcome was, as intended, a centrally planned system of cultural production that resulted in creative output consisting largely of thematically confined propaganda. As the Cultural Revolution (1966–1976) drew to a close, China emerged from its isolationist shell to more deeply engage with the rest of the world. It became clear to Party leadership that comprehensive top-down control of cultural production was unsustainable not only because the state could no longer bear the substantial costs but also because the narrow works of propaganda failed to satisfy rapidly diversifying consumer tastes in media and entertainment resulting in part from increasing cross-border cultural exchange.<sup>80</sup> In 1979, as the combined result of these internal impetuses<sup>81</sup> and exogenous pressure from the United States, whose authors' works received no protection in China at that time,<sup>82</sup> China embarked on the development of the first modern copyright law in the history of the People's Republic.<sup>83</sup>

The resulting copyright law, promulgated in 1990, was shaped by nearly a decade of intense internal debate. Although some prominent Chinese officials favored the development of a Western-style copyright law, support was far from unanimous.<sup>84</sup> Still steeped in

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<sup>77</sup> See Song, *Development of Copyright Law*, *supra* note 18, at 251–54.

<sup>78</sup> ALFORD, *supra* note 23, at 59.

<sup>79</sup> See *id.* at 59–60.

<sup>80</sup> Song, *Development of Copyright Law*, *supra* note 18, at 253–54.

<sup>81</sup> *Id.* at 251–57.

<sup>82</sup> See ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 120 (2005). The Chinese leadership at the time apparently viewed the establishment of copyright law as necessary for attracting foreign investment and technology. See Weiguang Wu, *The Rationale of China's Media Regulation Policy in the Process of Institutional Transformation* 37 (unpublished manuscript) (on file with author).

<sup>83</sup> *Id.* at 119.

<sup>84</sup> Song, *Development of Copyright Law*, *supra* note 18, at 261.

socialism, politically orthodox officials questioned the wisdom of granting private rights in information goods and the resulting effect on state-owned media and the entire system of state press control.<sup>85</sup> The debate about whether or not the copyright law should include provisions to ensure copyrighted works were ideologically “correct” only intensified following the 1989 Tiananmen protests.<sup>86</sup> Ultimately, the law was drafted with an express censorship provision: Article 4 denied copyright protection to works “the publication or distribution of which is prohibited by law” and required that copyright owners, “in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests.”<sup>87</sup>

Even in China, however, the relationship between copyright and censorship is often misunderstood or overstated. Some commentators see stronger copyright protections as complementing and exacerbating state information controls by erecting even higher and thicker barriers around information.<sup>88</sup> Much evidence points in the opposite direction, however. As a general matter, the Chinese government certainly need not rely on copyright to strengthen information controls when it wants, and there is little evidence that the government views copyright as a tool for enhancing censorship.

In fact, evidence suggests that at least some in the Chinese government have long been wary of copyright’s free-speech enhancing capability. This wariness is reflected in the disagreement among Chinese officials, during the drafting of the 1990 Copyright Law,

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<sup>85</sup> *Id.* at 251–57.

<sup>86</sup> MERTHA, *supra* note 82, at 125.

<sup>87</sup> Zhonghua Renmin Gongheguo Zhuzuo Quanfa (中华人民共和国著作权法) [Copyright Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991), art. 4 (China) [hereinafter Copyright Law of the People’s Republic of China], translated in *Copyright Law of the People’s Republic of China (Official Translation)*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1990/09/07/copyright-law-of-the-people’s-republic-of-china-official-translation/> [http://perma.cc/AEE8-ACLD] (last visited Oct. 12, 2015). Article 4 became the bane of foreign copyright owners. Foreign works imported into China for publication may not be disseminated lawfully until they have passed censorship review. Accordingly, while works awaited censorship review (which could take many months) they were ineligible for lawful distribution and, therefore, unprotected by copyright. *See* Priest, *supra* note 1, at 489–90. This loophole gave copyright pirates a long window during which to exploit the works without fear of legal repercussions. *Id.* at 483.

<sup>88</sup> *See supra* notes 10–16 and accompanying text.

over the desirability of granting private rights in information goods.<sup>89</sup> In another example, China's National Copyright Administration ("NCA") is situated within the primary censoring body for literary works (the General Administration for Press and Publications ("GAPP")), but Andrew Mertha suggests that in the past GAPP may have intentionally underfunded and undermined the NCA because of alleged concerns within GAPP about promoting private authorial rights and free-market information production.<sup>90</sup>

Moreover, although Chinese copyright law was conceived as a hybrid author rights and press control law in China, it has since steadily progressed in favor of author rights and away from press control.<sup>91</sup> Professor Hongsong Song attributes this trend largely to foreign pressure: continuous negotiations between the United States and China throughout the 1990s, during which the United States pushed China to lower its market barriers imposed by censorship policies, "can . . . be deemed to be not only a conflict between two countries, but also a form of struggle between state control and market forces."<sup>92</sup> Under foreign pressure, Chinese officials amended several areas in which the copyright law had facilitated press control, including a lack of performance rights in various types of works, certain statutory licensing provisions, and broad fair use provisions privileging certain state uses, all of which facilitated government use of copyrighted works for propaganda purposes.<sup>93</sup> To comply with its treaty obligations, China initially amended the provisions only with regard to foreign works, and maintained a dual system that discriminated against Chinese rightsholders for nearly a decade.<sup>94</sup>

Further engagement with the global economy and intellectual property community drove an even deeper wedge between Chinese copyright law and its press-control roots. After joining the World Trade Organization ("WTO") in 2001, China elevated domestic

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<sup>89</sup> See *supra* notes 84–87 and accompanying text.

<sup>90</sup> See MERTHA, *supra* note 82, at 140.

<sup>91</sup> See generally Song, *Development of Copyright Law*, *supra* note 18.

<sup>92</sup> *Id.* at 298; see also Wu, *supra* note 82, at 21–22.

<sup>93</sup> Song, *Development of Copyright Law*, *supra* note 18, at 299–304.

<sup>94</sup> *Id.* at 302–03.

rightsholders' status to that of foreigners.<sup>95</sup> Later, in 2007, the United States lodged a host of copyright-related complaints against China with the WTO Dispute Settlement Body, aiming to dismantle censorship and market access controls that hampered U.S. copyright owners' ability to compete with piracy and monetize the Chinese market.<sup>96</sup> Among its claims, the United States alleged that article 4 of China's Copyright Law contravened China's obligations under the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS") and the Berne Convention by conditioning copyright protection on the formality of passing censorship review, and by depriving unapproved works of required minimum standards of protection.<sup>97</sup> U.S. copyright owners complained that article 4 afforded pirates a major legal safe harbor by arguably denying protection to all foreign works except those that had been submitted for, and successfully passed, censorship review.<sup>98</sup> China responded that the Berne Convention expressly preserves members' rights to censor works and prohibit their distribution.<sup>99</sup> The WTO panel found that article 4 denied copyright protection to works that failed content review.<sup>100</sup> Since the sovereign's right to censor does not include the right to deny copyright protection, article 4 conflicted with China's obligation under TRIPS and Berne to afford

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<sup>95</sup> *Id.*

<sup>96</sup> See Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter IPR Panel Report]; Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009).

<sup>97</sup> See IPR Panel Report, *supra* note 96, ¶ 3.1.

<sup>98</sup> See Priest, *supra* note 1, at 483; Yu, *supra* note 10, at 427–28.

<sup>99</sup> IPR Panel Report, *supra* note 96, ¶ 7.120 (citing article 17 of the Berne Convention).

<sup>100</sup> *Id.* ¶¶ 7.103, 7.118, 7.139, 7.191. The panel noted that Chinese law was unclear regarding whether article 4 also denied protection to works that had not been approved but had not yet failed content review, but the panel made a point to stress in its findings China's "firm position" during the proceedings that "[w]orks that are unreviewed are decidedly not 'prohibited by law.'" *Id.* ¶ 7.118.

The United States also argued in the IPR Panel Report that Chinese law is inconsistent with articles 41.1 and 61 of TRIPS because the minimum sales volume thresholds for criminal copyright liability resulted in criminal sanctions that were unable to reach certain "commercial scale" infringements. *Id.* ¶ 2.2. The panel concluded that United States' evidence was insufficient to establish that China's criminal thresholds conflict with its TRIPS obligations. *Id.* ¶¶ 7.669, 7.681.

substantive copyright rights.<sup>101</sup> China subsequently amended the copyright law to delete the language from article 4 that denied copyright protection to prohibited works.<sup>102</sup> The practical benefit of this amendment for foreign copyright owners seeking improved copyright protection in China is doubtful,<sup>103</sup> but the episode evidences how foreign pressure to strengthen copyright protection checks the Chinese government's ability to use copyright as a formal censorship tool.

In a parallel proceeding, the United States assailed the state-run film import and distribution duopoly that China's information control regime enables.<sup>104</sup> Only one entity—the state-owned China Film Import and Export Corporation—holds the required permit to import films into China,<sup>105</sup> while just two companies—China Film and Huaxia Film Distribution—are approved to distribute foreign films in China.<sup>106</sup> The WTO Appellate Body found that China's limiting of audiovisual distribution services to state-owned Chinese enterprises breaches China's commitments to permit market access without discrimination.<sup>107</sup> Following the 2009 decision, China did not reform its import or distribution regulations, but it did at least agree to increase the number of foreign films permitted for theatrical release each year.<sup>108</sup>

Thus, Professor Song concludes that “exogenous pressure constrained the power of the Chinese government to reshape copyright law to suit the needs of press control,” but “[t]he nearly decade-

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<sup>101</sup> *Id.* ¶¶ 7.132, 7.139.

<sup>102</sup> *See* Copyright Law of the People's Republic of China, *supra* note 87, art. 4.

<sup>103</sup> *See* Peter K. Yu, *The US-China WTO Cases Explained*, No. 193 MANAGING INTELL. PROP. 39 (2009). One commentator called this a “nominal” victory for the United States, since the amendment left intact language in article 4 that prohibits copyright owners from exercising their copyrights in a manner that “violates the law.” McIntyre, *supra* note 12, at 107.

<sup>104</sup> *See* Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *Publications and Audiovisual Products Appellate Body Report*].

<sup>105</sup> *See id.* ¶ 175.

<sup>106</sup> Priest, *supra* note 1, at 489.

<sup>107</sup> *Publications and Audiovisual Products Appellate Body Report*, *supra* note 104, ¶¶ 414–15.

<sup>108</sup> *See* Priest, *supra* note 1, at 489 & n.120.

long double standard problem in copyright protection [during which foreign works received broader rights than domestic works] reveals just how reluctant the Party-state has been to remove the imprints of press control from China's copyright law."<sup>109</sup> As these examples illustrate, censorship and market forces enabled by copyright are in considerable tension. While stronger copyright protections and market forces do not always undercut press controls, they have consistently chipped away at them for more than two decades.

Nevertheless, scholars such as Neil Netanel and Peter Yu warn of potential harms that could result from instituting strong and effective copyright regimes in authoritarian states, such as China, that limit market access.<sup>110</sup> Strong copyright under such conditions could result in a net welfare loss by limiting the penetration—and potential democratizing effect—of unapproved *foreign* works, which are widely disseminated via pirate networks.<sup>111</sup> Foreign works can, after all, expose audiences in authoritarian states to alternative viewpoints, lifestyles, and systems of government.<sup>112</sup> Taking into account the free speech implications of the nexus between copyright protection and market access is an important point. Focusing on the potential democratizing effects of foreign works, however, risks undervaluing the potential influence of a strong domestic industry buoyed by copyright. As argued below, a strong domestic film industry has the resources to communicate diverse

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<sup>109</sup> Song, *Development of Copyright Law*, *supra* note 18, at 301.

<sup>110</sup> See Netanel, *supra* note 56, at 255–58; Yu, *supra* note 10, at 424–26. For Professor Yu, the ideal solution to China's market access problem "is to increase market access and strengthen copyright protection at the same time," but he queries "whether it would always be beneficial to push for stronger protection of intellectual property rights if market access, unfortunately, remains limited in China." Yu, *supra* note 10, at 428.

<sup>111</sup> While Professor Netanel is optimistic about copyright's capacity to enhance free speech in democratic states, he is more skeptical about its ability to induce democratic reform in authoritarian states. His skepticism is based on several assumptions: that strong copyright would price legitimate copies of foreign works beyond the reach of the average consumer, and that "the meager resource base of the domestic audience [in the authoritarian state] would significantly undercut copyright's practical import, as would the chronic dependence of authoritarian-state authors on state-controlled distribution networks." Netanel, *supra* note 56, at 264. These assumptions have less relevance to China today than they did when Netanel was writing nearly two decades ago.

<sup>112</sup> See *id.* at 260; Yu, *supra* note 10, at 425.

perspectives through more culturally resonant domestic productions, even in the guise of “officially sanctioned” content.<sup>113</sup>

## II. THE FILM MARKET AND CENSORSHIP IN CHINA

This Part introduces the history of Chinese film as a state controlled medium of expression, with an emphasis on the historical interplay between censorship and the market. Throughout the history of Chinese film, and particularly in the present day, authorities have used a multilayered censorship approach in order to maximize compliance while minimizing the administrative burden on the state. First and most conspicuously, the state imposes direct content controls that withhold information from public consumption. These generally come in two flavors: production controls (e.g., centrally planned projects, script approval requirements, etc.) and post hoc review (pre-release screening and editing).<sup>114</sup> Both types remain prevalent in China today. Second, Chinese authorities have employed strict licensing or permitting rules designed to limit production and distribution functions to approved entities only. Third, Chinese authorities have imposed restrictions on investment and ownership in film production and distribution entities.<sup>115</sup> Fourth, the state, especially today, relies heavily on self-censorship: production companies are responsible for policing the content they produce and face the prospect of punishment for any transgression. Fifth, the state encourages compliance by employing subsidies, fa-

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<sup>113</sup> See Priest, *supra* note 1, at 526–29. Professor Yu points out, however, the nuanced trade-offs Chinese policymakers and society face as a result of strengthening copyright protection: some industries (including the film industry) would benefit, while other industries potentially more central to technological and economic development would suffer from decreased access to cheap, pirated foreign information technologies (e.g., software). Yu, *supra* note 10, at 428–29. Copyright protection in China may remain weak, therefore, “until China reaches a crossover point where stronger protection is in its self-interests.” *Id.* at 429. The question is whether at China’s present stage of economic development it should have reached a crossover point, and if so, why intellectual property protection remains vexing across industries for both domestic and foreign producers in many copyright industries. See Priest, *supra* note 1, at 477–81.

<sup>114</sup> See Rogier Creemers, Explaining Audiovisual Media Piracy in China: Media Control, Enforcement, and Globalization 92 (Feb. 2, 2012) (unpublished Ph.D. dissertation, Maastricht University), <http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:3dae91cd-3547-423f-af8c-27d14064f427/ASSET1> [<http://perma.cc/5VCF-9QH5>].

<sup>115</sup> *Id.*

avorable release windows, and other incentives for “good behavior.”<sup>116</sup> Sixth, to induce self-censorship, authorities impose penalties against those deemed to have transgressed censorship rules. One common penalty is a multi-year filmmaking ban.<sup>117</sup> Seventh, the state has imposed varying degrees of restrictions and bans on foreign films. Presently, China caps annual imports at thirty-four films for revenue-sharing theatrical release (of which fourteen must be in “enhanced” formats such as IMAX or 3-D) and restricts foreign firms’ participation in China’s film production, importation, and distribution sectors. (China also reportedly imports an additional thirty to forty foreign films annually on a non-revenue-sharing, flat fee basis.)<sup>118</sup>

As the remainder of this Part demonstrates, however, for much of the history of Chinese cinema there has been—and continues to be—a productive tension between censorship rules and the market. This tension puts practical limits on how and to what degree the state can control content.

#### A. *Early Narrative Films and May Fourth Cinema*

The Chinese film industry has existed for nearly as long as moving pictures have existed as a medium of expression, and content control has been part of the landscape for much of that time. The first motion picture was exhibited in China in 1896,<sup>119</sup> and the first Chinese silent feature films were produced in the early

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<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Guang Dian Zongju Guanyu Chuli Yingpian Pingguo Wei Gui Wenti De Qingkuang Tongbao (广电总局关于处理影片《苹果》违规问题的情况通报) [SARFT Circular Concerning the Problem of the Film “Lost in Beijing” Violating Regulations] (issued by the St. Admin. of Radio, Film, and Television, Jan. 3, 2008) (China) [hereinafter SARFT Circular Concerning “Lost in Beijing”], translated in *SARFT Circular Concerning the Situation of Dealing with the Problem of the Film “Lost in Beijing” Violating Regulations*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/2008/01/03/sarft-circular-concerning-the-situation-of-dealing-with-the-problem-of-the-film-lost-in-beijing-violating-regulations/> [http://perma.cc/MN9R-Z4JA] (last visited Sept. 28, 2015) (imposing two-year filmmaking ban on producers of film deemed to be heterodox).

<sup>118</sup> Patrick Frater, *China and South Korea Sign Co-Production and Import Deal*, VARIETY (July 6, 2014), <http://variety.com/2014/biz/news/china-and-south-korea-sign-co-production-and-import-deal-1201258316/> [http://perma.cc/7WZH-USHH].

<sup>119</sup> YINGJIN ZHANG, CHINESE NATIONAL CINEMA 14 (2004).

1920s.<sup>120</sup> At that time, Chinese art and culture remained highly influenced by the May Fourth Movement (1917–1921), in which the Chinese government’s perceived weakness in the face of Japanese aggression triggered nationalism, student and worker protests, and broader reform efforts aimed at exalting Western science and democratic values and undermining Confucian tradition.<sup>121</sup> Although the melodramas of the 1920s were highly commercial (and extremely popular) mass entertainment, and were shunned as such by many May Fourth intellectuals,<sup>122</sup> some early feature films did reflect societal concerns of the times, infusing simple stories with social and political meaning.<sup>123</sup> Some of the most influential early Chinese filmmakers viewed themselves as educators as well as entertainers, although their narratives unflinchingly sought to promote traditional values.<sup>124</sup> One of China’s great screenplay writers of the 1920s, the Harvard-educated Hong Shen, refused to depict in his films topics that might morally mislead the public, such as pornography, immortals and demons, criminal activity, exposing human vices, and exposing the nation’s shortcomings.<sup>125</sup> Indeed, these very themes are technically forbidden under Chinese law today.<sup>126</sup> Hong’s early act of “self-censorship” underscores how deeply entwined notions of moral cultivation have been with cultural production in China, and how paternalism and concerns about the corruptive potential of film (and art more broadly) long predate the establishment of the People’s Republic.

Many early film critics were especially preoccupied with film’s unique educative potential.<sup>127</sup> They viewed film’s capacity to deliver moral and nationalistic messages to the masses as a critical peda-

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<sup>120</sup> *Id.* at 21–24.

<sup>121</sup> See JONATHAN SPENCE, *THE SEARCH FOR MODERN CHINA* 299–308 (2d ed. 1999).

<sup>122</sup> PAUL G. PICKOWICZ, *CHINA ON FILM: A CENTURY OF EXPLORATION, CONFRONTATION, AND CONTROVERSY* 74 (2012).

<sup>123</sup> For example, the earliest extant Chinese feature, *Laborer’s Love* (1922), although on the surface a simple comedy, was layered with multiple May Fourth themes: for example, it featured a “working class hero” and espoused individual freedom to aspire to romantic love. ZHANG, *supra* note 119, at 24–25.

<sup>124</sup> PICKOWICZ, *supra* note 122, at 74.

<sup>125</sup> ZHANG, *supra* note 119, at 28–29.

<sup>126</sup> See *infra* Part III.A.

<sup>127</sup> YING ZHU, *CHINESE CINEMA DURING THE ERA OF REFORM: THE INGENUITY OF THE SYSTEM 197–98* (2003).

gical tool that could fill the void left by the failed school systems across China.<sup>128</sup> Accordingly, many critics mistrusted the market and decried profit-oriented filmmaking.<sup>129</sup> The tension between moralism and commercialism even famously manifested itself within studios, leading to creative tensions between executives who emphasized the need to produce a hit versus those who worried about doing so at the expense of virtuous inculcation.<sup>130</sup>

*B. The 1930s: Censorship Under the Guomindang*

The 1930s are often regarded as a golden age of Chinese cinema,<sup>131</sup> ushering in a new level of artistic maturity and social consciousness and witnessing the first earnest efforts to incorporate progressive May Fourth themes into film.<sup>132</sup> Audiences began to appreciate film not only as entertainment but also as a therapeutic medium for communicating contemporary problems facing individuals and society<sup>133</sup>—a critical function following decades of war, warlordism, and imperialism. Leftist films emerged as artistically and politically important during this period, although their general popularity at the time is in doubt.<sup>134</sup>

Censorship by the Guomindang government (and the foreign powers occupying Shanghai) also emerged as a ubiquitous feature of the film industry.<sup>135</sup> Like the Communist Party that succeeded it, the Guomindang engaged in two kinds of censorship: social and political. Social censorship aimed primarily at enhancing Guomindang nation-building efforts by eliminating sex and superstition from films, and prioritizing Mandarin films over Cantonese-dialect and foreign films.<sup>136</sup> Political censorship primarily targeted leftist

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<sup>128</sup> *Id.* at 198.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 199.

<sup>131</sup> ZHANG, *supra* note 119, at 59.

<sup>132</sup> PICKOWICZ, *supra* note 122, at 75.

<sup>133</sup> ZHANG, *supra* note 119, at 111.

<sup>134</sup> The popularity of Hollywood films at this time in China, however, is not in doubt. Hollywood titles dominated the market in this period, although the numbers are skewed by the box office receipts from Shanghai, which accounted for more than half of nationwide box office revenue and was far more cosmopolitan than most Chinese cities at the time (and thus more receptive to foreign films). *Id.* at 69.

<sup>135</sup> *Id.* at 62; ZHU, *supra* note 127, at 202–03.

<sup>136</sup> ZHANG, *supra* note 119, at 69; ZHU, *supra* note 127, at 202–03.

films, which were seen as an ideological threat.<sup>137</sup> While censorship was widespread—in 1933 nearly a quarter of features produced in China were banned<sup>138</sup>—it appears to have been inconsistently enforced and consisted mostly of post hoc bans and revisions, with little direct interference in the production process. In a foreshadowing of the censor-market dialog that plays a significant role in today’s Chinese film industry, Guomindang censors were sympathetic to the economic hardships that plagued film studios, particularly the smaller ones, and established policies to help minimize the economic effects of censorship and even give objectionable or banned films an opportunity to at least partially recoup their costs.<sup>139</sup> Guomindang censors even agreed to allow “banned” films to enjoy a limited public release to help the producers recoup their investments.<sup>140</sup>

### C. *The Mao Era: Socialist Production and Party Domination*

Cinema during the Mao period (1949–1976) was primarily characterized by conformity and uniformity born of centralized state control and production quotas disconnected from market preferences. Film production went through three phases that profoundly affected the nature of films produced during the period: nationalization of the private studios (1949–1952), socialist realism (1953–1966), and the Cultural Revolution (1966–1976).<sup>141</sup> In Mao’s view, cinema was a powerful ideological medium and its proper function was to disseminate correct Party ideology.<sup>142</sup> Hollywood films, which were extremely popular in parts of China previously, were banned and not officially permitted again until years after the Mao era.<sup>143</sup>

In the earliest years of the PRC, the Party cooperated with and subsidized private studios, which initially released dozens of propaganda films. The party’s censorship policies were opaque, however, and guessing what Chairman Mao would deem to be politically

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<sup>137</sup> ZHANG, *supra* note 119, at 69.

<sup>138</sup> *Id.* at 70.

<sup>139</sup> *Id.* at 70–71.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 189.

<sup>142</sup> ZHU, *supra* note 127, at 51.

<sup>143</sup> *Id.* at 52.

correct proved perilous for filmmakers. Accomplished Shanghai-based director Sun Yu found himself at the center of a political firestorm when he released *The Life of Wu Xun* (武训传), the most ambitious of the privately produced propaganda features. Although the film sought to glorify the Communist revolution, Mao excoriated it for incorrectly depicting Chinese history and portraying peasants as reformers rather than revolutionaries.<sup>144</sup> Feature film production in state-owned studios ground to a halt for more than a year as the industry stagnated in political uncertainty, while Party officials and the press rained down criticism on private studios.<sup>145</sup> By 1953, all the private studios in China were nationalized.<sup>146</sup> Commentators theorize that Mao used the *Wu Xun* campaign to cow the comparatively Westernized Shanghai studios, signal that politics would now trump artistic expression, and cement the Party's role—and Mao's role in particular—as the arbiter of political correctness.<sup>147</sup> In one stroke, through the *Wu Xun* campaign, Mao “consolidated his power position within the [Communist Party] leadership and crushed the naïve dream of creative freedom held by all artists, no matter what credentials they might possess.”<sup>148</sup>

The ensuing “socialist realism” period was named after the Party's credo that films should depict socialism with simultaneous realism and idealism.<sup>149</sup> The period witnessed the expansion of the Chinese film industry, albeit under the complete control of the Party.<sup>150</sup> With the film apparatus secured within the bureaucracy, the state invested heavily in film education and the development of new film technologies.<sup>151</sup> The style and substance of socialist realism were confined to limited, politically acceptable parameters: the films were generally serious in tone (often set in wartime) and sublimated character development and style to political exemplarity, depicting model protagonists locked in class struggle.<sup>152</sup> Neverthe-

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<sup>144</sup> ZHANG, *supra* note 119, at 198–99.

<sup>145</sup> *Id.* at 198.

<sup>146</sup> *Id.* at 198–99.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 199.

<sup>149</sup> *Id.* at 189.

<sup>150</sup> *Id.* at 200–01.

<sup>151</sup> *Id.*

<sup>152</sup> ZHU, *supra* note 127, at 43.

less, resourceful filmmakers of this period found room for artistic expression and stylistic innovation within the confines of political orthodoxy, particularly in the genres of ethnic minority film, traditional theater and opera film, and animation.<sup>153</sup> A number of these films were popular in China, and some even found popularity and critical acclaim abroad in Hong Kong, Taiwan, and Europe.<sup>154</sup>

Overall, however, the socialist realism period was a trying and dangerous time for filmmakers, and a disappointment for Chinese cinema. Outspoken filmmakers, emboldened to air criticisms during the 1956 One Hundred Flowers Campaign, decried an epidemic of poor box office performance.<sup>155</sup> Film critic Zhong Dianfei publicly noted at the time that socialist films' target audience—workers, peasants, and soldiers—showed little interest in them.<sup>156</sup> He blamed poor attendance on state interference in the creative process and repression of directors' individual artistic styles.<sup>157</sup> Immediate reforms in response to the criticisms gave individual studios more artistic control, and the fruits of the reforms were unmistakable: production doubled and new themes, styles and genres proliferated.<sup>158</sup> Mao and the Party leaders soon turned on their critics,<sup>159</sup> however, and numerous high-profile filmmakers were discredited or banned during the ensuing Anti-Rightist Movement of 1957.<sup>160</sup> While film production continued apace for the next several years, the Anti-Rightist Movement dashed any hope that socialist cinema would see significant stylistic and artistic progress under Mao.

Chinese cinema reached its nadir in 1966–1969—the tumultuous first three years of the Cultural Revolution, when feature film production ceased entirely.<sup>161</sup> In his call for a new socialist revolution in the sphere of culture, Mao denounced the previous seven-

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<sup>153</sup> ZHANG, *supra* note 119, at 208–10.

<sup>154</sup> *Id.* at 209–10.

<sup>155</sup> *Id.* at 205.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 206.

<sup>159</sup> SPENCE, *supra* note 121, at 542–43.

<sup>160</sup> ZHANG, *supra* note 119, at 207.

<sup>161</sup> *Id.* at 219–20.

teen years of socialist filmmaking.<sup>162</sup> For the remainder of the Cultural Revolution, film production consisted of a handful of model revolutionary plays and operas and, later, feature films in line with the political and aesthetic values of the ultra-leftists and Mao's wife Jiang Qing.<sup>163</sup> In short, some stylistic innovations and artistic achievements occurred during the Mao era, but style and art were severely stunted overall by their relentless subordination to politics.<sup>164</sup>

*D. The 1980s: Transition, Liberalization, and the "Fifth Generation" Auteurs*

Following Mao's death and the end of the Cultural Revolution in 1976, China embarked on a new period of modernization, economic reform, and international reengagement. China eagerly cast off the repression and stagnation of the Cultural Revolution and embarked on a new era of economic liberalization and technological modernization under Deng Xiaoping. State investment resumed in film production, which had slowed to a crawl during the Cultural Revolution.<sup>165</sup>

From 1977 until the early 1990s, film production remained within the centrally controlled state studio system established under Mao.<sup>166</sup> While political oversight and censorship remained a fact of life for filmmakers even throughout this period, there was more room for creative maneuvering than in the previous three decades. For example, several influential films that were initially banned were ultimately released in China within a few years or even months after officially being declared "illegal."<sup>167</sup> Some of China's most celebrated directors—often referred to collectively as the "Fifth Generation"—emerged during this period, including Zhang Yimou, Tian Zhuangzhuang, and Chen Kaige. These directors felt relatively free to experiment with ideological critique and

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<sup>162</sup> *Id.* at 217.

<sup>163</sup> *Id.* at 219–22.

<sup>164</sup> *Id.* at 208–09.

<sup>165</sup> ZHU, *supra* note 127, at 52.

<sup>166</sup> See JASON McGRATH, POSTSOCIALIST MODERNITY: CHINESE CINEMA, LITERATURE, AND CRITICISM IN THE MARKET AGE 131 (2008).

<sup>167</sup> MICHAEL BERRY, SPEAKING IN IMAGES: INTERVIEWS WITH CONTEMPORARY CHINESE FILMMAKERS 6 (2005).

auteurism.<sup>168</sup> They were also unconstrained by market considerations, as production remained entirely state-subsidized.<sup>169</sup> Directors in the state studio system could produce the films they wanted within the allocated budget.<sup>170</sup> They were unaccountable for—but also unable to partake financially in—their films’ success.<sup>171</sup>

Thematically, Fifth Generation films were iconoclastic and distanced themselves stylistically and thematically from the films of previous generations—particularly social realist cinema.<sup>172</sup> The Fifth Generation directors deconstructed revolutionary history and undermined socialist mythology. Chen Kaige’s 1984 film *Yellow Earth* (黄土地), for example, portrays rural mountain villagers who resist change and are unresponsive to a Communist cadre’s indoctrination attempts.<sup>173</sup> Through its minimalist plot and fragmented narrative, the film counters the stylistic conventions of socialist realism and the myth that peasants readily embraced socialism.<sup>174</sup> The Fifth Generation’s films received accolades abroad, but they generally flopped with domestic audiences, for whom the avant-garde stylings probably seemed foreign and impenetrable.<sup>175</sup>

While censors granted far more leeway in the 1980s than in the Mao era,<sup>176</sup> censorship was still prevalent if less intrusive.<sup>177</sup> The deadly crackdown on protestors at Tiananmen in 1989 cooled the more permissive ideological environment that filmmakers enjoyed earlier in the decade, but it did not precipitate a return to Mao-era levels of control.<sup>178</sup> Instead, it seems to have prompted the Party to

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<sup>168</sup> PICKOWICZ, *supra* note 122, at 303–22.

<sup>169</sup> *See id.* at 310.

<sup>170</sup> *See id.*

<sup>171</sup> *See* ZHU, *supra* note 127, at 50–54; *see also* MCGRATH, *supra* note 166, at 3.

<sup>172</sup> ZHANG, *supra* note 119, at 225–58.

<sup>173</sup> *Id.* at 235–36.

<sup>174</sup> ZHU, *supra* note 127, at 58.

<sup>175</sup> *Id.* at 65.

<sup>176</sup> *See id.*; *see also* PICKOWICZ, *supra* note 122, at 303–22.

<sup>177</sup> *See* PICKOWICZ, *supra* note 122, at 303–22; ZHANG, *supra* note 119, at 240 (noting the example of *Evening Ball* (1987), a film by Fifth Generation filmmaker Wu Ziniu, for which censors required four rounds of revision before its release because they were concerned by Wu’s “transcendental concept of humanity, his condemnation of all wars, and his hard-to-decipher images”).

<sup>178</sup> *See* PICKOWICZ, *supra* note 122, at 315 (noting that although in the immediate aftermath of Tiananmen the state instituted a knee-jerk “crude Stalinist mode of control” over the film industry, but that the “freeze did not last long”); ZHANG, *supra* note 119, at

divert resources away from art films and invest heavily in the production of “main melody” films—propaganda films designed to reinstall correct political ideology and nationalism.<sup>179</sup> It might also have disillusioned some filmmakers, causing them to desert political ideals and whole-heartedly embrace commercialism.<sup>180</sup>

*E. 1990s: Economic Reform and Hollywood’s Reintroduction*

Maintaining a fully state-supported film sector disassociated from the market was untenable. Box office numbers declined drastically through the late 1980s and early 1990s due to a lack of popular interest in much of the domestic cinema, a lack of foreign films, and a panoply of new entertainment options competing for consumers’ discretionary income. Declines in box office returns triggered a vicious cycle. Decreased revenue begat lower investment in production. In 1992, the most expensive Chinese film produced cost a mere \$187,500.<sup>181</sup> In addition, the government still enforced a production quota of 120 films per year, further spreading budgets thin.<sup>182</sup> The low investment undermined film quality, rendering film products even less attractive to audiences.<sup>183</sup> By 1993, many Chinese studios had to rely on co-production arrangements with Taiwanese and Hong Kong studios in order to produce films.<sup>184</sup> In just one year, between 1992 and 1993, purely domestic productions had fallen by fifty percent, audience attendance by sixty percent, and box office returns and distribution net income by forty percent.<sup>185</sup>

By this time, many areas of China’s economy were undergoing profound economic reform, and the need for market-based reform in the film sector became self-evident. In 1993, the Ministry of Ra-

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259 (“At first sight, the military crackdown in Tiananmen of 1989 did not leave any direct impact on mainland filmmaking . . .”).

<sup>179</sup> ZHANG, *supra* note 119, at 240. Main melody (主旋律) films are so called because they follow the Party’s principal propaganda line (i.e., the Party’s “main melody”). See ZHU, *supra* note 127, at 81.

<sup>180</sup> See MCGRATH, *supra* note 166, at 3.

<sup>181</sup> ZHU, *supra* note 127, at 77.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

dio, Film, and Television (“MRFT”) outlined a plan for transitioning state production and distribution to a market-based model, emphasizing film’s economic function and, in the words of Professor Ying Zhu, “endorsing a cinematic practice not necessarily in alignment with film’s pedagogical function.”<sup>186</sup> The state-run studios, which were still the only studios permitted to produce films at this time, concentrated their reform efforts primarily on downsizing, internal restructuring, talent outsourcing, and tying employee bonuses to profits.<sup>187</sup> While the reforms improved studio management, they did little to solve several root causes of the studios’ troubles: low revenue, lack of sufficient financing, and lack of creativity and modern film production standards as a result of decades of filmmakers working under state patronage and censorship.<sup>188</sup> Most importantly, the reform efforts did nothing to bring audiences back to theaters.<sup>189</sup>

Market-based reforms and officials’ urgent desire to jump-start the domestic film market led to the repealing of the ban on theatrical exhibition of revenue-sharing foreign films in the mid-1990s.<sup>190</sup> Authorities hoped that by showing a limited number of Western films, with their higher production values and wider range of subject matter, audiences would be enticed back into theaters and rekindle the movie-going habit, reenergizing the market for domestic films in the process.<sup>191</sup> In 1994, the MRFT issued a reform measure permitting the import of ten foreign films per year (mostly Hollywood blockbusters) for theatrical release on a revenue-sharing basis.<sup>192</sup> Following China’s entry into the WTO, that number doubled.<sup>193</sup> In 2012, Chinese authorities again increased the number, this time to thirty-four.<sup>194</sup> This course of action by the MRFT had little to do with ideology and everything to do with the market

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<sup>186</sup> *Id.* at 76.

<sup>187</sup> *Id.* at 79.

<sup>188</sup> *Id.* at 81–83.

<sup>189</sup> *Id.* at 85.

<sup>190</sup> *Id.* at 85–86.

<sup>191</sup> See ZHANG, *supra* note 119, at 282.

<sup>192</sup> MCGRATH, *supra* note 166, at 171. In the first year, the ten films consisted of seven Hollywood blockbusters and three Hong Kong films. *Id.*

<sup>193</sup> *Id.* at 172.

<sup>194</sup> Priest, *supra* note 1, at 490.

(and international pressure—also a function of the market). Even the first few waves of Hollywood films contained movies that were expected to perform well at the box office but potentially raised thorny content issues at the time, such as Oliver Stone’s violent and political *Natural Born Killers* and John Woo’s violent action film *Broken Arrow*.<sup>195</sup>

During this period, Chinese officials also actively wooed Hollywood in an effort to entice foreign investment in new productions and gain foreign distribution for Chinese films. Chinese officials crowded that co-productions are treated as domestic productions and therefore provide an avenue for Hollywood studios to circumvent the import cap and receive twice the revenue share of imported films.<sup>196</sup> Chinese officials also promised to grant “preferential consideration” in the Chinese market to foreign companies that purchased overseas distribution rights for Chinese films.<sup>197</sup> Warner Bros. and Twentieth Century Fox are reportedly two major studios that developed favorable relationships with Chinese officials by purchasing such rights.<sup>198</sup>

The reintroduction of Hollywood was not the only major step that the MRFT took in 1995 to revitalize Chinese film production. To help domestic producers compete with the onslaught of imports, the MRFT made policy changes to open up the film production sector. Prior to 1995, only sixteen licensed state-owned studios could invest in and produce films.<sup>199</sup> The MRFT loosened its licensing policy to permit provincial level studios to participate in film production.<sup>200</sup> More importantly, it opened up film production

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<sup>195</sup> See ZHU, *supra* note 127, at 86.

<sup>196</sup> *Id.* at 152.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 81, 87.

<sup>200</sup> See Guanyu Gaige Gushi Yingpian She Zhi Guanli Gongzuo De Guiding (关于改革故事影片摄制管理工作的规定) [Regulations Concerning Reforming Feature Film Shooting Management Work] (promulgated by the Ministry of Radio, Film, and Television, Jan. 5, 1995), para. 1 (China), translated in *Regulations Concerning Reforming Feature Film Shooting Management Work*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1995/01/05/regulations-concerning-reforming-feature-film-shooting-management-work/> [http://perma.cc/VD7M-VJRR] (last visited Oct. 31, 2015).

to outside investors<sup>201</sup> (later regulations clarified that outside investors eligible to invest in film production do not include wholly foreign-owned entities, although foreign companies could invest through joint ventures with Chinese entities).<sup>202</sup> In addition, the studio reforms of the mid-1990s, partly as a result of Hollywood's reintroduction, led to reforms in the distribution sector that opened it up to private investment and Hollywood-style vertically integrated marketing and management in which the film producer, distributor, and exhibitor shared in profits and losses.<sup>203</sup>

By the end of 1995, the MRFT's plan appeared to have worked. Audiences returned to theaters in droves to see the "big ten" Hollywood imports, and the return of the theater-going habit gave domestic films an immediate boost.<sup>204</sup> Private investment flooded into domestic film production. With Hollywood production values now setting the standard, Chinese producers were forced to acknowledge that quality films with high production values were key to attracting audiences, and several large budget Chinese films were released that year. While the Hollywood imports claimed seventy to eighty percent of the Chinese box office in 1995, domestic films fared admirably: domestic co-production *Red Cherry*, which was the number one domestic film that year, surpassed most of the Hollywood blockbusters.<sup>205</sup> It also quickly became apparent that private investment was key to producing films that could compete in this new landscape, as the majority of the state-run studio productions were "box-office turkeys" in 1995.<sup>206</sup>

The Chinese film industry's resurgence was exceedingly short-lived, however, because state censors reinserted themselves. In an

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<sup>201</sup> *Id.* para. 3.

<sup>202</sup> See Guangbo Dianshijiemu Zhizuo Jingying Guanli Guiding (广播电视节目制作经营管理规定) [Radio and Television Program Production Business Management Regulations] (promulgated by the St. Admin. of Radio, Film, and Television, July 19, 2004, effective Aug. 20, 2004), art. 5 (China), *translated in Radio and Television Programme Production Business Management Regulations*, CHINA COPYRIGHT AND MEDIA, <http://chinacopyrightandmedia.wordpress.com/2004/07/19/radio-and-television-programme-production-business-management-regulations> [<http://perma.cc/MP27-LM32>] (last visited Oct. 1, 2015).

<sup>203</sup> ZHU, *supra* note 127, at 87.

<sup>204</sup> *Id.* at 86.

<sup>205</sup> ZHANG, *supra* note 119, at 282.

<sup>206</sup> ZHU, *supra* note 127, at 88.

atmosphere in which the rapid onset of commercial culture resulted in “spiritually polluting” literature, music, and art,<sup>207</sup> film also entered the crosshairs of culture authorities. Private profiteers inexperienced at filmmaking rushed to enter the fray, and the proliferation of low budget films depicting gratuitous sex and violence dismayed officials.<sup>208</sup> The MRFT called for the production of ten “quality” domestic films (which studios interpreted to mean main melody films) annually<sup>209</sup> and, in order to provide further protection, revenue, and concomitant investment in domestic production, they required exhibitors to allocate no more than one-third of their screen time to foreign films.<sup>210</sup> In 1996, therefore, the diminished screen time for foreign films and the devotion of much of the remaining screen time to socialist hero main melody films turned away audiences and private investors alike.<sup>211</sup> The tightening of state control over studios at this time “resulted in monotonous cinematic representation and the avoidance of controversial contemporary subjects more attuned to the concerns of ordinary moviegoers.”<sup>212</sup> Another consequence was that some film exhibitors, sensing the domestic studios’ anxiety over the marketability of their main melody films, exploited the studios by demanding they take lower revenue shares and cover costs not customarily borne by the studio.<sup>213</sup>

Despite the market-oriented transition and promising developments for Chinese filmmakers, censorship remained a consistent drag on the industry’s reform efforts.<sup>214</sup> Inconsistent, shifting, and opaque censorship rules often led filmmakers to err on the side of caution and avoid controversial subjects of the day, or invest in politically (though not economically) safe main melody productions, giving film practitioners experience producing only a narrow range of films.<sup>215</sup> Therefore, as Professor Zhu notes, “even when film

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<sup>207</sup> *See id.*

<sup>208</sup> *Id.*

<sup>209</sup> ZHANG, *supra* note 119, at 282.

<sup>210</sup> ZHU, *supra* note 127, at 89.

<sup>211</sup> *Id.* at 88–89.

<sup>212</sup> *Id.* at 90.

<sup>213</sup> *Id.* at 89.

<sup>214</sup> *See* ZHANG, *supra* note 119, at 284.

<sup>215</sup> ZHU, *supra* note 127, at 90.

reform returned to the Chinese filmmakers much of the control over their creative processes and products, they had difficulty in making the transition from a cinema of propaganda to a cinema of popular appeal and commercial entertainment.”<sup>216</sup> Nevertheless, the 1990s witnessed the advent of key reforms that would save the Chinese film industry a decade later, spurred by commercialization: modernization and privatization of the production and distribution sectors, and the introduction of foreign content, capital, and expertise into the Chinese film market.

*F. 2000 to the Present: The Rise of China’s Film Industry*

The problems that plagued the industry in the 1990s, coupled with rampant VCD and DVD piracy,<sup>217</sup> continued to stunt the Chinese film industry’s growth well into the new millennium. As recently as 2005, annual box office revenue in China amounted to just \$250 million (inclusive of both foreign and domestic films)—a mere three percent of the U.S. box office total that year.<sup>218</sup>

However, the seeds of future success were sewn when, in the 1990s, officials permitted private investment in theaters and distribution.<sup>219</sup> By 2014, China had replaced Japan as the world’s second largest box office.<sup>220</sup> China’s 2014 box office proceeds reached \$4.76 billion, and by 2016 China is likely to become the first country besides the United States to cross the \$5 billion sales threshold in a single year.<sup>221</sup> The confluence of three factors has resulted in an unprecedented Chinese film industry boom.<sup>222</sup> First, the past decade has witnessed a meteoric rise in the number of theaters. Today, theater chains are building 5,000 screens per year in China, which now boasts 25,000 screens nationwide<sup>223</sup>—more than

<sup>216</sup> *Id.*

<sup>217</sup> See Priest, *supra* note 60, at 796–99.

<sup>218</sup> *Id.* at 798.

<sup>219</sup> ZHU, *supra* note 127, at 152.

<sup>220</sup> See Priest, *supra* note 1, at 484.

<sup>221</sup> Clifford Coonan, *China’s Box Office Surges 36 Percent in 2014 to \$4.76 Billion*, HOLLYWOOD REP. (Jan. 1, 2015), <http://www.hollywoodreporter.com/news/chinas-box-office-surges-36-760889> [<http://perma.cc/A9X3-VTHS>]; Stephen Cremin, *Peter Loehr on the China Opportunity*, FILM BUS. ASIA (Sept. 15, 2014, 12:00 PM), <http://filmbiz.asia/news/peter-loehr-on-the-china-opportunity> [<http://perma.cc/TW6V-CZL5>].

<sup>222</sup> See Priest, *supra* note 1, at 484.

<sup>223</sup> Cremin, *supra* note 221 (quoting China film executive Peter Loehr).

double the number of screens that existed in 2011.<sup>224</sup> Screen installations were initially concentrated in first-tier cities such as Beijing and Shanghai but now even fifth and sixth-tier cities are experiencing the boom.<sup>225</sup> Second, the quality of the movie-going experience has improved dramatically during the past decade. This includes quality of the physical spaces in which films are exhibited as state-of-the-art cinemas with stadium seating, IMAX screens, and 3-D projection proliferate nationwide.<sup>226</sup> It also includes a significant rise in content quality as the number of imports and co-productions with high production values increases and purely homegrown productions, spurred by global competition, improve dramatically. Third, Chinese consumers' discretionary spending has increased markedly—particularly that of young, white collar Chinese who are the most avid filmgoers.<sup>227</sup> Although first-run blockbuster films can cost as much as twenty-six to twenty-eight dollars per ticket,<sup>228</sup> moviegoing has become an essential social and leisurely pursuit for many young Chinese.<sup>229</sup>

China's domestic film industry has grown with the meteoric rise in box office revenue. Currently, box office receipts for domestic films are about equal to that of foreign films,<sup>230</sup> and six of the ten highest grossing films in China are domestic productions, all of which were released in 2010 or later.<sup>231</sup> Some of this assuredly derives from economic protectionist policies instituted in the 1990s,

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<sup>224</sup> See Priest, *supra* note 1, at 484 (noting that China had 10,700 screens nationwide in 2011).

<sup>225</sup> See Cremin, *supra* note 221; Patrick Frater, *How China's Homegrown Biz Is Threatening Hollywood's Payday*, VARIETY (Sept. 12, 2013, 4:20 AM), <http://variety.com/2013/biz/news/is-china-outgrowing-hollywood-1200605567/> [<http://perma.cc/F6SB-SEL3>].

<sup>226</sup> See Priest, *supra* note 1, at 485.

<sup>227</sup> See Cremin, *supra* note 221.

<sup>228</sup> *Id.*

<sup>229</sup> See *The Red Carpet*, ECONOMIST (Dec. 21, 2013), <http://www.economist.com/news/christmas-specials/21591741-red-carpet> [<http://perma.cc/SKL3-8JS9>] (“Young [Chinese] people, flush with cash, are eager to get out of the house. Films have become central to Chinese courtship and consumption.”).

<sup>230</sup> Cremin, *supra* note 221.

<sup>231</sup> Clarence Tsui, *China Box Office: 10 Highest-Grossing Movies of All Time*, HOLLYWOOD REP. (Feb. 28, 2013), <http://www.hollywoodreporter.com/gallery/china-box-office-10-highest-425083#1-avatar-james-cameron-2010-2219-million> [<http://perma.cc/R7HV-ZG47>].

such as limiting the annual screen time available to foreign films<sup>232</sup> and instituting “blackout” periods during which only domestic films can be shown.<sup>233</sup> However, there are signs that the Chinese film industry is now successfully competing on its merits.<sup>234</sup> Hollywood films, which are exceedingly popular in first tier cities such as Beijing and Shanghai, are less popular in other, less cosmopolitan cities.<sup>235</sup> Audiences in these cities are more interested in local fare emphasizing themes that resonate with their experiences and feature popular Chinese television stars.<sup>236</sup> According to *Variety*, a major U.S. film industry trade publication, in 2013 China produced domestic “megahits” at a rate of about one per month, and about half of those were by first-time or little-known directors.<sup>237</sup> In any event, rumblings are steadily growing that, as a result of U.S. pressure, the import cap will be raised yet again or removed altogether by 2017.<sup>238</sup> If other market access barriers are lifted as well, Chinese filmmakers will be forced to compete on the quality and attractiveness of their content alone.

The effect of commercialization on both Chinese film production and censorship practices over the past decade is palpable. By the turn of the century, entertaining the potentially enormous audience in China—and scoring the associated potential riches—had become most Chinese filmmakers’ focus, rather than producing state-sponsored main melody films for the state or art-house films for a small circle of critics.<sup>239</sup> At that time, to keep from running afoul of censors, producers tended to stick to a few dominant

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<sup>232</sup> See *supra* note 210 and accompanying text.

<sup>233</sup> See Priest, *supra* note 1, at 483 n.78.

<sup>234</sup> See Frater, *supra* note 225 (“Certainly a degree of the local success is due to China’s control of all distribution, including blackout periods in which new Hollywood films cannot be released, and weeks in which studio blockbusters are stacked against each other, limiting their playability. But those who think the surge in the local Chinese film industry is due mainly to such practices are too focused on the increasing scale of the business in China rather than its growing sophistication and diversity.”).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Clifford Coonan, *MPAA’s Chris Dodd: China Will Give More Access to Hollywood Movies*, HOLLYWOOD REP. (Apr. 18, 2014), <http://www.hollywoodreporter.com/news/mpaas-chris-dodd-china-will-697558> [<http://perma.cc/7J9E-LR2M>].

<sup>239</sup> MCGRATH, *supra* note 166, at 165–66.

themes considered noncontroversial: histories (that did not twist the Party's historical narrative), martial arts films (exemplified by Ang Lee's *Crouching Tiger, Hidden Dragon*, Zhang Yimou's *Hero*, and Peter Chan Ho-sun's *The Warlords*),<sup>240</sup> and urban comedies (exemplified by Feng Xiaogang's wildly successful satirical comedies about modern life).<sup>241</sup> However, the narrow subject matter range made the films difficult to differentiate.<sup>242</sup> Established directors with bankable names made many of these films, especially in the history and martial arts genres. Up-and-coming directors and former "underground" filmmakers that sought mainstream acceptance and success, on the other hand, have continually needed to distinguish themselves. They have done so by pushing the envelope of acceptable content,<sup>243</sup> and many have sought to bring that edge to the commercial mainstream.<sup>244</sup> As *Variety* magazine recently wrote in a cover story on the rise of China's domestic film industry, "[y]oung filmmakers are no longer forced to work underground and have chipped away at the regulators' hard lines (and their own cautionary self-censorship) to produce genre films in formats from horror to thriller to romantic comedy."<sup>245</sup>

High-profile co-productions and foreign investment in films such as *Looper*, a sci-fi thriller about futuristic hit-men who travel to China sixty years in the future, *Transformers: Age of Extinction*, and *Iron Man 3* provide three things that Chinese officials particularly value: capital, training, and high production values. However, such films need to generate strong returns in order for financiers and producers to invest in future China projects. Forcing producers of such films to strictly adhere to regulations that forbid eminently marketable subject matter such as violence, murder, the underworld, crime, sex or sexual innuendo, and horror would (for bet-

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<sup>240</sup> Frater, *supra* note 225.

<sup>241</sup> See MCGRATH, *supra* note 166, at 165.

<sup>242</sup> Frater, *supra* note 225.

<sup>243</sup> See PICKOWICZ, *supra* note 122, at 329.

<sup>244</sup> See *id.* at 334–35 (describing how many underground filmmakers in China in fact make daring underground films with the ultimate goal of becoming mainstream filmmakers and, for many, having the luxury of "mov[ing] back and forth aboveground and underground in order to address the different consumer needs and interests of both foreign and domestic viewers").

<sup>245</sup> Frater, *supra* note 225.

ter or worse) greatly hamper their ability to market the films. This is especially true for filmmakers seeking to produce globally marketable films in China: censoring authorities simply must take into account global tastes and consumption habits when reviewing films. Although some co-productions, including *Looper* and *Iron Man 3*, result in two prints—one for Chinese consumption and one for global consumption<sup>246</sup>—the Chinese version might even contain *more*, rather than less content in order to ensure that it contains proportionally sufficient “Chinese” themes to qualify for co-production status, and to make it more attractive to Chinese audiences.<sup>247</sup>

In sum, this Part has aimed to demonstrate that autocratic, complete top-down control of the film industry is an aberration of the Mao era. Indeed, the history of China’s film industry demonstrates that despotic dominion over film production is neither sustainable nor desirable, even from the state’s point of view. While censorship—in celebrated director Feng Xiaogang’s words—“torments”<sup>248</sup> China’s filmmakers and has done so throughout much of history, censorship has also been tempered by market demands and by the ineluctable impulse of filmmakers to differentiate themselves from their forebears, to satiate those market demands, or both. That said, the market clearly is not all-powerful. Chinese producers still create under the pall of a pervasive censorship apparatus, and while the scope of acceptable subject matter today may be far broader than in past decades, the censorship process remains opaque and ad hoc, and there are major political and social themes of central importance to Chinese society that remain off limits. Films directly criticizing the Party, its ideology, or its leaders would be wildly successful if officially released,<sup>249</sup> but those and

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<sup>246</sup> See ZHU, *supra* note 127, at 151 (noting that the China Film Co-Production Corporation, as early as the 1990s, “made important concessions to allow two different prints for all co-productions, one for domestic release and one for international release”).

<sup>247</sup> See Priest, *supra* note 1, at 492 & n.142.

<sup>248</sup> EVAN OSNOS, *AGE OF AMBITION: CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA* 320 (2014) (quoting Feng Xiaogang).

<sup>249</sup> Cf. Song, *Development of Copyright Law*, *supra* note 18, at 295 (noting that in China’s book publishing industry, books by dissident writers such as Liu Xiaobo that critique the establishment are extremely popular and therefore “become the favorites of private publishers” despite the political risks involved). Book publishing has occurred under the purview of a different censoring authority. See generally *id.* Given the structure of the

many other subjects plainly remain untouchable, demonstrating the limits of the market's power over censors. The next Part considers whether the gains that market forces have made are meaningful to Chinese society despite the obvious limitations.

### III. COPYRIGHT-INDUCED LIBERALIZATION OF CHINA'S CENSORSHIP PRACTICES AND RULES

This Part considers whether the market-induced liberalizations of China's film censorship practices and rules have led to meaningful gains over time in terms of expressive freedom in China's film market. "Free expression" here can be evaluated along two dimensions: (1) plurality of voices and viewpoints in films lawfully distributed in China, and (2) diversity of approved film subject matter. Changes along these dimensions can be observed through the extent to which market pressures lead to formal liberalization of the rules or films technically violate censorship rules.

To aid this inquiry, this Part first provides a very brief outline of pertinent censorship rules. It then analyzes how these rules have been applied in practice or have changed as a result of market pressures. Lastly, this Part draws from political science literature on Chinese economic reform to provide a theoretical basis for arguing that the selective enforcement of rules, combined with (or indeed driven by) market forces and economic realities, can lead to meaningful (albeit not absolute) liberalization and reform of formal rules.

#### *A. China's Film Censorship Regulations*

As noted at the beginning of Part II, the Chinese government uses a multilayered censorship approach that involves content censorship, licensing and permitting requirements, investment restric-

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publishing industry and the industry's relationship to the censoring authority, book publishers have been able (and indeed, are often forced by circumstances) to take more risk. For the difference between censorship in the book publishing and film industries, see Yu Hua, *Censorship's Many Faces*, N.Y. TIMES, Feb. 28, 2013, at A29 ("China has more than 500 publishing houses, each with its own editor in chief (and de facto censor); if a book is rejected by one publisher there's still a chance another will take it. In contrast, films are not released until officials in the state cinema bureau in Beijing are satisfied, and once a film is banned it has no hope of being screened.").

tions, self-censorship, rewards and subsidies, and import restrictions.<sup>250</sup> This Section will briefly introduce the censorship regulations most pertinent to this discussion, in particular, film content censorship rules, permitting requirements, and investment restrictions.

As films and filmmakers, both foreign and domestic, proliferate in China, the state has sought to maintain a tight grip on content and production through restrictive content and licensing requirements. Throughout the 1990s, the government issued a series of regulations that outlined rules concerning media entity ownership and verboten content.<sup>251</sup> Article 3 of the 1994 Audiovisual Product Management Regulations enumerated a list of six general categories of forbidden content, which are repeated in more recent regulations:

- (1) Content that endangers the unity and territorial integrity of the nation and sovereignty of the State;
- (2) Content that incites the division of the ethnicities and undermines national solidarity;
- (3) Content that divulges State secrets;

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<sup>250</sup> See *supra* notes 114–18 and accompanying text.

<sup>251</sup> See Dianying Shencha Guiding (电影审查规定) [Film Examination Regulations] (promulgated by the Ministry of Radio, Film, and Television, Jan. 16, 1997) (China), translated in *Film Examination Regulations*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1997/01/16/film-examination-regulations/> [http://perma.cc/WLK9-R2ZR] (last visited Oct. 1, 2015); Dianying Guanli Tiaoli (电影管理条例) [Film Management Regulations] (promulgated by the St. Council, May 29, 1996, effective July 1, 1996) (China), translated in *Film Management Regulations*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1996/06/15/film-management-regulations/> [http://perma.cc/8M7Z-SZ68] (last visited Oct. 1, 2015); Yin Xiang Zhipin Guanli Tiaoli (音像制品管理条例) [Audiovisual Products Management Regulations] (promulgated by the St. Council, Aug. 25, 1994, effective Oct. 1, 1994) (China) [hereinafter *Audiovisual Products Management Regulations*], translated in *Audiovisual Products Management Regulations*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1994/08/25/audiovisual-products-management-regulations/> [http://perma.cc/2FVA-VMGD] (last visited Oct. 1, 2015); Dianying Shencha Zan Hang Guiding (电影审查暂行规定) [Provisional Film Examination Regulations] (promulgated by the Ministry of Radio, Film, and Television, Apr. 21, 1993, effective June 4, 1993) (China), translated in *Provisional Film Examination Regulations*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/1993/06/04/provisional-film-examination-regulations/> [http://perma.cc/MXZ2-P2KT] (last visited Oct. 1, 2015).

- (4) Content that propagates obscenity and superstition or glorifies violence;
- (5) Content that slanders or insults others; [and]
- (6) Other content of which the publication and dissemination are prohibited by State provisions.<sup>252</sup>

Clearly, much of this list targets content viewed as seditious and politically sensitive, although it does touch broadly on socially objectionable content as well, such as violence and slanderousness. (These, too, however, have political undertones, as showing scenes of graphic violence can in theory lead to unruliness and political instability, and “slanderous” content may target party officials or Revolutionary figures.) Of particular note are the list’s vagueness and the exceptional breadth of subject matter that it covers. Indeed, item six essentially affords the Party-state *carte blanche* to censor content at will. The Chinese word for “provisions” (规定) is a broad term that could be interpreted to include any rule or stipulation that originates from a state organ. Hence, if any state organ, including the censoring body, declares something to be illegal, that content violates article 3(6). In any event, nothing in the film regulations requires authorities to provide a justification for banning a film or requiring revisions, and they often do not provide one. Unsurprisingly, filmmakers lament the ad hoc nature of censorship:

The censorship system is very ridiculous, for there is no standard. They say, “Your films are illegal,” and then I ask, “What is the relevant film law? Which clause do my films violate?” No, there is no specific law. So the censorship is quite cruel. If they say your film is “illegal,” it is “illegal.”<sup>253</sup>

In keeping with the traditional Chinese view that expressive works are morally and psychologically influential and therefore should edify with “correct” ideology and positive themes and imagery, the 2006 Film Management Regulations (promulgated by

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<sup>252</sup> Audiovisual Products Management Regulations, *supra* note 251, art. 3.

<sup>253</sup> LUCY MONTGOMERY, CHINA’S CREATIVE INDUSTRIES: COPYRIGHT, SOCIAL NETWORK MARKETS, AND THE BUSINESS OF CULTURE IN A DIGITAL AGE 50 (2010) (quoting filmmaker Li Yang).

the MRFT's successor, the State Administration of Radio, Film, and Television ("SARFT")<sup>254</sup> encourage filmmakers to produce films that "support healthy and beneficial culture, strive to transform backward culture, [and] determinedly resist degenerate culture."<sup>255</sup> The 2006 regulation contains the same list of verboten political subject matter as the 1994 regulation quoted above, but enumerates additional censorship-worthy topics, with an emphasis on such socially "unhealthy" or corrupting subject matter as violence, horror, graphic sexuality, criminal activity, showing the dark side of modern Chinese society, or simply presenting a pessimistic rather than uplifting outlook on life.<sup>256</sup> Specifically, according to the 2006 regulation, any film must be edited or revised if it:

- disagrees with or alters Party narratives about historical facts and individuals, including "twisting Chinese culture and Chinese history, gravely violating historical facts," or criticizing Revolutionary heroes, the army, or the police;
- contains graphic sexual content including the depiction of "promiscuity, rape, prostitution, sexual behavior, homosexuality, masturbation, male and female genitalia and other intimate parts; intermittent filthy lines, songs, background music and sound effects;"
- contains horror, violence, monsters, and gore;
- "blur[s] the basic nature of righteousness and unrighteousness; sedulously display[s] unlawful or criminal aggressiveness and arrogance;"
- graphically portrays violence or crimes such as murder, drug use, and gambling;

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<sup>254</sup> In 2013, SARFT merged with the General Administration of Press and Publication ("GAPP") to form the State Administration of Press, Publication, Radio, Film and TV ("SAPPRFT").

<sup>255</sup> See *Dianyingjuben (Genggai) Beian, Dianyingpian Guanli Guiding (电影剧本 (梗概) 备案, 电影片管理规定)* [Film Script (Outline) Filing, Film Management Regulations] (promulgated by the St. Admin. of Radio, Film, and Television, Apr. 3, 2006, effective June 22, 2006), art. 12 (China) [hereinafter *Film Script (Outline) Filing*], *translated in Film Script (Outline) Filing, Film Management Regulations*, CHINA COPYRIGHT AND MEDIA, <http://chinacopyrightandmedia.wordpress.com/2006/05/22/film-script-outline-filing-film-management-regulations> [<http://perma.cc/NYD6-9JL5>] (last visited Oct. 1, 2015).

<sup>256</sup> *Id.* art. 14.

- portrays “bad habits” such as excessive drinking and smoking;
- casts police in a negative light by showing prisoner abuse or “extortion of confession by torturing criminals or criminal suspects;”
- portrays society and life in a dark, negative, or dispiriting manner;
- “advocates religious extremism,” provokes conflicts between worshippers of different religions or between believers and non-believers, or hurts “the feelings of the masses;”
- “propagates the destruction of the natural environment, abuse of animals, catching, killing and eating of State-protected animals;” or
- generally violates “the spirit of relevant laws and regulations.”<sup>257</sup>

In addition to the more formal content regulations, SARFT also issues sporadic “notices.”<sup>258</sup> For example, SARFT’s 2011 ban on television dramas containing time travel plot elements arrived in the form of an ad hoc notice.<sup>259</sup> Time travel dramas reportedly raised SARFT’s ire following the extreme popularity of several serials in which a modern-day protagonist travels back in time and consorts, often romantically, with well-known historical figures.<sup>260</sup> While such plot devices seem innocuous enough, they can undermine official histories or visions of the future, and comparisons

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<sup>257</sup> *Id.* arts. 12, 14.

<sup>258</sup> See Creemers, *supra* note 114, at 97.

<sup>259</sup> See Guangdong Zongju Guanyu 2011 Nian 3 Yue Quan Guo Paishe Zhizuo Dianshiju Beian Gongshi De Tongzhi (广电总局关于2011年3月全国拍摄制作电视剧备案公示的通知) [Notice Concerning the Nationwide Television Drama Shooting Filing Announcement for March 2011] (promulgated by the St. Admin. of Radio, Film, and Television, Mar. 29, 2011, effective Mar. 29, 2011) (China), translated in *Notice Concerning the Nationwide Television Drama Shooting Filing Announcement for March 2011*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/2011/03/29/notice-concerning-the-nationwide-television-drama-shooting-filing-announcement-for-march-2011/> [http://perma.cc/4KE2-WQ4H] (last visited Oct. 31, 2015).

<sup>260</sup> See Priest, *supra* note 1, at 492.

with the past or future can be used—and traditionally have been used—to criticize policies of the present.<sup>261</sup>

For Chinese films aiming for theatrical release on the mainland, censorship review begins prior to filming. A filmmaker must submit to SARFT an outline of the script for approval before filming can commence.<sup>262</sup> At one film set visited by a writer for *The Economist*, the writer was told that the script had been revised approximately twenty times, and censors only agreed to approve the film after a sympathetic communist hero was written in.<sup>263</sup> Films that do not undergo preproduction review are still frequently made in China, but their distribution options are limited to underground distribution, online distribution through one of China's popular video streaming websites such as Youku.com or LeTV, or overseas distribution.<sup>264</sup>

State control extends not only to content, it also extends to every aspect of film production, including governing who can invest in and produce a film project. However, as suggested above in Part II.E, the need to privatize and commercialize film production has led to significant liberalization in these areas since the mid-1990s. Prior to that time, only state funding could be used in film production. Subsequently, private entities, with the exception of foreign-owned entities, have been permitted (and encouraged) to invest in the film sector. In 2002, SARFT liberalized its production rules further to allow private (non-foreign-owned) companies to apply for one-off film production permits.<sup>265</sup> Two years later it revised its regulations again to permit private companies to apply directly for a permanent film production permit (under certain circumstances).<sup>266</sup>

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<sup>261</sup> *Id.*

<sup>262</sup> See *Dianying Guanli Tiaoli* (电影管理条例) [Film Administrative Regulations] (promulgated by the St. Council, Dec. 25, 2001, effective Feb. 1, 2002), art. 8 (China) [hereinafter *Film Administrative Regulations*], translated in *Film Management Regulations (Revised)*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/2001/12/25/film-management-regulations-revised/> [http://perma.cc/GE9A-F2T3] (last visited Oct. 31, 2015).

<sup>263</sup> *The Red Carpet*, *supra* note 229.

<sup>264</sup> See Priest, *supra* note 1, at 493–94.

<sup>265</sup> Film Administrative Regulations, *supra* note 262, art. 8.

<sup>266</sup> *Dianying Qiye Jingying Zige Zhun Ru Zan Hang Guiding* (电影企业经营资格准入暂行规定) [Provisional Film Enterprises Business Qualification

Foreign investment and participation in mainland film production is now permitted in the form of joint ventures and co-productions with local partners so long as the foreign equity stake does not exceed forty-nine percent.<sup>267</sup> Co-production is an increasingly popular model for Hollywood studios because the studio is directly involved in production, foreign studios can take advantage of cheaper labor and equipment costs by filming in China, and since co-productions are treated as domestic films they are not subject to the import cap and are eligible for a higher revenue share.<sup>268</sup> As “domestic” Chinese films, however, co-productions are ostensibly subject to the same approval and content censorship rules as all other domestic productions.<sup>269</sup> In addition, at least one-third of the “main cast” of any foreign-Sino co-production must be Chinese nationals,<sup>270</sup> and the production should “abide by Chinese” laws and aim to promote China’s economic and cultural prosperity.<sup>271</sup>

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Entry Regulations] (promulgated by the St. Admin. of Radio, Film, and Television, June 15, 2004, effective Nov. 10, 2004), art. 5 (China), *translated in Provisional Film Enterprises Business Qualification Entry Regulations*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/2004/10/10/provisional-film-enterprises-business-qualification-entry-regulations/> [http://perma.cc/JEZ5-N5UH] (last visited Sept. 28, 2015).

<sup>267</sup> *Id.* art. 6.

<sup>268</sup> See Film Script (Outline) Filing, *supra* note 255, art. 3 (stipulating that the script preview requirements also apply to foreign-Sino co-productions); Zhong Wai Hezuo Shezhi Dianyingpian Guanli Guiding (中外合作摄制电影片管理规定) [The Stipulation of Administration on Chinese-Foreign Film Co-Production] (promulgated by the St. Admin. of Radio, Film, and Television, June 15, 2004, effective Aug. 10, 2004), art. VI (China) [hereinafter Stipulation of Administration on Chinese-Foreign Film Co-Production], *translated in The Stipulation of Administration on Chinese-Foreign Film Co-Production*, CHINA FILM CO-PRODUCTION CORP., <http://www.cfcc-film.com.cn/policeg/content/id/1.html> [http://perma.cc/62M6-ASDR] (last visited Sept. 28, 2015); ZHU, *supra* note 127, at 82 (noting that for many co-productions in the 1990s, a major impetus for using that model was to take advantage of cheaper labor and equipment in the Chinese market).

<sup>269</sup> See Stipulation of Administration on Chinese-Foreign Film Co-Production, *supra* note 268, art. XVI; Priest, *supra* note 1, at 492.

<sup>270</sup> See Stipulation of Administration on Chinese-Foreign Film Co-Production, *supra* note 268, art. XIII.

<sup>271</sup> See *id.* art. VI.

## B. *The Market's Effect on Censorship Rules and Practice*

### 1. *The Market's Role in Liberalizing Censorship Rules*

As evidenced above in Part II, market forces and foreign pressure have had a demonstrable liberalizing effect on formal rules designed to secure state control over film production. Less than two decades ago, only state work units were eligible to produce or invest in domestic productions (with the exception of co-productions). Because Chinese film productions had to be self-sustaining, and therefore more attractive to consumers, because they had to compete with high production value Hollywood content, and because China was aiming to join the WTO, officials felt compelled to open the film sector up to private investment and allow the importation and distribution of foreign content.<sup>272</sup> Just a few years later, in 2002, the same market and international pressures (a function of global film commercialization) pushed SARFT to approve private companies for film production.<sup>273</sup> By 2004, the rules were revised yet again to permit even foreign companies to directly invest in and jointly produce “domestic” Chinese films. More recently, SARFT decentralized the censorship review process for domestic films, placing review authority in the hands of regional rather than central government officials.<sup>274</sup> The decentralization effort was spurred by attempts to be more responsive to filmmakers’ needs and increase content review turnaround times. While it remains unclear how much this system will liberalize censorship practices, director Jia Zhangke, whose films have been the subject of high-profile bans, observed that “[i]f the power is not that centralized, it is also a signal that the censorship system will make some changes.”<sup>275</sup>

In sum, in less than a decade, market forces pressed Chinese authorities to move from a system in which only domestic films could be distributed in theaters on a revenue-sharing basis and only

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<sup>272</sup> See ZHANG, *supra* note 119, at 293.

<sup>273</sup> See *supra* note 262 and accompanying text.

<sup>274</sup> Clifford Coonan, *China to Decentralize Censorship Process for Local Films*, HOLLYWOOD REP. (Mar. 7, 2014), <http://www.hollywoodreporter.com/news/china-decentralize-censorship-process-local-686733> [<http://perma.cc/R5JQ-4EQL>].

<sup>275</sup> *Id.*

state-owned studios could produce and invest in domestic films, to one in which foreign blockbusters compete head-to-head with domestic films and almost anyone, Chinese or foreign, can invest in and produce a film in China.

## 2. The Market's Effect on Censorship Practice: Approval of Films that Technically Violate Content Censorship Rules

The regulations that demonstrably changed as a result of market pressures have tended to be regulations governing investment and production. One reason Chinese officials may have been willing to make such significant changes in such a short period of time is that they doubtless operate under the belief that content control, regardless of who produced or financed the film, is the key. Accordingly, while SARFT liberalized its rules governing licensing and investment, it simultaneously tightened and expanded its rules governing content.

Although SARFT content regulations are getting increasingly strict, films are consistently released that violate the rules. Seemingly countless films, domestic and foreign alike, repeatedly violate SARFT proscriptions against graphic violence, murder, criminal activity, horrific imagery, and gore.<sup>276</sup> Some examples from 2014 alone include the Hollywood films *Transformers: Age of Extinction* (the 2014 China box office champion), *X-Men: Days of Future Past*, *Captain America: The Winter Soldier*, *The Hobbit: The Desolation of Smaug*, and *Edge of Tomorrow*. Many recent domestic films depict graphic violence, as the discussion that follows demonstrates; and domestic horror productions are increasingly common including the 2014 hit *The House that Never Dies* (京城81号) and other recent popular films such as *Midnight Whisper* (半夜叫你别回头), *Who in the Mirror* (半夜不要照镜子), and *Blood Stained Shoes* (绣花鞋).

While violence, gore, and horrific subject matter are now commonplace in Chinese theaters, these are not the only kinds of technically verboten subjects that frequently pass censorship. For example, *Breakup Buddies* (心花路放) by mainland director Ning Hao is a comedy in which a recent divorcee and his best friend take

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<sup>276</sup> See *supra* Part III.A.

a road trip filled with misadventures.<sup>277</sup> Many have complained that the film is rife with sexual innuendo, provocative scenes, and frank discussion of a one-night stand.<sup>278</sup> The *China Daily* reported that many parents had unwittingly taken their children to see the “vulgar” film, and children could be heard in the theater asking their parents such questions as, “[w]hat is a condom?”<sup>279</sup> Regardless, the film was a blockbuster, placing second overall in the Chinese box office for 2014 and earning nearly \$190 million.<sup>280</sup> The film’s bawdy reputation doubtless had plenty to do with its success, but the film had the makings of a hit regardless, as Ning had directed hit films in the past, and the lead actors in *Breakup Buddies* had recently paired up in one of the biggest hits in Chinese film history, the irreverent comedy *Lost in Thailand*.<sup>281</sup> Domestic hits are key to the Chinese film industry’s vitality, sustainability, and competitiveness with foreign imports—a factor that likely figured into the censorship review board’s decision when approving the film for distribution.

One of Ning’s previous films, *No Man’s Land* (无人区) (2013), was banned for three years.<sup>282</sup> The violent Chinese neo-“Western” about a series of murders and double-crossings that take place in rural Xinjiang province (a locale that happens to be a center of political unrest) portrays the murder of a policeman among other graphic depictions of violence, murder, and other crimes. The film, which has been favorably compared to the wryly nihilistic films of

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<sup>277</sup> Clifford Coonan, “*Breakup Buddies*” Director Ning Hao Talks About Keys to Success, HOLLYWOOD REP. (Oct. 6, 2014), <http://www.hollywoodreporter.com/news/q-a-breakup-buddies-director-738256> [<http://perma.cc/FXW6-F2Y8>].

<sup>278</sup> See “*Xin Hua Lu Fang*” Bei Pi Shao Buyi (《心花路放》被批少儿不宜) [“*Breakup Buddies*” Criticized for Being Too Vulgar for Children], CHINA DAILY (Oct. 14, 2014), [http://ent.ifeng.com/a/20141014/40328858\\_0.shtml](http://ent.ifeng.com/a/20141014/40328858_0.shtml) [<http://perma.cc/95HS-6VVM>].

<sup>279</sup> *Id.*

<sup>280</sup> Clifford Coonan, *China Box Office 2014: “Transformers 4,” Homegrown Films on Top*, HOLLYWOOD REP. (Dec. 29, 2014, 2:24 PM), <http://www.hollywoodreporter.com/news/china-box-office-2014-transformers-760374> [<http://perma.cc/WFV2-BW55>].

<sup>281</sup> Coonan, *supra* note 277.

<sup>282</sup> Clifford Coonan, *Ning Hao Road Movie “No Man Land” to Screen After Lengthy Ban*, HOLLYWOOD REP. (Oct. 17, 2013), <http://edit.hollywoodreporter.com/news/ning-hao-road-movie-no-649199> [<http://perma.cc/HWM3-D9BC>].

Joel and Ethan Coen,<sup>283</sup> was publicly criticized on the blog of a SARFT censorship official for being “trashy,” having “depraved” characters, allowing the guilty to remain at large in the end, depicting police as “stupid and incompetent,” and “harming China’s national image.”<sup>284</sup> Nevertheless, the film was ultimately released in China, some say after significant modifications,<sup>285</sup> and was an instant hit, earning \$42 million in the first month following its release.<sup>286</sup>

2013 box office hit *Drug War* (毒战), a China-Hong Kong co-production by celebrated Hong Kong director Johnnie To, was allegedly inspired by real-life Chinese mafia trials.<sup>287</sup> The film performed well at the Chinese box office and received critical acclaim abroad.<sup>288</sup> It is packaged as a gangster thriller, but it takes on a number of controversial subjects including the illegal drug trade in China and prisoner execution.<sup>289</sup> The story, which takes place in the Chinese city of Jinhai, involves a captured drug lord who seeks lighter sentencing in exchange for helping a shrewd police captain in a major sting operation. During the climactic gun battle between gang members and narcotics officers, virtually all of the officers, including the protagonist captain, are savagely killed in graphic fashion.<sup>290</sup> *Drug War* is the first Chinese film to graphically depict details of the drug trade, including how drugs are smuggled in the

<sup>283</sup> Elizabeth Kerr, *No Man’s Land: Film Review*, HOLLYWOOD REP. (Jan. 14, 2014), <http://www.hollywoodreporter.com/review/no-man-s-land-film-671106> [<http://perma.cc/DE88-6YL5>].

<sup>284</sup> Zhao Baohua, *Qingnian Daoyan Qiewu Zi Lian* (青年导演切勿自恋) [*Young Directors Please Don’t be Narcissistic*], TENCENT (Apr. 16, 2013, 10:20 PM), <http://cul.qq.com/a/20130416/000089.htm> [<http://perma.cc/YC2T-33HW>].

<sup>285</sup> See *The Red Carpet*, *supra* note 229.

<sup>286</sup> Stephen Cremin, *Trio from China Compete in Berlin*, FILM BUS. ASIA (Jan. 15, 2014, 20:30 PM), <http://www.filmbiz.asia/news/trio-from-china-compete-in-berlin> [<http://perma.cc/5E95-3SCT>].

<sup>287</sup> See “*Du Zhan*” *Ri Gong Ying Chong Kouwei Jia Jing Fei Dahuo Pin* (《毒战》2日公映 重口味加警匪大火拼) [*“Drug War” to Premier on the 2nd, a Hardcore Gangster Film*], SINA (Apr. 1, 2013, 10:40 PM), <http://ent.sina.com.cn/m/c/2013-04-01/22403890676.shtml> [<http://perma.cc/G254-XRQ8>].

<sup>288</sup> David Bordwell, *Mixing Business with Pleasure: Johnnie To’s Drug War*, DAVID BORDWELL’S WEBSITE ON CINEMA (July 8, 2013), <http://www.davidbordwell.net/blog/2013/07/08/mixing-business-with-pleasure-johnnie-tos-drug-war/> [<http://perma.cc/Z86G-LEKT>].

<sup>289</sup> See “*Drug War*” *to Premier on the 2nd, a Hardcore Gangster Film*, *supra* note 287.

<sup>290</sup> See *id.*

human body and methamphetamine production.<sup>291</sup> It was also the first to graphically depict a prisoner execution by lethal injection.<sup>292</sup>

While To, like any director in China, did not have creative *carte blanche*, he still clearly had wide creative latitude and used it to powerful, thought-provoking effect. As *New York Times* critic Manohla Dargis observes:

[W]hile Mr. To may not fill the movie with rousing speeches, either by inclination or out of political necessity, the brilliant, unsettling action scenes—ugly, savage, dehumanizing—speak volumes. (This is one of the rare times that the Hong Kong master has shot on the mainland, and if he faced any pressure from China’s censors to soften his material, it isn’t evident to an outsider.)<sup>293</sup>

To be sure, *Drug War* betrays the fingerprints of ham-handed censors. The narcotics police are uncompromisingly valorous and self-sacrificing, and conspicuously devoid of moral reflection, fragility, or doubt about their methods or the policies they enforce.<sup>294</sup> The cartoonishly exaggerated ill effects of drug use come across with all the realism and subtlety, one critic quips, of a public service announcement by the Partnership for a Drug-Free America.<sup>295</sup>

Even when the film ostensibly walks the party line, however, it manages to make a statement. The two-dimensional treatment of the narcotics officers, one critic suggests, only makes the criminals seem more human and sympathetic by comparison.<sup>296</sup> Depictions of gangsters running amok in a crowded Chinese city might appear to justify the pervasive state surveillance the film depicts, but shots that linger on rows of security cameras at seemingly every intersection, and the repeated use of surveillance footage to depict key

<sup>291</sup> See *id.*

<sup>292</sup> See *id.*

<sup>293</sup> Manohla Dargis, *Running on Illegal Fuel and Savage Zeal*, N.Y. TIMES (July 25, 2013), <http://www.nytimes.com/2013/07/26/movies/drug-war-moving-fast-and-furious-in-china.html> [<http://perma.cc/H6X4-FU9H>].

<sup>294</sup> See Bordwell, *supra* note 288; Steve Erickson, *Review: Drug War*, FILM COMMENT (July/Aug. 2013), <http://www.filmcomment.com/article/review-drug-war-johnnie-to/> [<http://perma.cc/3G52-UWGS>].

<sup>295</sup> Erickson, *supra* note 294.

<sup>296</sup> Bordwell, *supra* note 288.

events, are a constant reminder that everyone—not just criminals—live under the eye of the surveillance state. And while the film does not overtly question China’s draconian drug laws that make even trafficking a capital offense,<sup>297</sup> the final scene, in which the antagonist’s execution is depicted in methodical, unflinching, close-up, and clinical detail, will inculcate in many viewers a feeling of discomfort or even compassion despite the prisoner’s monstrous deeds.

The film violates SARFT content rules by concentrating on the darkest elements in Chinese society—depicting a criminal underworld already deeply infiltrating Chinese cities and bringing acts of savagery and murder to the streets in broad daylight. Thus, even the director was surprised when the film reportedly passed censorship review with minimal revisions.<sup>298</sup> Despite its potentially problematic subject matter, the film, with its action-packed luster and critical acclaim, is doubtless the kind of film Chinese officials like to see in the market competing with Hollywood films and driving audiences to theaters. The desire to see such films achieve commercial success limits censors’ ability to restrict filmmakers’ creative choices.

Zhang Yimou’s 2014 film *Coming Home* (归来) explores the emotional and psychological trauma of a family rent asunder by the Cultural Revolution, and the painful reconciliation thereafter. The film is widely regarded as an allegory for the nation’s own difficult reconciliation with that painful period.<sup>299</sup> The film’s release in

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<sup>297</sup> See Erickson, *supra* note 294 (“Not only does the film never question the ethics of a war on drugs in which dealers and manufacturers are subject to the death penalty, it appears to enthusiastically endorse it.”).

<sup>298</sup> *Jinri Shangying De “Du Zhan” Chong Kouwei Jingtou Duo Duo* (今日上映的《毒战》重口味镜头多多) [“Drug War” that Premiered Today has Many Hardcore Scenes], HANGZHOU DAILY (Apr. 2, 2013), [http://hzdaily.hangzhou.com.cn/dskb/html/2013-04/02/content\\_1467306.htm](http://hzdaily.hangzhou.com.cn/dskb/html/2013-04/02/content_1467306.htm) [<http://perma.cc/V6FP-99LE>]. The *Hangzhou Daily* reports that the censors had only two major requests of To: that the amount of shooting and the number of police killed be kept to a minimum. *Id.* If those were the censors’ primary demands, then they abjectly failed.

<sup>299</sup> See, e.g., Xan Brooks, *Cannes 2014 Review: Coming Home—‘Sweet but Suspect Reconciliation Romance,’* GUARDIAN (May 20, 2014), <http://www.theguardian.com/film/2014/may/20/cannes-review-coming-home-zhang-yimou-gong-li> [<http://perma.cc/839E-XUS5>]; A.O. Scott, *Review: In ‘Coming Home,’ a Family Rocked by the Cultural Revolution,* N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/>

China and respectable domestic box office returns of \$48 million contrast with Zhang's 1994 film *To Live* (或者), which also explored a family decimated by the Cultural Revolution.<sup>300</sup> *To Live* was banned in China, and Zhang was banned from filmmaking for two years as punishment for making the film.<sup>301</sup>

It is worth pausing to note that China's "underground" film-making scene also tests the boundaries of acceptable content, although the role of underground films in pressuring censors should not be overstated. Underground films differ from "aboveground" films in that they do not undergo or complete censorship review<sup>302</sup> and are ineligible for official distribution in China (although today many such films are made available on online streaming platforms).<sup>303</sup> Underground films do sometimes delve into forbidden subject matter, from controversial political topics to sensitive social themes such as homosexuality.<sup>304</sup> Despite the "underground" label, however, most of these films are actually made with the state's full knowledge and tacit consent.<sup>305</sup> Underground films provide an outlet for new voices and perspectives and are an unofficial testing ground for controversial subject matter. Nevertheless, their effect on expanding the boundaries of officially tolerated speech is likely limited. Most underground films do not take on highly sensitive subject matter, and even those that do almost always stop short of directly criticizing the Party.<sup>306</sup> Thus the differences between underground films and approved films that test the boundaries are often not all that stark. Moreover, the line between underground and aboveground films and filmmakers is often blurry. For example, some famous directors of approved films alternate between official and unofficial projects.<sup>307</sup> Many unestablished underground

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movies/review-in-coming-home-a-family-rocked-by-the-cultural-revolution.html  
[<http://perma.cc/V8YD-XD82>].

<sup>300</sup> Richard Natale, "To Live:" *A Sweeping Sage of Modern China*, L.A. TIMES (Dec. 14, 1994), [http://articles.latimes.com/1994-12-14/entertainment/ca-8810\\_1\\_chinese-film](http://articles.latimes.com/1994-12-14/entertainment/ca-8810_1_chinese-film) [http://perma.cc/9NU8-DCT4].

<sup>301</sup> *See id.*

<sup>302</sup> PICKOWICZ, *supra* note 122, at 328.

<sup>303</sup> *See* Priest, *supra* note 1, at 493–95.

<sup>304</sup> *See* PICKOWICZ, *supra* note 122, at 328, 330–31.

<sup>305</sup> *Id.* at 328.

<sup>306</sup> *See id.* at 327–28.

<sup>307</sup> *See id.* at 325–26, 334–35.

filmmakers appear to choose controversial subjects in order to attract foreign attention, accolades, and investment, which they hope to parlay into subsequent opportunities to make approved mass market films in China.<sup>308</sup> Lastly, because underground films are unofficial, their influence on rules governing officially tolerated speech is bound to be weaker than that of envelope-pushing approved films.<sup>309</sup>

It seems that Chinese officials are powerless to stop the trend of audiences demanding increasingly diverse, direct, hard-hitting, and mature subject matter and filmmakers rushing in to satisfy that demand. SARFT officials complain privately (and publicly<sup>310</sup>) that films released in Chinese theaters today are “trashy.”<sup>311</sup> China’s president Xi Jinping recently admonished creators not to allow their art to “lose its direction as it is absorbed into the market economy,” reminding them that the “basic requirement of the Party” is that “art must reflect well the people’s wishes; it must persist in the fundamental orientation of serving the people and serving Socialism.”<sup>312</sup> Yet every one of the “trashy” films that regulators lament has undergone and passed their own review. Meanwhile, wholesome main melody films have long languished at the box office,<sup>313</sup> as the 2013 film *Young Lei Feng* vividly demonstrated. *Young Lei Feng*, which told the apocryphal life story of a paragon of Revolutionary virtue, was released to much official fanfare on “Learn From Lei Feng Day” but was reportedly pulled from theaters in

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<sup>308</sup> *Id.* at 334–35.

<sup>309</sup> See Priest, *supra* note 1, at 527–28.

<sup>310</sup> See *supra* note 284 and accompanying text (discussing the SARFT official’s public rant against Ning’s *No Man’s Land*).

<sup>311</sup> See *The Red Carpet*, *supra* note 229.

<sup>312</sup> *Xi Jinping: Wenyi Buneng Zai Shichangjingji Da Chao Zhong Mishi Fangxiang* (习近平：文艺不能在市场经济大潮中迷失方向) [*Xi Jinping: Art Cannot Get Lost in the Market Economy*], XINHUA (Oct. 15, 2014), [http://news.xinhuanet.com/politics/2014-10/15/c\\_1112840544.htm](http://news.xinhuanet.com/politics/2014-10/15/c_1112840544.htm) [<http://perma.cc/3FR9-YJKN>], translated in *Xi Jinping’s Talks at the Beijing Forum on Literature and Art*, CHINA COPYRIGHT AND MEDIA (Oct. 16, 2014), <https://chinacopyrightandmedia.wordpress.com/2014/10/16/xi-jinpings-talks-at-the-beijing-forum-on-literature-and-art/> [<http://perma.cc/C9SQ-KTSR>].

<sup>313</sup> ZHANG, *supra* note 119, at 286.

numerous cities on the first day after it “failed to sell a single ticket.”<sup>314</sup>

Rather than calling for a return to yesteryear, many critics of the increasingly diverse, sexual, violent, and thematically-mature films produced in China are calling for a film rating system.<sup>315</sup> China does not have a rating system, as many countries do, to indicate the content’s age appropriateness.<sup>316</sup> The lack of a rating system derives from the Party’s position that unhealthy content is prohibited from distribution; therefore, any film appropriate for adults is equally appropriate for children. The divergence between theory and reality on this point has grown for the better part of three decades, and it is not coincidental that that span has witnessed the growth of film commercialization. The premise that all approved content is “healthy” for the masses is a principal justification for the sweeping content censorship rules. Adopting a rating system would be tantamount to admitting that certain segments of society can tolerate “unhealthy” graphic or disturbing content—a fundamental paradox given film and literature’s role as a morally and politically edifying medium. Unsurprisingly, therefore, authorities steadfastly refuse to acknowledge that formal content regulations are profoundly out of step with the realities of content produced and distributed now in China.<sup>317</sup> Consumers and even distributors may be poised to force their hand, however. In 2013, the China Consumers Association publicly called for a ratings system, and a survey of more than six-thousand moviegoers found that ninety

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<sup>314</sup> Clarence Tsui, *Chinese Cinemas Cancel Propaganda Film Screenings*, HOLLYWOOD REP. (Mar. 5, 2013), <http://www.hollywoodreporter.com/news/chinese-cinemas-cancel-propaganda-film-426236> [<http://perma.cc/5KJ4-NNMF>]; see also Dan Levine, *In China, Cinematic Flops Suggest Fading of an Icon*, N.Y. TIMES, Mar. 12, 2013, at A5.

<sup>315</sup> See, e.g., “*Breakup Buddies*” Criticized for Being Too Vulgar for Children, *supra* note 278 (quoting microblog posts from public figures opining that the lack of a film rating system has made it very difficult for parents to know whether a film like *Breakup Buddies* is appropriate for children).

<sup>316</sup> See *The Red Carpet*, *supra* note 229.

<sup>317</sup> Jonathan Landreth, *China Nixes Film Ratings, Restates Censor Role*, HOLLYWOOD REP. (Aug. 19, 2010), <http://www.hollywoodreporter.com/news/china-nixes-film-ratings-restates-26834> [<http://perma.cc/QYT3-MPL4>].

percent support a ratings system.<sup>318</sup> The public outcry over the inappropriateness of *Breakup Buddies* for children, and the lack of any way for parents to determine the level of appropriateness beforehand, renewed the media debate over a film ratings system in 2014.<sup>319</sup> One theater owner made international news by taking matters into his own hands and instituting and enforcing his own ratings system.<sup>320</sup> If (and perhaps when) the Party admits the Emperor has no clothes and adopts a ratings system, it may be the most overt demonstration yet of the market's formidable counterweight to the power of state censors and ideologues.

There are, of course, many films that do not pass censorship review, including ostensibly "aboveground" films produced as part of the official process. One notable example of the latter is Li Yu's *Lost in Beijing*, which was initially approved for distribution in 2008 and then subsequently banned and pulled from theaters after grossing over \$2 million.<sup>321</sup> The film, a drama/domestic comedy, deals explicitly with topics such as rape, infidelity, gambling, and marital strife.<sup>322</sup> In a memo circulated to SARFT officials, the film was banned because it was distributed in China and overseas with "pornographic content" that had not passed censorship review.<sup>323</sup>

Often, there are no clear answers for why a given film is approved while a similar film is not. What does seem clear, however, is that market demands and industry concerns now factor significantly into the equation. As political scientist Stanley Rosen and cinema studies professor Ying Zhu observe,

In the absence of the familiar state subsidies of the Maoist era, media and cultural units in postsocialist

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<sup>318</sup> Clifford Coonan, *Chinese Cinemagoers Keen on Film Ratings System*, HOLLYWOOD REP. (Aug. 26, 2013), <http://www.hollywoodreporter.com/news/chinese-cinemagoers-keen-film-ratings-614450> [<http://perma.cc/SWU8-HZCY>].

<sup>319</sup> See "*Breakup Buddies*" Criticized for Being Too Vulgar for Children, *supra* note 278.

<sup>320</sup> Ben Child, *Chinese Cinema Manager Invents His Own Ratings System*, GUARDIAN (Aug. 12, 2014), <http://www.theguardian.com/film/2014/aug/12/chinese-cinema-manager-film-ratings-system> [<http://perma.cc/V3SA-Z5SM>].

<sup>321</sup> *Lost In Beijing Filmmakers Banned for Two Years*, SCREEN DAILY (Jan. 5, 2008), <http://www.screendaily.com/lost-in-beijing-film-makers-banned-for-two-years/4036456.article> [<http://perma.cc/R325-4DAZ>].

<sup>322</sup> See *id.*

<sup>323</sup> See SARFT Circular Concerning "Lost in Beijing," *supra* note 117, para. I(1).

China are judged by their commercial success in a crowded marketplace. State authorities and regulators fully understand this, even when the primary (political) values of the authorities are incongruent with the (commercial) values of the units they supervise. This has led to a system marked by *negotiation*, sometimes tacit and sometimes public, where cultural units may include their audiences as a means of pressuring the authorities to exercise restraint in their control and regulation.<sup>324</sup>

Thus, the film censorship process involves a three-way dialog between the censors, the audience, and filmmakers. Censors wield great power over filmmakers but relatively little direct power over the audience, which has the option of simply avoiding the cinema if the offerings are not compelling, as happened in the 1990s.<sup>325</sup> Filmmakers need to produce attractive and compelling content. Even in these box office boom times, filmgoers are dissatisfied with the quality of Chinese films, noting as major reasons domestic films' similarity, thematic repetition, and lack of creativity—all problems that largely stem from or are exacerbated by censorship.<sup>326</sup> If consumer dissatisfaction manifests itself in sagging box office returns for domestic films, the pressure on SARFT to loosen the censorship reigns further will mount.

Why would the Party feel the need to yield to market pressures and temper their information control practices, at least to some extent, to ensure the continued health and growth of the domestic film industry? There are at least five reasons. First, as discussed above in Part II, state-supported filmmaking is unsustainable and goes against the grain of economic reform and privatization that has revolutionized much of China's economy. Second, film is an important form of entertainment and social release in China, especially for young people,<sup>327</sup> and officials at the highest level recog-

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<sup>324</sup> Ying Zhu & Stanley Rosen, *Introduction*, in *ART, POLITICS, AND COMMERCE IN CHINESE CINEMA* 1, 4 (Ying Zhu & Stanley Rosen eds., 2010).

<sup>325</sup> See *supra* Part II.E.

<sup>326</sup> See Coonan, *supra* note 318 (citing a survey of filmgoers by research firm Film Business Asia).

<sup>327</sup> See *id.*

nize film's social value as a form of entertainment.<sup>328</sup> Ensuring the health and growth of a film industry that puts out quality product to satisfy demand fits within the Party's strategy of non-democratic appeasement that some have called "responsive authoritarianism."<sup>329</sup> Third, officials also recognize the film industry's potential as a high-growth, low carbon-impact "green business," and are incentivized to foster its growth.<sup>330</sup> Fourth, there is an ever-increasingly blurred line between state and private interests in China. China Film Group ("CFG"), for example, is a massive state-owned enterprise, the largest player in the Chinese film industry, and the paramount member of the state-run film import duopoly.<sup>331</sup> As an investor in all aspects of the industry from film technologies to production, importation, and distribution, CFG is extremely invested in the success of China's film industry, as are many other state-owned or invested companies.<sup>332</sup> Fifth, officials have repeatedly voiced a desire to improve China's global "soft power," that is, its ability to attain desired outcomes through attraction and persuasion rather than force.<sup>333</sup> The United States' attractive power through its culture industries, Hollywood in particular, is the para-

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<sup>328</sup> Guowuyuan Bang Guanyu Cujin Dianying Chanye Fanrong Fazhan De Zhidao Yijian (国务院办公厅关于促进电影产业繁荣发展的指导意见) [Guidance on Promoting the Prosperity and Development of the Film Industry] (issued by the St. Council, Jan. 21, 2010) (China) [hereinafter Guidance on Promoting the Prosperity and Development of the Film Industry], *translated in Guiding Opinions Concerning Stimulating Flourishing and Development of the Film Industry*, CHINA COPYRIGHT AND MEDIA, <https://chinacopyrightandmedia.wordpress.com/2010/01/21/state-council-secretariat-guiding-opinions-concerning-stimulating-flourishing-and-development-of-the-film-industry/> [<http://perma.cc/APF2-EB26>] (last visited Sept. 28, 2015) ("Film is one of the cultural entertainment forms deeply loved by the masses, the film industry is a cultural industry with high technological content, high added value, low resource consumption and low pollution. Vigorously flourishing and developing the film industry, has important significance for strengthening socialist culture construction, satisfying the masses' spiritual culture needs, stimulating integrated development of economy and society, and to enlarging the international competitiveness and influence of Chinese culture, strengthening State culture soft power.").

<sup>329</sup> See STOCKMANN, *supra* note 17, at 6.

<sup>330</sup> See Guidance on Promoting the Prosperity and Development of the Film Industry, *supra* note 328.

<sup>331</sup> See *supra* notes 105–06 and accompanying text.

<sup>332</sup> See *supra* notes 105–06 and accompanying text.

<sup>333</sup> JOSEPH S. NYE, JR., *THE FUTURE OF POWER* 88–94 (2011).

digmatic example, and one that China has studied well.<sup>334</sup> In theory, the more advanced, globally competitive, and attractive Chinese films are, the more global audiences will be attracted to Chinese culture. In government documents, soft power is expressly cited as an important reason to foster a flourishing film industry.<sup>335</sup> Until now, foreign consumers have shown little interest in Chinese films, and many theorize that the creative shackling that results from censorship is a major reason why.<sup>336</sup> Giving Chinese films the creative space needed to be globally competitive is another pressure point to which Chinese censors are no doubt increasingly sensitive. Lastly, some observers argue the government's obvious willingness to turn a blind eye to content regulation violations reflects the influence of cultural liberals within the Party.<sup>337</sup> The Party liberals believe that a permissive approach will improve China's global image and provide a steam valve for a new generation of creative talent.<sup>338</sup> In exchange for having more creative freedom, filmmakers will accept the unwritten ground rules: no direct criticism of the party and no overt calls for mobilization.<sup>339</sup>

### 3. SARFT Censorship Practice as an Adaptive Informal Institution that Could Lead to Liberalization of Formal Content Regulations

The previous subsection demonstrates that censors routinely act in ways that permit widespread technical violations of content regulations. Still, the rules are not invoked or ignored consistently, and the ad hoc and opaque nature of the practice is eminently fru-

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<sup>334</sup> See generally Stanley Rosen, *The Chinese Dream Confronts the American Dream in Popular Culture: China as Producer and Consumer of Films at Home and Abroad* (May 1, 2015) (unpublished manuscript) (on file with author).

<sup>335</sup> See, e.g., *Guidance on Promoting the Prosperity and Development of the Film Industry*, *supra* note 328.

<sup>336</sup> See *The Red Carpet*, *supra* note 229.

<sup>337</sup> See, e.g., PICKOWICZ, *supra* note 122, at 330. Pickowicz discusses this phenomenon in the context of the state's relatively permissive attitude toward underground films in the early 2000s, but his analysis applies equally well to the state's approach to "aboveground" commercial productions. Furthermore, as Pickowicz notes, there is often a blurry line between aboveground and underground filmmakers and their projects. *Id.* at 325–35.

<sup>338</sup> *Id.* at 331–32.

<sup>339</sup> *Id.* at 332.

strating to film producers trying to differentiate their product by pushing the limits of acceptable content. That said, the ad hoc nature of censorship practice might in fact engender formal liberalization down the road.

Attempts to create a more open, transparent media while simultaneously attempting to maintain effective ideological control over that media creates an apparently irreconcilable dilemma for Chinese policy makers. The Party may, as Rogier Creemers puts it, simply be “trapped.”<sup>340</sup> In that case, there are two potential outcomes. First, censors could take a hardline turn, strengthening the formal content rules and enforcing them emphatically. This outcome seems unlikely, as it would certainly lead to a significant downturn in the Chinese film industry that would, for reasons discussed above, be unacceptable to Chinese authorities. Second, and more plausibly, censorship officials could take a more organic, permissive, and experimental approach to censorship practice, while leaving the more restrictive formal laws intact as a baseline standard until circumstances warrant a change in formal laws. In fact, this circumstance echoes previous high-stakes clashes between ideology and practical, market-driven considerations in which the latter ultimately gained an upper hand over ideology and Party control—namely, China’s large scale economic reforms in the 1980s and 1990s.

Political science professor Kellee Tsai observes that most institutions do not exist in isolation.<sup>341</sup> Rather, they often exist in mutually dependent clusters.<sup>342</sup> Changes in formal institutions often result not from top-down decisions but from coping strategies that arise on the ground in reaction to limitations and restrictions in formal institutions that develop into widely practiced regularized patterns of interactions that violate the formal institutions.<sup>343</sup> These regularized, violative practices become informal institutions in their own right.<sup>344</sup> These widespread informal practices, which

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<sup>340</sup> Creemers, *supra* note 114, at 92.

<sup>341</sup> TSAI, *supra* note 54, at 49.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 38.

<sup>344</sup> *Id.*

Tsai calls “adaptive informal institutions,” contribute to the “institutional conversion of a formal regulation.”<sup>345</sup>

To demonstrate this principle, Tsai argues that China’s sweeping economic reforms did not originate with top-down economic policymaking.<sup>346</sup> In fact, “China’s formal institutions have presented local state and economic actors with more of a constraining rather than a permissive environment for private capital accumulation.”<sup>347</sup> In the late 1970s and early 1980s, when large numbers of private entrepreneurs sprang up in China, private businesses were illegal and there was much disagreement and uncertainty among Party leaders about the direction of economic reform and the desirability of private enterprise.<sup>348</sup> Nevertheless, many individuals, faced with a dearth of income-generating opportunities after the dismantling of the “iron rice bowl” of socialism, began engaging in entrepreneurial activity.<sup>349</sup> Local cadres, who oversaw locales that faced their own economic difficulties, had little incentive to enforce the formal rules and every incentive to bend them to accommodate these money-generating entrepreneurs. Not surprisingly, many local cadres joined the emerging entrepreneurial class. After some time, the entrepreneurialism operating in a legal gray zone was sufficiently widespread and effective to convince central government officials that a shift toward a market-oriented economy would work. It was only then that changes to the formal laws occurred. In Tsai’s example, the formal institutions trailed and were influenced by informal adaptations that responded to practical realities on the ground.<sup>350</sup>

The more actual practice diverges from the formal rules, and the more entrenched the practice becomes, the more likely it is that the formal rules will eventually change to reflect the practice. Such change can already be observed in China’s copyright industries. Professor Hongsong Song demonstrates that as China’s book industry transitioned from state-subsidized production to market-

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<sup>345</sup> *Id.* at 59.

<sup>346</sup> *See id.* at 55.

<sup>347</sup> *Id.*

<sup>348</sup> *See id.* at 50–60.

<sup>349</sup> *See id.* at 57.

<sup>350</sup> *See id.* at 50–60.

based production and remuneration in the 1990s, state firms lagged far behind the practices of the illicit private publishers, who paid their authors copyright royalties instead of the basic remuneration rates still practiced by state publishers.<sup>351</sup> Successful authors were highly incentivized to work with private publishers (which were fronted by state publishing operations)<sup>352</sup> as the authors could make far more money publishing with private publishers than with state publishers.<sup>353</sup> The resulting formal reforms, spurred by economically driven informal coping strategies, follow the same evolutionary path from coping strategy to adaptive informal institution to formal reform that Professor Tsai describes:

In the process of commercialization, market forces gradually changed the behavior of the participants in the publishing sector and established a new set of conventions largely based on the profit motive. The official acceptance of copyright royalties shows how the new behavioral principles achieved a dominant role in practice and forced the state to change formal rules to match reality . . . .

The emergence and growth of copyright royalties in the 1990s was a significant event for both the relaxation of press control and the development of copyright. The increasing importance of market-driven copyright royalties meant not only that copyright holders were able to enjoy market profits, but also that there was a significant decline in state patronage and a corresponding rise in authors' independence.<sup>354</sup>

This model suggests it is possible for informal practices, such as allowance of films that formally violate censorship rules, to induce bottom-up changes to the formal regulations. While there has not yet been formal liberalization of content regulations, in the long-term, the prospects for such a change are promising given the gradually (albeit spasmodically) increasing divide between formal

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<sup>351</sup> See Song, *Dancing in Shackles*, *supra* note 18, at 296–308.

<sup>352</sup> See *id.*

<sup>353</sup> Song, *Development of Copyright Law*, *supra* note 18, at 293–95.

<sup>354</sup> *Id.* at 295.

ensorship rules and practice. The decentralization of SARFT censorship review, noted above, could also help spur this change, just as in the economic reform context, where local responses to practical realities of entrepreneurs were conducive to driving bottom-up policy changes that would have been impossible in a system of highly centralized control.<sup>355</sup>

#### 4. The Social and Expressive Value of Film Commercialization Undergirded by Copyright

Among the examples of films discussed above that violate SARFT content rules, none takes on the most politically sensitive subject matter in today's China. None overtly challenges Party rule or calls for a democratic system of government, for example, which would doubtless trigger an instant ban. Nevertheless, the films above offer fresh viewpoints on topics of importance to contemporary Chinese society in a package with broad appeal.<sup>356</sup> *Breakup Buddies*, for example, while on the surface a bawdy comedy, explores relationships, divorce, and sexuality in an aging Chinese society, and, in the director's vision, is an allegory for Chinese society itself as it reaches a crossroads in its political and economic maturation. As Ning recently told the Hollywood Reporter,

For the last 30 years, China has experienced fast development. After the fast development, it is slowing down. It is like a transition from a young person to middle age. He faces some problems and he must think of what was not good before and where to go in the future. My feeling is that China is experiencing middle age and adjusting itself after fast development.

Because of the fast development, people's values are a bit thin and the only one value is success. It will create some problems for sure if you measure everything by this yardstick, including love. So a

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<sup>355</sup> See *supra* notes 274–75 and accompanying text.

<sup>356</sup> Cf. PETER SWIRSKI, FROM LOWBROW TO NOBROW 29–32 (2005) (arguing that popular, commercial content is a “universal forum for the propagation and assimilation of ideas” that “comments on all aspects of contemporary life, in the end informing, and in some cases even forming, the background of many people's values and beliefs”).

one-night stand appears to be a way of releasing pressure and dissatisfaction with love. It becomes a normal phenomenon. I want to use this angle to tell a modern story.<sup>357</sup>

Ning's *No Man's Land*, beneath its violence, action, and dark humor, comments on "disintegrating morality and unchecked, rampant selfishness" and "shines a glaring light on how little life is valued in modern mercenary China," even though all along "Ning is having a gleefully nasty time with it."<sup>358</sup> Even the slapstick romp and megahit *Lost in Thailand* derives much humor and much of its vast success from lampooning materialism and exposing the anxieties of China's urban middle class.<sup>359</sup>

One should not discount the social importance of such messages. As Professor Paul Pickowicz argues, numerous creators who chose to work in the "velvet prison" of the official but moderately permissive aboveground film sector in China have, through their critical examinations of Chinese society and politics, "chipped away at the foundation of state socialism" and "eroded public confidence in the system."<sup>360</sup> Chinese literature has a great tradition of critical or oppositional messages embedded in entertaining and seemingly apolitical works. Moreover, it is easy—especially for Western critics—to primarily evaluate phenomena within China through the limited and polarized lens of democratization. Professor Bingchun Meng argues that researchers of China's Internet appear to have an "ongoing fixation, in both the mainstream media and the academic circle, on whether the Internet could democratize China."<sup>361</sup> She notes a number of problems with that limited approach, including that it imposes a Western-centric view of progress, is likely to result in missing important nuances in changing power relationships in society, and may cause one to overlook

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<sup>357</sup> Coonan, *supra* note 277.

<sup>358</sup> Kerr, *supra* note 283.

<sup>359</sup> See He Huifeng, "Lost in Thailand" Redefines Mainland Audiences' Tastes in Films, S. CHINA MORNING POST (Jan. 14, 2013), <http://www.scmp.com/news/china/article/1127386/lost-thailand-redefines-mainland-audiences-tastes-films> [<http://perma.cc/AMT4-MEEY>].

<sup>360</sup> PICKOWICZ, *supra* note 122, at 320.

<sup>361</sup> Bingchun Meng, *Moving Beyond Democratization: A Thought Piece on the China Internet Research Agenda*, 4 INT'L J. COMM. 501, 501 (2010).

the experience and effect on average consumers.<sup>362</sup> This is not to discount the importance of democratic values for China and beyond; rather, it is to emphasize that films—even officially approved commercial films—can and do speak to many other topics—even sensitive topics—of importance to ordinary Chinese citizens. Most importantly, the general long-term trend, partly if not largely coerced by market trends, appears to be toward permitting more, not fewer, such topics to be addressed in film. Thus, even partial media liberalization has important social benefits, powerful critical potential, and the potential to engender further media liberalization.

There is an inherent danger in partial media liberalization, however. As Daniela Stockmann has demonstrated, partial liberalization of the news and print media in China, driven by commercial imperatives similar to those encountered by the film industry, has probably led to *more* effective state information control over sensitive topics, despite the explosion of commercial magazines and news publications eager to feed a vast market hungry for new news and perspectives.<sup>363</sup> What explains this paradox? The answer, according to Professor Stockmann, lies in consumer perceptions of free speech based on the perceived nature of the speaker.<sup>364</sup> For news concerning politically sensitive topics, consumers are more likely to be skeptical of traditional “political organ papers” such as the *People’s Daily* or *China Daily*, which they believe to parrot the Party line.<sup>365</sup> On the other hand, consumers are more likely to trust messages in commercialized papers and magazines, which “brand themselves as trustworthy representatives of ordinary citizens, leading to greater credibility in the eyes of audiences.”<sup>366</sup> Commercialized media is responsive to market demand and thus “feels free” to consumers, especially when reporting on less sensitive topics. But the more sensitive the topic, the more censorship mechanisms that control all licit news media, even commercialized media, kick in to ensure that the tone and position taken in com-

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<sup>362</sup> *Id.* at 501–04.

<sup>363</sup> STOCKMANN, *supra* note 17, at 12.

<sup>364</sup> *See id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 4.

mercial media does not diverge too sharply from the Party line. Thus what feels like free reporting to consumers is often the Party line. In this way, partial press freedom actually increases the persuasiveness of the Party's messaging.<sup>367</sup>

This is an obvious danger in the film space, as well. Main melody films are currently viewed as ham-handed propaganda that is of little interest to most consumers. The government will doubtless improve its ability to weave its message into entertaining, attractive films both through the production of better features and through required revisions that both add and delete content.

While the market enables this form of more persuasive messaging, the market also provides a strong counterbalance. The audience's relationship to film, which is primarily a form of entertainment, differs from its relationship to news media. If the audience feels that domestic film content becomes too narrow or predictable, which is already a common complaint,<sup>368</sup> history indicates that attendance will suffer—an outcome that, for reasons described above,<sup>369</sup> is unacceptable to authorities. Market pressures are the best way to ensure new voices and viewpoints emerge that stimulate audiences. The alternative model—a dual production system with official state-supported main melody films on one extreme and unapproved underground films on the other, holds little promise for producing a vibrant, diverse film culture in China. After all, underground films require funding, as well. But, as Geremie Barmé observes, since they cannot be lawfully distributed and monetized in China, underground films have a history of being crafted to please a different master—Western audiences and critics.<sup>370</sup> For this reason, director Chen Daming believes even underground films “are not a true reflection of China.”<sup>371</sup> Chen believes that filmmakers should participate in aboveground filmmaking, despite the burdens of censorship.<sup>372</sup> What the industry needs, he argues, is

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<sup>367</sup> *Id.* at 12–13.

<sup>368</sup> *See supra* note 326 and accompanying text.

<sup>369</sup> *See supra* notes 327–39 and accompanying text.

<sup>370</sup> GEREMIE R. BARMÉ, *IN THE RED: ON CONTEMPORARY CHINESE CULTURE* 190–92 (2000).

<sup>371</sup> MONTGOMERY, *supra* note 253, at 52.

<sup>372</sup> *See id.*

high quality domestic cinema,<sup>373</sup> not the shunting of China's most talented directors and writers into lower-production-value, marginalized underground cinema, or into other industries altogether.

Even in the case of news media in China, Stockmann observes a phenomenon akin to that which this Article argues is occurring in the film space: "marketized media bring about political change," even if not democratic reform.<sup>374</sup> "The introduction of market mechanisms leads media to undergo cycles of liberalization and retrenchment," Stockmann observes, "whereby the state walks a fine line between tolerating space to respond to market demands and controlling media content."<sup>375</sup> Noting that censorship authorities are sensitive—to a point—to market demands, Stockmann concludes that "[i]n the long term, these dynamics appear to lead to greater openness of space in news reporting and cautious adjustments of central policy positions to popular demands."<sup>376</sup> While to date, according to Stockmann, this has failed to yield greater pluralism of political viewpoints on sensitive subjects in news media,<sup>377</sup> it provides evidence that the market-censor-producer relationship is dynamic and each group exercises a measure of power to counterbalance and influence the others. Furthermore, this exercise of power can, through inducing widespread informal coping mechanisms, lead to liberalization of formal rules to the benefit of all consumers of information in China.

## CONCLUSION

This Article's main claim is simple and relatively narrow: film industry commercialization in China, enabled and undergirded by copyright law, is not a drag on free speech. To the contrary, it engenders liberalization of the government's informal censorship practices and even its formal censorship rules. This has led to greater diversity of film subject matter available for mass consumption than any other model.

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<sup>373</sup> *Id.*

<sup>374</sup> STOCKMANN, *supra* note 17, at 5.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

I do not argue that copyright and commercialization is a panacea that will fully defang or obliterate censorship policies or trigger higher-level political reforms. Censorship remains the bane of China's film industry and, as China's film industry grows in global importance, the global film industry. Free speech in China's film industry has a tremendously long way to go. Censorship in China is deeply rooted in traditional views of literature as morally edifying, and today film censorship is, in the Party's view, closely tied to state legitimacy and stability. Nevertheless, contemporary censorship practice in China's film industry results from a dialog between the market, the censors, and filmmakers. Market demands and filmmakers' need and desire to satisfy those demands (in addition to their own creative impulses) have provided a counterbalance to state censorship that can, does, and likely will continue to erode censorship practices as well as formal content-oriented rules. The alternative model—state patronage that produces “main melody” propaganda films while private filmmakers produce underground films that are unable to reach a mass Chinese audience and therefore might not even be produced with a Chinese audience in mind—would have far more negative consequences for expressive diversity in Chinese cinema.