NEITHER HERE NOR THERE BUT FAIR: FINDING AN INTERNATIONAL COPYRIGHT LEGAL SYSTEM BETWEEN EAST AND WEST, PAST AND PRESENT

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I. INTRODUCTION

I wrote a story yesterday. It was not very good, but that is beside the point, which is that in my busy life, where almost everything but eating, sleeping, going to the bathroom, and calling my mother is done with the expectation of future financial compensation, I wrote a story. I go to law school because its education should lead me to a well-paying career; I tutor students with learning disabilities because the local community college pays me. That is not to say I do not enjoy doing these things—I do—but would I do them for free? Probably not. Yet yesterday, I wrote a story. I am not sure what made me do it, except it was certainly not for money.

No writer writes for money. The majority of writers in America, most of them freelance, earn from $30,000 to $40,000, but only fifteen percent of them earn more than $30,000 annually. While this may be enough for a freelance writer to survive, it is not enough to support a family, to pay student loans, and to meet other financial obligations. Samuel Johnson is often quoted as saying, “No man but

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1 If everything else in the world were free, such as my house and Haagen-Dazs ice cream, then I would do these things for free. I am not a shallow person, only honest.

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a blockhead ever wrote, except for money,"³ but if this is true, then the world has a substantial population of male blockheads. Passing over that issue, why, then, do we write? On the same note, why do artists paint? Why do ballerinas dance? Why do musicians play? Whatever our reasons, none of them includes money. If we wanted to make money, we would all try to be lawyers.

This is the problem with copyright legal systems, particularly Western European, American, and consequently international ones: they try to create and use economic incentives to encourage authors and artists to write, paint, dance, play, and do all the colorful things authors and artists do to illuminate a culture, inspire a society, and make the world a more beautiful place. Yet there is little to no money in what we do, and even if there were, we still would not do it for money. What we do is an art.⁴ It is hard to write a good story—believe me, I know—or to paint a pretty picture, or to dance well, or to play the oboe in the right key; it takes a bit of soul, and sometimes a miracle, to do any of that. How can anyone put a price on our souls?

This paper proposes that if nations wish to formally encourage their authors and artists to create, then their copyright legal systems should offer some incentive other than an economic one to do so. In order to support this thesis, I will make a comparative study between Western European, American, and Chinese copyright legal systems, beginning with a narration of their different historical developments before the twentieth century and somewhat similar economic and legal justifications. Next, I will discuss modern Western European, American, and Chinese copyright legal systems developed after the opening of the twentieth century, highlighting their increased similarities in structures and justifications, as well as their individual inherent cultural and social values, which preserve their fundamental differences and incompatibilities. Finally, I will describe and analyze the international copyright legal system embodied in the Berne Convention and the World Intellectual Property Organization. The


⁴ For a fuller presentation of this argument, see Katie Lula, The Pas De Deux Between Dance and Law: Tossing Copyright Law Into the Wings and Bringing Dance Custom Centerstage, 5 CHI.-KENT J. INTELL. PROP. 177, 187 n.106 (2006).
international copyright legal system’s structure and justifications are essentially Western, but that does not imply that it has the most effective structure or the best justifications. The concept of modern international copyright, as shaped by Western copyright and enacted by the international copyright legal system, compared to Chinese copyright concepts and judged against historical copyright developments around the world, is out of touch with the incentives that inspire artists and therefore is significantly flawed.

II. PAST COPYRIGHT REGIMES

The origins of copyright law depend on what we deem to be the nature and function of copyright itself. Recent scholarly writings that analyze the development and evolution of copyright as a concept and a legal system either define it through historical narrative, crystallize it in economic terms as a result of general industrialization, or frame it as a legal response to particular technological innovations.

For example, if we try to define copyright from its birth in ancient cultures, we actually find that copyright did not truly exist—at least not in any form similar to its current modern form. Stories, drawings, dances, and other creative works did not belong to the creator but to the social community. In early India, history tells of societies and their creations, not of any single person and his or her writings. Great masterpieces, such as the Bible, are anonymous. Real value was in what was said, not who said it.

In economic and legal terms, copyright is too often defined and dated at the invention of printing and book publishing in Europe in the fifteenth century. The problem with this method of

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7 PloMan & Hamilton, supra note 5, at 4.

8 Id.

9 Id.

10 Id. at 140-41.
determining the origins of copyright is that at the other end of the world, China was in advance of Europe: printing, and implicitly, copyright, as conceived from a European perspective, had existed as early as the second century. And today in the twenty-first century, the entire world is redefining its conceptions and laws about copyright due to the introduction to its societies of innovative digital information technology, particularly digital networks such as the Internet.

To begin determining the true nature, function, and purpose of copyright in today’s modern context, we must examine what it originally was—from all angles: historically, economically, and legally. In this section, we will trace the development and evolution of copyright in the West—that is, Europe and America—and the East—that is, China—from ancient times up to the twentieth century. The West long believed that authors and artists had a property interest in their creations, and that societies benefited by formally recognizing that interest and providing copyright as an economic incentive for authors and artists to create and disseminate their works. Due to the existence of copyright, others’ past imaginative endeavors were grudgingly used and then only because such use helped apprentices and students develop their own unique creations. In contrast, China provided copyright predominantly to preserve governmental and imperial authority and, indirectly, social

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11 Id.
13 While there are many important and diverse countries in the Eastern hemisphere, for the purpose of this paper, China will be the sole representative of the East, as it is the largest country and the one most resistant to Western influences. For example, in 1793, China’s emperor famously rebuffed an attempt by King George III to establish formal diplomatic and trade relations: “We possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures.” Glenn R. Butterton, The Empire Strikes Back: Piracy With Chinese Characteristics, 81 CORNELL L. REV. 1129, 1131 (1996) (citations omitted).
14 ALFORD 1995, supra note 6, at 18.
and cultural values. Use of others’ past imaginative endeavors was more affirmative and more essential in China than it was in the West. By demonstrating originality within the context of past works and thus distinguishing the present from the past, it evidenced the user’s comprehension of and devotion to his or her society and culture. Comparing these historical developments and economic and legal perspectives helps to illuminate the current difficulty and complexity of copyright concepts and laws within today’s modern, international context.

A. Into the West

Most studies on the origins of copyright focus on Western history. As mentioned above, there are different ways to define and date copyright: historically, economically, and legally. Below, we will define and date copyright in the West first by narrating its development and evolution through informal historical social and cultural practices, and second by tracing its further development and evolution through general economic industrialization and innovation and simultaneous formal legal regulations.

1. Copyright from informal historical social and cultural practices

The most primitive form of copyright came in the form of authors’ rights, first recognized in Greece during the sixth century B.C., when the development of commerce and urban society introduced a new type of person: the artist, with a markedly individual personality, perspective, and occupation, compared to everyone else. For the first time, these artists claimed authorship—and Greek society recognized those claims—in their signed poems and artworks. For

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16 Alford 1995, supra note 6, at 18.
17 Alford 1993, supra note 15, at 33-34.
18 Id.
19 PLOMAN & HAMILTON, supra note 5, at 5.
20 Id.
21 Id.
example, *The Republic* was attributed to Plato, *Antigone* was attributed to Sophocles, and so on.

Early Jewish prophets and rabbis developed authors’ rights into a principle of religious law, which criminalized “the stealing of words from another” and commended “reporting a thing in the name of him [or her] who said it.”\(^2\) Reporters who orally passed on this and other principles of religious law from one generation to another were very careful not to express such principles without mentioning the author.\(^3\) Only when reporters developed a principle that was original and unprecedented did they adopt it as their own.\(^4\) Over the next few centuries, Jews further developed other basic Western copyright principles: “the permission of the author or his [or her] heirs must be obtained to copy material published by the author; permission to copy from another’s work should be paid for.”\(^5\)

During the height of the Roman Empire, the writings and correspondences of authors and public figures reflected recognition and use of such copyright principles and concepts.\(^6\) An author of a literary work had a general right to control the publication of his or her work; he or she could decide whether to publish the work in the first place, and with whom: “references are made to contracts between authors and publishers, and to authors selling their works for publication.”\(^7\) Romans also recognized plagiarism as “morally wrong, but there is no direct evidence that legal sanctions existed.”\(^8\)

After the Roman Empire fell, during the Middle Ages, religious institutions, such as monasteries in Ireland, rather than secular individuals, preserved and developed creative works.\(^9\) “The monks functioned equally as copyists, scholars, and authors.”\(^10\) The

\(^2\) Id. at 6 (citations omitted).

\(^3\) Id.

\(^4\) Id.

\(^5\) Id. at 7.

\(^6\) Id.

\(^7\) Id.

\(^8\) Id.

\(^9\) Id. at 8.

\(^10\) Id.
first recorded instance in ancient Western history of the adjudication of a copyright issue, although informal and primitive, occurred when the monk Columba copied a book of psalms originally compiled by his old teacher.\(^{31}\) Because the copy was taken without his permission, his teacher reported the theft to the local king, who ruled in his favor, stating: “To every cow her calf, and consequently to every book its copy.”\(^{32}\)

2. \textit{Copyright from economic industrialization and innovation and simultaneous legal regulations}

Despite this historical narrative featuring earlier instances of copyright existing at least in some form, many legal scholars and historians crystallize the beginnings of copyright only in 1436, when printing was invented in Europe.\(^{33}\) The reason being that without a means to mass-produce copies, there could be no universal, formal right to copy.\(^{34}\) As printing spread, “there was a proliferation of books – and of printers, who at the same time functioned as bookbinders and booksellers.”\(^{35}\) After printers acquired an author’s publication rights, they printed and sold authorized copies of creative literary works, but competition quickly arose “in the form of unauthorized copies of their books.”\(^{36}\) Thus, unauthorized publishing, so-called “piracy,” and copyright appeared simultaneously.\(^{37}\)

Other legal scholars and historians maintain that copyright did not exist until the West formally recognized it by legal regulation.\(^{38}\) Historically, “the first printing privilege was granted by the city of Venice around 1495.”\(^{39}\) France soon followed, granting privileges in

\(^{31}\) \textit{Id.}

\(^{32}\) \textit{Id.} (citation omitted).

\(^{33}\) \textit{Id.} at 5.

\(^{34}\) \textit{Id.}

\(^{35}\) \textit{Id.} at 9.

\(^{36}\) \textit{Id.}

\(^{37}\) \textit{Id.}

\(^{38}\) \textit{Id.} at 5.

\(^{39}\) \textit{Id.} at 9.
1507 and 1508, and in 1529 it became the first European nation to enact an official law regulating the “right of publishing.” In this way, copyright was legally invented.

The interest and intervention of European governments in printing and copying was prompted by not only the greedy complaints of the printers against piracy but also the government’s own two principal concerns: “the spread of knowledge and control.” On its face, copyright became a subject of public policy. It privatized the power to regulate who exclusively printed what and the granting of it to members of the printing trade—printers, publishers, and booksellers—essentially granted them an industrial and commercial monopoly, which they could organize and regulate clearly and consistently among themselves. However, in the practice of granting copyright, European governments essentially exercised censorship and used copyright as a tool to maintain their authority and public order.

As will be discussed below, the further development and evolution of copyright in England and later in America reflected this dichotomy, which gradually disappeared as the focus of copyright shifted—or, in literary terms, was translated—from being a legal tool of censorship to becoming solely an economic reward for the labor that authors and artists expended in creating their works.

a. England’s translation of copyright

England exemplified this dichotomy of copyright as an economic public policy and a legal excuse for governmental censorship. England feared printing. Its Crown “shuddered at the thought of widespread dissemination of works advocating religious heresy and political upheaval.” “In 1534, a royal decree prohibited anyone from publishing without a license and without approval from

40 Id.
41 Id.
42 See id. at 10.
43 Id.
44 Id.
45 LEAFFER, supra note 12, at 4.
official censors.” During this time, copyright and censorship became enmeshed, represented first directly by the Star Chamber Decrees of 1586 and 1637 and later indirectly by a series of licensing laws. When the Stationers’ Company, consisting of the members of the printing trade, received its royal charter in 1557, it received a monopoly on printing and publishing. The English Crown, on the other hand, retained ultimate control on what was printed. If any books were published that it thought advocated religious heresy, that threatened political upheaval of its government, or that it simply did not like, the charter could be taken back and the printing trade—and copyright, to the extent that it was defined by law—virtually destroyed.

In his Two Treatises on Civil Government, written in 1690, Englishman John Locke shifted the focus of copyright from a legal tool of censorship to rather an economic reward for the labor that authors and artists expended in creating their works. This theory, Locke explained:

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\text{corresponded to similar ideas on the [European] Continent, and was amplified and expanded by European jurists in the late seventeenth and early eighteenth centuries. In its mature form the theory maintained that the author’s [and artists’] rights are not created by law but always existed in the legal consciousness of man. In other words, copyright was a right growing out of natural law.}
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46 Id.
47 PLOMAN & HAMILTON, supra note 5, at 11.
48 Id.
49 Id.
50 Id.
51 Id. at 13.
52 Id.
Evidence, or rather the lack thereof, of laws explicitly referencing authors’ and artists’ natural rights supports this theory. Although there were “no explicit rules protecting the author, it was taken for granted that the author had the right to decide over his unpublished work: whether to publish or not, whether to let his work be publicly performed or not.” As a sixteenth-century French lawyer argued, “[T]he heavens and the earth belong to God, because they are the work of [H]is word . . . so the author of a book is its complete master, and as such can dispose of it as he [or she] chooses.” No law required compensation to the author for any publication or copying rights, yet upon publication, authors were unquestionably paid for their efforts. Publishers promised to print their works in original and undistorted form, though this was more for economic instead of legal reasons: “[t]he best original copy for publishing tended to promote the value of the work, while distortions and variations [diluted it].”

In 1709, the English Parliament brought printers’ economic rights and authors’ moral rights together by passing the Statute of Anne—named after England’s queen at the time—which codified not only the Stationers’ copyright but also the author’s copyright. The official purpose of the Statute, as revealed in its enactment clause, was “the encouragement of learned men to compose and write useful work.” In effect, by declaring that its ultimate purpose was to encourage the creation and dissemination of knowledge, the Statute shifted the emphasis—and copyright power—from the Stationer’s Company to authors and the public policy for copyright from governmental censorship to public welfare.

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53  *Id.* at 10 (emphasis added).


56  *Id.*

57  *Id.* at 12-13.

58  LEAFFER, *supra* note 12, at 5 (internal quotation marks omitted).

59  *Id.*
b. Coming to America

Most legal scholars and historians date the birth of copyright in America between the years 1783 and 1786, when twelve of the thirteen newly-independent colonies passed state copyright laws, “often patterned after [England’s] 1709 Statute of Anne.”\(^{60}\) These early pre-Constitutional colonial laws contained preambles declaring the purpose of copyright, “in order of importance listed: (1) to secure the author’s right; (2) to promote learning; (3) to provide order in the book trade; [and] (4) to prevent monopoly.”\(^{61}\) Nowhere, either explicitly or implicitly, was there mention of copyright as a censorship tool to provide public order or to preserve governmental authority. “[T]he 1783 Massachusetts statute [explicitly] defined the purpose of copyright as both the utilitarian goal of producing new creative works, and the securing of ‘one of the natural rights of all men [and women].’”\(^{62}\)

America’s Constitution empowered Congress “to promote the Progress of Science and useful Arts, by securing for limited Time to Authors . . . the exclusive Right to their respective Writings.”\(^{63}\) Known as the Copyright Clause, this provision was “adopted in final form without debate in a secret proceeding on September 5, 1787.”\(^{64}\) Consequently, little is known about what America’s Founding Fathers had in mind while drafting this particular Constitutional clause or about the original meaning and scope of its various words.\(^{65}\) “Although the dominant purpose of the clause appeared to be the promotion of learning,”\(^{66}\) as expressed by the first half of the clause, the second half, by using the word “securing” instead of “granting,” “giving,” or some other such word, suggested copyright as the protection a pre-existing right: a legal embodiment of authors’ and

\(^{60}\) PLOMAN & HAMILTON, supra note 5, at 14.

\(^{61}\) Id. at 15.

\(^{62}\) MERGES ET AL., supra note 54, at 321 (citations omitted).

\(^{63}\) U.S. CONST. art. I, § 8, cl. 8.

\(^{64}\) LEAFFER, supra note 12, at 6.

\(^{65}\) Id.

\(^{66}\) PLOMAN & HAMILTON, supra note 5, at 16.
artists’ natural, inherent human rights in their works as proposed by Locke.

Congress enacted America’s first federal Copyright Act in 1790; its provisions, “modeled on [England’s] Statute of Anne, set the tone for future statutes.” In contrast to the Constitutional clause’s focus on copyright as a natural right, the 1790 Act viewed copyright only as a material, economic right: the governmental grant of a monopoly on authors’ and artists’ creative works. While books, maps, and charts were explicitly protected, copyright protection was mainly procedural. The Act required “that a copy of the work be deposited in the clerk’s office at the Federal district court where the author or owner resided, to be followed by publication of the copyright registration in a newspaper for a period of four weeks . . . .” Unpublished manuscripts were also protected, but only if written by American citizens; foreign works could be pirated without threat of legal sanctions for infringement of their own foreign copyright. By allowing this piracy provision, the Act represented “the action of a developing country to protect its burgeoning culture while exploiting the cultural products of more developed nations,” namely European nations.

Throughout the nineteenth century, “a series of amendments and court decisions progressively expanded the scope of the act,” granting copyrights for “[printed books], musical compositions, dramatic works, photographs, artistic works, and sculpture,” but copyright as a legal concept retained its economic emphasis. In 1828, the Supreme Court in Wheaton v. Peters viewed copyright primarily as the authors’ rights to the fiscal rewards of their creations upon publication in exchange for public access to the creations. This

67 LEAFFER, supra note 12, at 7.
68 PLOMAN & HAMILTON, supra note 5, at 16.
69 Id.
70 Id.
71 See id.
72 Id.
73 MERGES ET AL., supra note 54, at 321.
74 PLOMAN & HAMILTON, supra note 5, at 16-17.
view was supported not only by the Act but by American common law as well:

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted. . . . [A] literary man is as much entitled to the product of his labour as any other member of society . . . .

As we shall see in Section II of this paper, this decision set the stage for today’s modern international debate between copyright owners and the public about the economic regulation of access to information via innovative digital technology.

B. From the East

America and Europe were not the only nations to develop their own concepts of and laws on copyright. The West’s formal advent of copyright occurred between the invention of printing in 1436 and the creation of copyright privileges, laws, and charters during the sixteenth and seventeenth centuries, but China had polished its copyright concepts and laws almost a millennium before then. Below, we will define and date copyright in the East first by narrating its historical development and evolution through traditional Chinese legal and social practices, and second by explaining the unique structure of China’s ancient copyright legal system with legal and social justifications.

1. The historical development and evolution of copyright in China

During the Tang dynasty, between approximately 581 and 907, China’s advent of printing caused “substantial, sustained

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efforts to regulate publication” and what Western Europe and America call copyright. One of the earliest efforts in China came in 835 in the form of an imperial edict prohibiting the unauthorized printing of “calendars, almanacs, and related items that might be used for prognostication, which . . . were being copied in great quantity . . . and distributed throughout China.” The Tang dynasty further “prohibited the unauthorized copying and distribution of state legal pronouncements and official histories, and the reproduction, distribution, or possession of ‘devilish books and talks’ (yaoshu yaoyan) and most works on Buddhism and Daoism.” Yet in 1009, because the problem of printing undesirable materials remained, China’s emperor took the next logical step, similar to that which would be taken by Western European governments centuries later: he “ordered private printers to submit works they would publish to local officials for pre-publication review and registration.” Persons who obtained governmental approval sometimes then included in their printed works notices of such official approval in order to combat unauthorized reproduction and pirating—a copyright notice, perhaps the first formal copyright notice in history. For example, a notice in a twelfth-century Sichuan work about Chinese history stated, “This book has been printed by the family of Secretary Cheng of Meishan, who have registered it with the government. No one is permitted to reprint it.”

While the West initially disguised its censorship policies in copyright, before disregarding them for more enlightened natural law and economically utilitarian policies, China had no scruples about using copyright primarily for censorship. By halting the private reproduction of materials that were either subject to exclusive governmental control or heresy, the purpose of prepublication review was entirely censorship. The Song dynasty’s list of censored items

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78 ALFORD 1995, supra note 6, at 13.
79 Id.
81 ALFORD 1995, supra note 6, at 14.
82 Id. (citation omitted).
grew to include those covered under the 835 edict, versions of classic materials “(which were only to be reproduced under the auspices of the Imperial College), model answers to imperial civil service examinations, maps, and materials concerning the inner workings of government, politics, and military affairs.” 84 That list later also included pornography “and materials that [either] used the names of members or ancestors of the imperial family, that were written in ‘inappropriate’ literary styles, or that were ‘not beneficial to scholars’” 85 nor the public.

From 1368 to 1644, the Ming dynasty “endeavored to strengthen state control of publication, although relatively few changes were made to [China’s] formal . . . [copyright legal system] until the Qing” 86 dynasty in the twentieth century, which will be discussed below. “Each . . . dynastic code [did little more than] forb[id] the unauthorized republication of governmental works on astronomy, the civil service examinations, and other subjects that had long been considered sensitive, . . . [including] ‘devilish’ books.” These provisions were supplemented periodically by special decrees . . . 87 Other than that, however, China’s copyright concepts and laws were extremely primitive from a Western perspective: China had no legal sanctions for copying or pirating others’ works, no formal legal recognition of authors’ and artists’ rights, and no grant to an author or artist of an economic monopoly in exchange for public access to his or her work. The penalties carried out—anything from one hundred bamboo blows to exile—were to punish unauthorized production or reproduction of prohibited or governmentally regulated works 88, not unauthorized production or reproduction of others’ authorized works. Why did China, which for almost a millennium was “the world’s most advanced [civilization] scientifically and . . . most sophisticated culturally, . . . not of its own accord generate more comprehensive protection for its rich bounty of scientific and artistic creation?” 89

84 Id.
85 Id. (citation omitted).
86 Id. at 14.
87 Id.
88 ALFORD 1995, supra note 6, at 14.
2. Justifications for the structure of China’s copyright legal system

An answer may be that China “neither saw public, positive law as the defining focus of social order nor divided it into distinct categories of civil or criminal.”

To guide and govern society, Chinese law instead “buttressed, rather than superseded, the more desirable,” intangible, yet fundamental law of individual morality and was to be used only when morality failed to elicit appropriate social behavior.

“The primary purpose of [Chinese] ‘law’ is not to establish who is right or wrong, [as in the West,] but to eliminate a threat to or violation of the [social] and natural order.”

Consequently, socio-cultural and legal attitudes neither required nor desired the West’s complex version of copyright. China did not care about who copied what, but rather about what was written or copied and whether the substance or act of copying disrupted or might disrupt society. It was “appropriate—indeed, necessary—to control the flow of ideas to the populace.”

Thus, as will be discussed below, China’s version of copyright reflected its desire to maintain social order, as embodied in imperial governmental authority, and to preserve cultural values.

a. Maintaining imperial legitimacy and power

Instead of the “rule of law,” a principle often found in the West, China followed the “‘rule of man,’ with the emperor and his officials possessing the absolute right to rule the people, who in turn had an absolute duty to obey.” Before the twentieth century, all governmental efforts to protect copyrights in China were “directed

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90 Id. at 8.
91 Id.
92 PLOMAN & HAMILTON, supra note 5, at 142.
93 Id.
94 ALFORD 1995, supra note 6, at 57.
overwhelmingly toward sustaining imperial power.” Officially “were only tangentially, if at all, concerned” with authors’ rights in any ownership or possession in their works, with promoting creativity, or with disseminating knowledge to the public. They were concerned with “textual distortions and errors contained in pirated editions of the Classics, dynastic histories, and other orthodox works . . . .” They punished those who pirated works not only because the copies were inaccurate and violated the prepublication authorization, but also because it led to a disruption in local peace. The reasons for banning unauthorized works concerning time and astronomy focused on protecting “the emperor’s assertion that he was the link between human and natural events; . . . [unauthorized] works regarding prognostication were of concern because they might be used to predict a dynasty’s downfall.”

While copyright as a tool of censorship to preserve governmental power and authority appears to be a shared use and justification by both China and the West, there is one fundamental difference, a sort of procedural-substantive difference. The West aimed to protect only the human-made legal structures and aspects of its governments—metaphorically, procedures. Calendars, almanacs, histories, classic novels, legal and political commentaries, and other materials banned in China could be printed in the West, whatever their effect on culture or society, so long as they did not threaten governmental power or the present political regime. China, in contrast, aimed to protect cultural and social order—metaphorically, substance—whatever the political regime. Governmental power functioned to preserve Chinese culture and society, and because prohibited materials tended more often than not to disrupt cultural and social order, the government—under any dynasty or emperor—censored their printing.

b. Preserving cultural values

97 Id.
98 Id.
99 ALFORD 1995, supra note 6, at 17.
100 Id. at 13.
China’s governmental “efforts to define and supervise the realm of acceptable ideas [for Chinese society and culture were] not as avowedly totalitarian as they might initially have seemed.”

As discussed above, the Chinese legal system derived legitimacy from Chinese culture, whose aspects were built on connection with the past. In Chinese society, “the intelligentsia [were] a class without technical knowledge. They monopolized authority based on the wisdom of the past, spent time on literature, and tried to express themselves through art.”

“[T]he need to interact with the past curtailed sharply the extent to which it was proper for anyone other than persons acting in a fiduciary capacity to restrict access to its expressions.” Such a thing as the West’s version of copyright was a hindrance.

For example, Chinese painters tolerated, oftentimes willingly, the “forging of their own works.” Copying proved “the quality of the work copied and its creator’s degree of understanding and civility.”

To the suggestions that he put a stop to the forging of his works, the painter Shen Zhou responded with “comments that were not considered exceptional, that: ‘if my poems and paintings, which are only small efforts to me, should prove to be of some aid to the forgers, what is there for me to grudge about?’” A famous Chinese aphorism similarly expressed,

“genuine scholars let the later world discover their work rather than promulgate and profit from it themselves.” If, after all, even the characters comprising the Chinese language itself . . . “actually come from nature . . . and were not created by man; man merely imitated them,” on what basis could

102 Id. at 24.
103 PLOMAN & HAMILTON, supra note 5, at 141.
105 Id. at 34.
106 Id.
107 Id. (citation omitted).
A Chinese painter in the eleventh century once said, “In matters of calligraphy and printing, one is not to discuss price.” This sense and generosity of these cultural sentiments continue to be valued in China today, and to exert influence on China’s modern copyright concepts and laws, as will be discussed below.

III. MODERN COPYRIGHT REGIMES

Today in the twenty-first century, China—now politically designated the People’s Republic of China—is the “only large and important nation in the world that does not have a comprehensive [modern] copyright law.” Since 1979, Western nations—particularly the United States—have pressured China to develop a copyright legal system that decreases copyright infringement of Western—particularly American—business interests and that allows those businesses to enter the Chinese market. “Recogniz[ing] the need to meet some . . . of these demands[,]” China has promulgated a somewhat more modern, Westernized copyright concepts and laws.

Yet, “while China’s new copyright system meets China’s needs, it [still] does not completely satisfy [the West’s governmental or] business concerns.”

To explore this conflict, this second section of this paper discusses and compares Western versus Eastern modern copyright concepts, laws, and jurisprudential purposes as developed in the twentieth and twenty-first centuries. “China’s copyright system should be recognized by the [West] as legitimate, . . . reflect[ing Chinese] cultural and social back-ground,” and as sufficient in

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108 Id. (citation omitted).
109 PLOMAN & HAMILTON, supra note 5, at 141.
110 Id. at 140.
111 Lazar, supra note 95, at 1185.
112 Id.
113 Id.
“meeting the basic needs of [Western] businesses.” 114 China should not be expected to reform its political, legal, and cultural systems in order to conform to Western perspectives, particularly the flawed—as explained in the Introduction to this paper—Western perspectives that modern “copyright protection provides important economic incentives for creators” 115 and that unless those economic incentives are provided, creators will not create. No nation can be “expected to discard its history and traditions, especially a country as populous and as old as China.” 116 Indeed, Western nations are not asked to discard their history, ideas, and laws about copyright—although perhaps they should. This issue, however, will be discussed further in the third section of this paper.

A. In the West

In the United States, the Copyright Act of 1909—a revision of the Copyright Act of 1790, which was discussed above in Section I—“lasted for sixty-eight years, until the enactment of the Copyright Act of 1976.” 117 At the end of the twentieth century, an explosion in digital information technological development, which is now transforming society around the entire world as the invention of printing did in Europe in 1436, leads some legal scholars to question the continued relevance and usefulness of the 1976 Act 118 and, inevitably, traditional Western copyright concepts. This “digital revolution” allows the public “to store, manipulate, and transmit” information from the creative works of authors and artists “in ways that greatly transcend . . . previous techniques of replication and dissemination,” 119 most noticeably, in the international arena.

On March 1, 1988, the United States joined the Berne Convention, “the largest and most important international copyright

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114 Id.
115 Id. at 1206.
116 Id. at 1207.
117 LEAFFER, supra note 12, at 7.
118 Id. at 22.
119 Id.
convention.”\textsuperscript{120} The principal motivating reasons for entry were “the growing importance of intellectual property in world trade and the systematic piracy of American works in certain foreign countries.”\textsuperscript{121} Thus, the United States’ entry into the Berne Convention added momentum to the Western movement for a uniform international copyright legal system, a movement which, as will be discussed in the third section of this paper, had been developing for over a century.

However, the integration of these two phenomena—(1) the explosive growth of digital technology, and (2) the movement toward a uniform international copyright legal system—presents two problems. First, these trends make it difficult to create a copyright legal system that is compatible with all nations, cultures, and societies, both Western and Eastern. Second, traditional Western copyright concepts, which is predominant in international copyright concepts, are incompatible with the burgeoning culture of digital information, where physically intangible works are made, copied, transferred, viewed, and modified through copious mediums across the world in seconds for little to no cost. These two problems lead to question what exactly is copyright? Or more significantly, what is its purpose, for it does not matter what a copyright is if it is not needed. In the West, modern arguments for establishing copyright are justified on two fundamental grounds: first, as an author’s natural, inherent human right “to reap the fruits of his or her own labor”; and second, as an economic utilitarian incentive to produce many great creative works that contributes to the public welfare.\textsuperscript{122}

1. \textit{The “naturalness” of copyright}

The first ground, evolved from John Locke’s theory, as discussed above, and colloquially known as the natural law justification for copyright, enjoys considerable support in the West.\textsuperscript{123} It recognizes the property right of copyright in creative works based upon the rights of authors and artists “to reap the fruits of their creations, to obtain contributions to society, and to protect the

\begin{scriptsize}
\begin{enumerate}
\item \textsuperscript{120} Id. at 12.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 16.
\item \textsuperscript{123} Id. at 18.
\end{enumerate}
\end{scriptsize}
integrity of their creations as extensions of their personalities.\textsuperscript{124}

Under natural law, an author or artist “who has created a piece of music should have the right to control its use and to be compensated for its sale.”\textsuperscript{125} Additionally, because authors and artists have enriched society through their works, they enjoy “a fundamental right to obtain a reward commensurate with the value of [their] contribution.”\textsuperscript{126} Formal copyright laws therefore reinforce authors’ and artists’ natural rights.\textsuperscript{127}

However, the natural law justification for copyright has its faults.\textsuperscript{128} First, it fails to define exactly how much control an author or artist should have over his or her work, including “how long that control should last, and who should benefit from control of the copyrighted work.”\textsuperscript{129} Second, copyright does not guarantee a minimum compensation, much less any compensation, for the author’s or artists’ contribution to society.\textsuperscript{130} Indeed, who would dare put a price on the shreds of Beethoven’s soul intertwined in the notes of his seventh symphony, and the sweet sorrow derived from listening to it?

2. \textit{The “usefulness” of copyright} 

As a complement to natural law, the utilitarian approach gives authors and artists the “limited monopoly” of private property rights over their creations, whose worth is ultimately “determined by the market.”\textsuperscript{131} In \textit{Mazer v. Stein}, the U.S. Supreme Court found the primary “rationale underlying the Copyright Clause”\textsuperscript{132} in the United States Constitution not as a principle of natural law, as discussed

\textsuperscript{124} \textit{Id.} at 16.
\textsuperscript{125} \textit{Id.} at 17.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} at 18.
\textsuperscript{132} \textit{Id.} (emphasis added).
above, but as utilitarian. The court explained that “[t]he economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is [the] best way to advance the public welfare through the talents of authors [and artists].”

Yet the fundamental flaw and miscalculation from the natural law justification remains: who can put a price on a soul’s contribution to a work of art that enriches a society? If no one can, then the work’s value to society is immeasurable, and the essential purpose for a copyright legal system becomes not to create fair financial compensation for the work—which would be an impossible task for some if not all works—but rather to simply ensure, by any other incentive, that society remains culturally rich with such creative works. The West admits this, though perhaps subconsciously. In Twentieth Century Music Corp. v. Aiken, Justice Stewart further described the basic purpose of copyright:

The limited scope of the copyright holder’s statutory monopoly, like the limited duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an “author’s” [or artist’s] creative labor. But the ultimate aim is . . . to stimulate artistic creativity for the public good. “The sole interest of the United States and the primary object in conferring the monopoly,” this Court has said, “lie in the general benefits

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derived by the public from the labors of authors [and artists].”

B. East Meets West

The road to a modern copyright legal system in China—as the West perceives modern copyright—has been long, arduous, and, for all, not entirely satisfactory. As discussed above, ancient China had a “primitive” but sufficient copyright legal system dating from the Tang and Song Dynasties, which “forbade unauthorized reproduction of books and government documents” in order to preserve imperial power, rather than to protect authors’ and artists’ works. Only in the twentieth century did a “modern” copyright law—from the West’s perspective—appear in China.

This section discusses the historical development and evolution in the twentieth and twenty-first centuries of China’s copyright legal system as it struggles to balance its prevalent social and cultural values and traditions with the West’s increasing pressures to modernize. Second, this section will examine the reasons why China’s system remains resistant to becoming entirely Western, and implicitly, the reasons why it never will nor should ever be entirely Westernized.

1. The modern development and evolution of China’s copyright legal system

In 1910, the Qing dynasty issued the first modern copyright laws, known as the “Da Qing” statute. It functioned much like Western copyright statutes by explicitly protecting the ownership and inheritance of “literature, art, pamphlets, calligraphy, photographs, sculptures, and models.” The statute also extended protection to

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134 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (emphasis added).

135 Lazar, supra note 95, at 1186.

136 Id.

137 Id.

“works of joint authorship, commissioned works, oral works, and translations.”

Also, like Western copyright statutes, the Da Qing statute limited the period of protection, preserving a work’s copyright up to thirty years after the death of its author. In 1915 and 1928, the governments of the Northern Warlords and Guomindang continued the Da Qing statute, re-promulgating and amending it under their own political regimes.

This trend toward Westernized so-called modernity did not last long. In 1949, the Communist government, renaming China the People’s Republic of China, repealed all copyright law. The government “considered all creative works to be without value,” because they, and their copyrights, had “no place in a society where law and the judicial system [came] secondary to state interest and government policy.” Despite this, the government instituted “administrative orders and internal regulations that governed plagiarism and remuneration, but these were informal and limited in power.”

During Mao Zedong’s Cultural Revolution between 1966 and 1976, these few regulations were again “dismantled and all intellectual property rights were abolished.”

A second about-face came in 1982, when, armed with a new, less Communist and more democratic Chinese constitution and an “open-door” policy welcoming Western trade, politics, and, inevitably, ideas, China announced its intention to “encourage and assist creative endeavors conducive to the interests of [its] people.” In 1986, it formally recognized copyright by adopting the General

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139 Id.
140 Id. at 865-66.
141 Lazar, supra note 95, at 1186.
142 Id.
143 Id. (citations omitted).
144 Id.
145 Id.
146 Id. at 1187.
147 Id. (citations omitted).
Principles of the Civil Law, which explicitly recognized Chinese individuals’ intellectual property rights in their creative works.\textsuperscript{148}

Because China wanted to “appease Western (primarily U.S.) concerns and to facilitate foreign investment,” it was essentially forced to begin developing a Westernized, modern copyright legal system.\textsuperscript{149} However, China’s copyright legal system remained more limited than its Western counterparts, reflecting prevalent, traditional Chinese concepts of and legal justifications for copyright within Chinese society and culture.\textsuperscript{150} “China’s stated purpose in developing its intellectual property system is ‘to rapidly develop social productive forces, [to] promote overall social progress, [to] meet the needs of developing a socialist market economy, and [to] expedite China’s entry into the world economy.’”\textsuperscript{151} Still China mentioned nothing on authors’ and artists’ natural rights in their creative works or the suspected necessity of a government providing economic incentives for them to create, unlike the West, whose copyright legal systems heavily regulated and functioned on such concepts.

In January 1992, China and the United States signed a Memorandum of Understanding on the Protection of Intellectual Property, providing enhanced protection of American copyrights in China and altering Chinese law to conform to two international copyright conventions, the Universal Copyright Convention and the Berne Convention.\textsuperscript{152} However, China failed to abide by the Memorandum’s terms, resulting in continuing production and distribution, both within and beyond China, of pirated Western software, movies, and sound recordings.\textsuperscript{153} As a result, “just before, and after, [its] accession to the World Trade Organization in 2001,” China was forced again to change substantively its copyright law.\textsuperscript{154}

\textsuperscript{148} Id. at 1187.

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. (citations omitted).

\textsuperscript{152} Id. at 1188-89.

\textsuperscript{153} Id. at 1189-90.

\textsuperscript{154} Ruth Taplin, Managing Intellectual Property in the Far East: *China*, KNOWLEDGE LINK NEWSLETTER, Apr. 2005,
China enacted a stronger—and more Westernized—copyright legal system in October 2001.\textsuperscript{155} Intended this time to protect the rights and interests of authors and artists and to encourage their creative efforts, while still preserving Chinese culture, the law gave “private rights for a socialist purpose” and attempted to create a “demarcation between the bourgeois desire for personal fame . . . and the lawful rights and interests of authors [and artists].”\textsuperscript{156} Copyright was not to be exercised in a way that would harm public interest, “free access to copyrighted works [was allowed] for many socially desirable purposes, such as education, news reporting, and translation.”\textsuperscript{157} Yet China’s newest version of copyright still reflected little of the economic focus of Western—particularly American—copyright law.\textsuperscript{158} Rather, China gave copyright protection primarily for traditional cultural interests; economic interests, while moderately protected, were only a corollary.

2. \textit{Reasons why China’s modern copyright legal system resists becoming entirely westernized}

Consequently, copyright in China continues to be a contentious issue not only for the West but also for Chinese society itself, where ancient cultural values and modern socialist ones, remnant of China’s Communist era, still hold sway. For instance, copying “the works of great masters [remains] inherent to Chinese brushwork painting: learning and then [directly] incorporating their styles [has] never . . . [been an] infringement of anyone’s rights,”\textsuperscript{159} whereas in the West, such action violates the author’s or artist’s right in derivative works of their original work. Also in China, the cultural maxim persists that artistic styles and ideas should be given freely;


\textsuperscript{155} Id.

\textsuperscript{156} Lazar, \textit{supra} note 95, at 1191 (citations omitted).

\textsuperscript{157} Id. at 1206.

\textsuperscript{158} Id. at 1192-93.

\textsuperscript{159} Taplin, \textit{supra} note 154.
charging for such is inappropriate.\textsuperscript{160} From a socialist perspective, authors and artists lack power and prestige in today’s Chinese culture, compared to scientists,\textsuperscript{161} and therefore also do not do work deserving of any economic compensation. Modern copyright, to the Chinese, financially protects the West and its cultural products, not China or its products.\textsuperscript{162}

One legal scholar predicted that once research and technological development progress to a more advanced stage, China might desire a completely Western modern copyright legal system to protect its own economy.\textsuperscript{163} However, this prediction is flawed: as my above historical narration articulates, China has long been in advance of the West, both socially and technologically. Its current modern copyright legal system is not underdeveloped, as Western standards judge, but rather is simply reflective of a different yet equally successful approach to dealing with copyright concepts and legal issues. China’s prevalent cultural and socialist perspectives on copyright, dating from both ancient and modern Chinese history, have been and continue to be strong enough and successful enough to prevent a completely Westernized modern copyright legal system in China.

a. Prevalent cultural values

As discussed above, China’s copyright legal system reflects the two primary but symbiotic objectives of traditional Chinese law: “to maintain social order and moral goodness, and to maintain the power of the state over the people.”\textsuperscript{164} Confucianism, a predominant belief and philosophical system followed by the Chinese, maintains that “a formal legal system serves only to make people litigious and self-interested.”\textsuperscript{165} Societal good is emphasized over the pursuit of personal rewards, because as early as the Qin Dynasty, “individual

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Lazar, supra note 95, at 1201.

\textsuperscript{165} Id.
pursuit of economic gain was seen as a threat” to society’s public welfare and peace, and consequently to the government, and was actively discouraged.\textsuperscript{166} Based on this cultural value, to the Chinese, copyright as an economic incentive and legal means for authors and artists to create works and to private profits is not as important a justification—if a justification at all—as it is in the West. Copyright royalties threaten social equality by enriching authors and artists at the expense of society and free public access to their works.\textsuperscript{167}

Furthermore, as discussed above, “Chinese intellectuals rely on historical developments in literature, fine arts, and calligraphy to a greater degree than Westerners.”\textsuperscript{168} The Chinese view copying as “the greatest compliment that authors can receive.”\textsuperscript{169} To benefit the public and enrich society, “the works of prior authors and artists should be [freely] available for scholars and artists to build upon.”\textsuperscript{170}

b. Modern socialist perspectives

Parts of ancient China’s prevalent cultural values are reflected in modern China’s political philosophies. During Mao Zedong’s Cultural Revolution, law—including copyright law—was viewed as a tool to oppress a class or classes of people: “[L]iterature and art are for the masses of the people, and in the first place for the workers, peasants, and soldiers; they are created for the workers, peasants and soldiers and are for their use.”\textsuperscript{171} A popular saying in China during the Revolution asked, “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?”\textsuperscript{172} Traditional socialism considered the renunciation of private property essential to economic

\textsuperscript{166} Id. at 1202.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 1204.
\textsuperscript{169} Id. (citations omitted).
\textsuperscript{170} Id.
\textsuperscript{171} Id. (citations omitted).
\textsuperscript{172} ALFORD 1995, supra note 6, at 56 (citations omitted).
growth; copyright, being essentially a private property right, was therefore forbidden.\footnote{Lazar, supra note 95, at 1205.} This view changed—but did not entirely disappear—when China opened its doors to the international community: specifically, to Western trade, and inevitably, to Western legal values and systems.

IV. \textbf{International Copyright Regimes: WIPO and the Berne Convention}

Before, or simultaneous with, acceding to an international copyright legal system, every nation needs its own “well-developed and healthy” national copyright legal system “for economic and social well-being.”\footnote{\textsc{World Intellectual Property Organization}, \textit{General Information}, http://www.wipo.int/about-wipo/en/gib.htm (last visited Oct. 14, 2006) \cite[hereinafter WIPO General Information]{WIPO General Information}.} Copyright encourages the use, development, and preservation of “local inventive and artistic talents, assets, . . . [and] knowledge and folklore.”\footnote{\textit{Id.}} While it is not essential to the creation of artistic works, it unarguably “attracts investment [and spurs economic growth], providing a stable environment in which investors, both local and foreign, can be confident that their intellectual property rights will be respected;” commercially-valuable information is exchanged at not only a local and national level but also at an international level.\footnote{\textit{Id.}} On the other hand, copyright formally combats “illegal” activities such as counterfeiting and piracy.\footnote{\textit{Id.}}

Widespread accession to and consistent enforcement of an international copyright legal system achieves the same results on a larger scale, helping to maintain stable international political, economic, social, and cultural environments.\footnote{\textit{Id.}} With the recent explosion in Internet digital information technology and use over the past ten to fifteen years, “especially for e-commerce and information and knowledge exchange,” a uniform international copyright legal
system becomes crucial for the orderly development and peace of both the international community and national societies. 179

In this final section of this paper, we will first discuss the historical development and evolution of the international copyright legal system. Second, we will highlight the primary principles and purposes of an international copyright legal system, as embodied in the Berne Convention. Third, we will analyze how those principles and purposes are ignored or forgotten in practice by the Berne Convention’s administrative organization, the World Intellectual Property Organization. Finally, we will propose a new international copyright legal system—a “Beijing Convention”—that better enforces those principles and purposes with a simplified yet effective conceptual and procedural structure based on both Eastern and Western historical precedents.

A. The Development and Evolution of the International Copyright Legal System

“Interest in international copyright protection increased, soon after 1800, for a variety of reasons which affected the development of copyright generally.” 180 Due to national social and political changes, “literary and artistic creations and consumption ceased to be” confined to the ruling classes: nobility, the bourgeoisie, and the intelligentsia. 181 Around the world, the ascent of a middle class “demanded access to the cultural pursuits previously restricted to the aristocracy.” 182 As literature and art flourished both within and beyond national boundaries, authors and artists “complained of the mutilation of their works and the loss of royalties in other countries.” 183 “The need for international protection of intellectual property became evident when foreign exhibitors [and inventors] refused to attend the International Exhibition of Inventions in Vienna

179 Id.
180 PLOMAN & HAMILTON, supra note 5, at 18.
181 Id.
182 Id.
183 Id. at 19.
in 1873 because they were afraid their ideas would be stolen and
exploited commercially in other countries.”\textsuperscript{184}

France was the first nation to initiate some effort to create an
international copyright legal system.\textsuperscript{185} France believed that if it
declared piracy of foreign works illegal within France, “then other
governments might be more likely to adopt a similar measure.”\textsuperscript{186}
Therefore, from 1884 to 1886, international conferences held
respectively in Paris and in Berne, Switzerland formed a convention;
a treaty was signed, uniting nations in the provision of foundations for
new, unprecedented, modern-day international copyright legal
systems and concepts.\textsuperscript{187} Copyright officially entered the
international stage in 1886 when the Berne Convention for the
Protection of Literary and Artistic Works,\textsuperscript{188} the first and principal
international copyright convention and treaty,\textsuperscript{189} began to enter into
force for its member states. It aimed to help citizens of its member
states “obtain international [copyright] protection of their right to
control, and receive payment for, the use of their creative works such
as: novels, short stories, poems, plays, songs, operas, musicals,
sonatas, drawings, paintings, sculptures, [and] architectural works.”\textsuperscript{190}

To provide developing countries with a model of a copyright
legal system—and perhaps to keep pace with the quickening
development and evolution of international and national copyright
legal systems and concepts—the Berne Convention was later revised
and amended at Paris in 1896, at Berlin in 1908, again at Berne in
1914, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967,
and at Paris in 1971 and 1979.\textsuperscript{191} “Its success as an international

\textsuperscript{184} WIPO General Information, supra note 174 (emphasis in original
text omitted).

\textsuperscript{185} PLOMAN & HAMILTON, supra note 5, at 19-20.

\textsuperscript{186} Id. at 20.

\textsuperscript{187} Id. at 21.

\textsuperscript{188} WIPO General Information, supra note 174.

\textsuperscript{189} LEAFFER, supra note 12, at 8.

\textsuperscript{190} WIPO General Information, supra note 174.

\textsuperscript{191} WORLD INTELLECTUAL PROPERTY ORGANIZATION, Summary of
the Berne Convention for the Protection of Literary and Artistic Works (1886),
agreement [for a uniform copyright legal system and concepts] is reflected by its large number of member states, which by the mid-1980’s included every major nation in the world except China, Russia [then politically designated the Soviet Union] and the United States.”¹⁹² Today, the Berne Convention boasts of 162 members, including China, Russia—now politically designated the Russian Federation—and the United States.¹⁹³

The justification and motivation for uniform international copyright derives from the exponential growth of international markets for music, movies, books, and other cultural products.¹⁹⁴ While national governments historically failed to treat copyright consistently between native and foreign authors and artists, uniform international copyright is particularly important today due to the existence of these international markets, fueled by unprecedented technological innovation that transcends national boundaries.¹⁹⁵ The Berne Convention—and its administrative representative, the World Intellectual Property Organization—strives toward overcoming this failure; whether they have or will succeed, remains to be discussed.

B. Neither Here Nor There But Fair: Principles of the Berne Convention

The Berne Convention functions on three principles,¹⁹⁶ which may be characterized as neutral yet fair in nature, primarily influenced neither by Western nor Eastern copyright concepts or principles but rather by fundamental universal, almost natural, ones. The first principle of the Berne Convention emphasizes “national treatment”:


¹⁹² LEAFFER, supra note 12, at 8.


¹⁹⁴ MERGES ET AL., supra note 54, at 319.

¹⁹⁵ Id.

¹⁹⁶ WIPO Summary, supra note 191 (the three principles can be found in Articles 5(1) and 5(2) of the Berne Convention).
works originating in a member state must be given the same protection granted by all other member states to the works of their own citizens. The second principle emphasizes “automatic” protection: copyright “protection must not be conditional upon compliance with any [procedural] formality,” such as registration or notification. Finally, the third principle emphasizes the “independence” of copyright protection: minimum copyright protection in a foreign member state must be independent of the existence of protection in the work’s country of origin.

Guided by these principles, the Berne Convention protects all forms of creative works, including “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.” Also protected are authors’ and artists’ rights to translate, rights to make adaptations and arrangements of their works, rights to perform in public dramatic, dramatico-musical and musical works, rights to recite in public literary works, rights to communicate to the public the performance of such works, rights to broadcast, rights to make reproductions in any manner or form, rights to use their work as basis for an audiovisual work, and rights to reproduce, distribute, perform in public, or communicate to the public that audiovisual work.

The Berne Convention “also provides for ‘moral’ rights, that is, the right to claim authorship of the work and the right to object to

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197 Id.
198 Id.
199 Id. “If, however, a contracting State provides for a longer term [of copyright protection] than the minimum prescribed by the [Berne] Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.” Id.
200 Id. (citations omitted).
201 Id.
any mutilation or deformation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author’s [or artists’] honor or reputation.” Consistent with the Berne Convention’s neutral yet fair principles, moral rights echo of both Western copyright concepts—such as John Locke’s idea of copyright as a natural right—and Eastern ones—such as China’s ancient concerns with textual distortions and errors in unauthorized, banned works and its commendation of copying to prove the quality of the work copied and the creator’s degree of understanding and civility, as discussed above. In practice, with the given international copyright legal system, these principles are not emphasized as much as they should be. They should be actively used to balance Western and Eastern copyright concepts and laws, and to shape the structure of a new international copyright legal system.

C. “W” Is For “West”

Since its inception almost 120 years ago, the impetus of the Berne Convention—the benevolent desire to promote creativity by protecting creators’ rights in their works—has been embodied in, yet unfortunately ignored in practice by the World Intellectual Property Organization (“WIPO”). WIPO began at its birthplace in Berne, with a staff of seven; reflecting the growth of participation and activity in the international community and the importance of creating a workable international copyright legal system, WIPO currently holds its seat in Geneva, claiming 183 member states, with a staff of approximately 938, from ninety-five countries around the world. WIPO plays a “pivotal role” in the international community by striving to ensure the development and evolution of an international copyright legal system that balances Western and Eastern concepts. Below we will further discuss what WIPO does and, unfortunately, how it fails.

202 Id.

203 WIPO General Information, supra note 174.

204 Id.

1. What WIPO does

WIPO reflects “the central role of [intellectual property, including copyright,] as an important tool for social development, economic growth, and wealth creation,” but despite this emphasis on wealth and economies, WIPO does understand that copyright—and, indirectly creative works—is “the foundation of human existence and co-existence,” which “is foreign to no culture and native to all nations.”

It could be said that WIPO’s primary public relations objective is to bring the concept of international copyright “closer to people [by highlighting] the diversity of cultures, origins, and [legal and social] systems.”

WIPO believes that a successful copyright legal system has “enormous potential to generate positive growth and development and [to] impact beneficially on the progress of all nations” and all classes of citizens, “attracting both users and beneficiaries of innovation and creativity,” which is true, as mentioned above. Therefore, WIPO encourages every nation, whether a member state of its organization or not, to recognize copyright “as a powerful tool for economic, social, and cultural development” and consequently to develop a national copyright legal system appropriate to its native needs, including a focused national public policy and a suitable national legislative structure and enforcement procedures. An ideal national copyright system should be “effective, affordable, and easily accessible to all stakeholders,” which include its users and beneficiaries like authors and artists and the public.

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207 Id. (citations and internal quotations omitted).

208 Id. (citations and internal quotations omitted).

209 WIPO Message, supra note 205.

210 Id.

211 WIPO Medium-Term Plan, supra note 206 (citations omitted).

212 Id.
an ideal national copyright system should also be consistent with WIPO’s burgeoning international laws and agreements.\textsuperscript{213}

If WIPO “seeks to enhance its role as the leading international organization, and the UN [sic] specialized agency, responsible for initiating and governing] effective international cooperation,”\textsuperscript{214} it should continue to hone and redefine its “technical and legal [knowledge] and assistance.”\textsuperscript{215} WIPO should also seek to better understand “cultural and social dimensions of IP-related issues,”\textsuperscript{216} focusing on tailoring national and international copyright legal systems to the needs of all by helping to integrate modern copyright concepts into national policies.\textsuperscript{217} WIPO strives to harmonize “intellectual property legislation and procedures” with those of the international community, “marshal[ling] information technology as a tool for storing, accessing, and using intellectual property information,”\textsuperscript{218} but more importantly, it should also harmonize Western copyright concepts and laws with Eastern ones.

2. How WIPO fails

WIPO’s programs on assisting the development of intellectual property are supposed to be tailored for each individual nation,\textsuperscript{219} but if that were true, then China, one of the largest and most important nations in the world, would never have been essentially forced to adopt its current modern, Westernized copyright regime. Instead, its ancient copyright legal system, relatively “primitive,” informal, but sufficient, would have been reenacted after the Cultural Revolution ended. As it is, WIPO, driven by the West instead of by the world, influenced a different outcome, one compatible with Western copyright concepts and legal systems but incompatible with—and possibly insulting to—Chinese culture.

\textsuperscript{213} Id.

\textsuperscript{214} WIPO Medium-Term Plan, supra note 206.

\textsuperscript{215} WIPO Message, supra note 205.

\textsuperscript{216} WIPO Medium-Term Plan, supra note 206.

\textsuperscript{217} WIPO Message, supra note 205.

\textsuperscript{218} WIPO General Information, supra note 174.

\textsuperscript{219} WIPO Medium-Term Plan, supra note 206.
WIPO functions by consensus, which, although not the easiest path, is arguably the most powerful; however, the result of this is that WIPO reflects predominantly Western copyright concepts and legal values, particularly America’s utilitarian philosophy that the best way to advance public welfare through the talents of authors and artists is to encourage their efforts with financial compensation—as discussed above. WIPO strongly emphasizes economic justifications, pointing to the mounting importance of intellectual property in business dealings and, consequently, in wealth augmentation locally, nationally, and internationally. Its Director General, Kamil Idris, personally emphasizes two “vital need[s] for developing countries and countries in transition[.]” their equal participations both in the international economy and simultaneously in their creation of a “hospitable [international] environment for technological and commercial collaboration between . . . [one another, which will] ensure a healthy global economy and improve the quality of life for all.”

The twenty-first century presents many challenges for the international community: “bridging the widening knowledge divide, the reduction of poverty, and the attainment of prosperity for all.” Success of a nation in overcoming these challenges depends partially—but not entirely—on effective national and international copyright legal systems. It is the job of political leaders and lawmakers to ensure the reduction of poverty and the attainment of peace and prosperity for all. It is the job of authors, artists, and WIPO to bridge the widening knowledge divide, not by providing economic incentives for the creation of artistic works—money did not compile the notes of Beethoven’s seventh symphony, genius and the soul did—but rather by providing easy international public access, through ideally structured copyright legal systems, to existing artistic works so that new ones are not incited but inspired.

220 WIPO Message, supra note 205.
221 See discussion supra Part II.A.2.
222 Id.
223 Id.
224 WIPO Medium-Term Plan, supra note 206.
225 Id.
D. A Beijing Convention

What would have happened if China, instead of the West, had become and currently was the predominant influence behind the Berne Convention and the World Trade Organization? By returning to ancient, prevalent Eastern cultural values, would—could—the current international copyright legal system be more effective? As a matter of fact, if there were a Beijing Convention instead of a Berne Convention, no international copyright legal system would exist in the first place. As discussed above, Chinese culture tolerates copying, because it proves the quality of the work copied and its creator’s degree of understanding and civility. Its current copyright act, designed to encourage and assist creative endeavors conducive to the interests of the public, not to create economic incentives to create works of art, reflects this cultural value. If China had greater influence across the world, then modern copyright—as the West defines it—would be unnecessary.

Instead, a new but not historically unprecedented international copyright legal system should—and hopefully will—exist in its place, true to the principles of the Berne Convention and to a balance of Eastern and Western values. While the following suggestion may appear over-simplistic, its generality, if placed in force, would be effective. Authors and artists will only be guaranteed receipt of credit for their creative efforts and works, not economic compensation or control of their works. Such credit will hold a high place in societies, symbolized in awards ranging from the monthly printing in the local newspaper of local authors and artists who publicize their works, to a grand Oscar-like awards ceremony for national or international creative works, with various categories such as “Best-Written Novel,” “Best-Composed Artwork,” “Best-Choreographed Dance,” etc. Some awards and ceremonies for authors and artists already exist—for example, the Nobel Prize in Literature, the Pulitzer Prize, the Man Booker Prize, the Tony awards, and so on. However, these awards and ceremonies should be emphasized more in societies and cultures.

In the event that someone copies their original work, credit will be given to the original author or artist, referring the public to him or her and thereby favorably honoring his or her reputation, as is consistent with the third principle of the Berne Convention and the

226 See discussion supra Part II.B.
ancient Jewish religious principle of “reporting a thing in the name of him [or her] who said it.” In the event that someone copies and improves upon an original work, credit will still be given and the same result will occur in regards to favorably honoring the original author’s or artist’s reputation; either way, everyone wins, particularly the public, for as the ancient Chinese painter observed, “If my poems and paintings, which are only small efforts to me, should prove to be of some aid to the forgers, what is there for me to grudge about?”

Only in the event that credit is not given will there be a cause of action for copyright infringement and a claim for civil damages. Otherwise, there is no need for any economic compensation to ensure creation of artistic works. Most authors and artists have second or third jobs to earn a living, yet they still create. Very few authors and artists manage to earn a living simply by creating, like the Steven Spielbergs and the J.K. Rowlings of the world. In today’s democratically-inclined political atmosphere, no legal system should be designed to benefit the few. Even in today’s Western copyright legal systems where economic incentives are provided but not guaranteed and rarely achieved, authors and artists still create, proving utilitarian justifications for copyright are ineffective and therefore unnecessary.

For example, the online encyclopedia Wikipedia, “where anyone can write, edit, or access an entry for free”: it “produced more than 1 million articles in under four years. At 127 million words in the English version alone, Wikipedia is larger than any other English-language encyclopedia, including the [copyrighted and expensive] Encyclopedia Britannica, which weighs in at fifty-five million words.” “What’s most remarkable is that every word is written by volunteers[.]” almost every entry is of superb quality—highly detailed, cross-referenced, and frequently updated by those people who know the definitions best—yet “no one gets paid for a

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227  PLOMAN & HAMILTON, supra note 5, at 6.

228  Alford 1993, supra note 15, at 34 (internal quotation marks omitted).


230   Id.
If every field of artwork, such as writing, dancing, painting, were structured like Wikipedia, imagine the possibilities.

Also in this new international copyright legal system, the ancient problem of unauthorized, pirated copies of works will simply be that: an ancient, irrelevant, and moot problem. The development of innovative, high-quality digital information technology and the growing use of the Internet affects international society the same as the invention of printing affected national societies in the West and to some extent in the East. Just as the importance of scholarly monks and members of the intelligentsia who used to copy creative works decreased, due to the growing use and trade of printing, so the importance of publishers and distributors will now decrease, due to the growing ability of individuals to publish and distribute their own creative works through high-quality yet inexpensive software and electronic community networking. The attitude of major publishing houses, film studios, and other big entertainment businesses—which could be generally characterized as "If we don't make money, we won't create"—will then be vindicated: big entertainment businesses will not continue to create, but common, everyday people will, thanks to the growing use and availability of high-quality, cost-efficient digital technology. Producing and distributing creative works will become truly “democratized.”

Given greater public access to all works across national boundaries, through the innovations in digital technology and the Internet, all societies and cultures will be enriched. Open access and trade of international ideas and creative works will inspire more innovative ideas and creative works. The liberty and variety of this rich environment will inspire more variety and naturally prevent globalization and homogenization; no true author or artist wants to create exactly like the next author or artist, and if con-artists, under this new international copyright legal system, cannot make money off the original or the exact copy of the original work, then they will become conveniently extinct, as will “piracy.” Rather, true authors and artists like to create uniquely and individually, always focusing on transgressing the boundaries of the imagination; the quality, style,
and variety of their arts have nothing to do with the limits or growth of their bank accounts.

Under this new international copyright legal system, I could type up the story I wrote yesterday, convert it to a PDF file so that multiple software applications could access it, and send it to all my friends, who may send it to their friends, and so on, until my story—in all its terribly-written glory—is exposed to the world for its perusal. I may not be financially compensated, but I will be honorably credited as the author who showed the world what and how not to write. And nobody would dare want to copy that.233

V. CONCLUSION

The problem with copyright legal systems, and the concept of copyright itself, has persisted due to the influence of Western copyright legal systems and concepts upon international ones. They try to create and use economic incentives to encourage authors and artists to write, paint, dance, and do all the colorful things authors and artists do to illuminate a culture, inspire a society, and make the world a more beautiful place. However, because there is no money in writing, painting, dancing, and other art—and even if there was, no price can pay for the slivers of soul involved in the resultant works—such an incentive is flawed. This paper has argued that if nations of the world, united in the Berne Convention and WIPO, wish to formally encourage authors and artists to create, then their copyright legal systems should offer credit and honor to reputations to inspire creativity, not empty promises of economic compensation to incite it. After comparing both ancient and modern structures and justifications of Western copyright legal systems, China’s copyright legal system, and the international copyright legal system as embodied by the Berne Convention and WIPO, this paper concludes that the concept of copyright, particularly Western copyright, compared to Chinese copyright and measured by conceptual developments throughout history, is inherently flawed and therefore should be changed.

233 On the other hand, perhaps someone would copy me, as it could be argued that I followed the footsteps of Edgar Allen Poe, who also taught the public what and how not to write. To read his brilliant essay, see Edgar Allan Poe, The Philosophy of Composition, in The American Tradition in Literature: Volume I 1296 (George Perkins & Barbara Perkins eds., 10th ed. 2002).