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# From copycat to copyright: intellectual property amendments and the development of Chinese online video industries

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## ABSTRACT

Many commentators have in the past hailed the production in China of lower cost versions of famous Chinese and international cultural and media products, better known as a shanzhai (山寨) form of production. Against that, this paper argues that there has been a significant move away from a copycat model in the Chinese creative industries, a trend which should be viewed within the context of China's obligations as a full member of the WTO. This paper argues that the way in which online video industries have developed and innovated over the last 14 years in China has changed in that online video industries are constantly mutating their business models in response to lawsuits for IP violations instead of simply aligning with existing regulations. By doing that, they are indirectly adapting their business models to local legislation relating to the protection of IP for domestic and international content.

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## Introduction

While there are myriad platforms for online videos in China, the market is dominated by three: iQiyi, Youku Tudou, and Tencent Video, owned respectively by the so-called BAT – Baidu, Alibaba, and Tencent (Asia Video Industry Association 2018; eMarketer 2018). While advertising is still the main source of income in the online video industry, VOD (video on demand) or OTT (over-the-top) subscription models have become much more popular in recent years. One such estimate expects to see China's paid online video market grow from 62.7 billion yuan in 2020 to 98 billion in 2022 (Statista 2021). This is reflected in the shifting proportion of different revenue streams, as illustrated by a drop in advertising revenue as a percentage of overall revenue from 35.9% in 2019 to a projected 18.1% in 2022 (Statista 2020). In the same period, revenue from copyright distribution is projected to rise from 5.4% to 6.4%. In addition, money from paid content, whose revenue presumably is dependent on strong copyright protection, is projected to rise from 42.9% to 57% (Statista 2020). It appears, then, that the online video industry overall and, in particular, its creators are well placed to benefit from the further strengthening of Intellectual Property (IP) protection in China.

The paper will, therefore, consider how the need for Chinese online video industries to protect their own copyright and the international content that they have acquired has shaped their business models and consumer markets since 2008.

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The first section provides the theoretical context of Chinese perspectives on how their country should operate within the global economy, particularly where these are at odds with the approaches of so-called western nations.

The second section will discuss the challenges that media industries faced in the shift from analogue to digital distribution of content by focusing on the antipiracy campaigns, legislation, and business models that have been put in place to prevent online copyright infringements.

In the third section, an overview of the debate around the copyright protection in the Chinese new media industries will be given. It will be argued that the 'copycat culture' that some commentators saw as 'a period that China and other developing countries must go through in fostering their companies' innovative capacities' (Ai Jun, Sociologist, cited in Xinhua 2011) no longer applies to Chinese online video distribution industries.

The third and fourth sections are the result of desk-based research which involved surveys of the Chinese language press, trade magazines, Wemedia platforms, and company documents. The former will underline the key factors that influenced the current shape of online video distribution industries; the latter will analyse the correlation between the different litigations and the changing business models in Chinese online media industries to show how a strict copyright regime is actually fostering instead of undermining their innovative development.

We will finally discuss some changes that took place from January 2020 onwards where, due to the COVID-19 pandemic, online video industries saw a significant boom compared with the traditional film and screen industries (Liu 2021); TikTok being 'the world's most-downloaded app in January 2020, just as COVID-19 intensified in China' with more than 100 million downloads (McKinsey & Company 2021).

## Theoretical framework

At the time of writing, there is an ongoing trade dispute between China and the United States, part of which focuses on the accusation by the latter that foreign companies often have to transfer their IP to their Chinese counterparts in the joint ventures that are sometimes a condition of doing business in China (Jiang 2018). This dispute seems to exemplify each country's differing interpretations of the role of the protection and exploitation of IP in the development of their economies. Our own research employs a legal compliance framework (Thomas 2017) in its investigation of China's changing IP and copyright regime. This is based on the fact that China has been a signatory member country of international copyright conventions, and its current form and enforcement of copyright have been the result of several negotiations under this global jurisdictional framework (Vlassis 2021). In Kalantzis-Cope's (2018) reading of copyright disputes, US corporations' lobbying spearheaded the global privatisation of information through the World Trade Organisation (WTO)'s TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights). Essentially, this means that all signatories to the WTO, which China joined in 2001, should treat information as a 'good' that can be traded within and between states. This position has been challenged by scholars, including Kalantzis-Cope (2018) himself and Pang (2012), who see this IP regime as benefiting developed nations over those not fully developed.

Whatever one's views about the way in which this copyright regime operates internationally, this paper argues that China's long-term trajectory in relation to the protection of copyright for cultural content can be understood within the context of this global jurisdictional framework. This is illustrated by its legal obligation to uphold the above-mentioned TRIPS protocols of the WTO, which were manifest in the introduction of The National Copyright Administration of the People's Republic of China's (2006) *Regulations on Protection of the Right of Communication through Information Network*,<sup>1</sup> as well as the *World Intellectual Property Organization Copyright Treaty* and *World Intellectual Property Organization Performances and Phonograms Treaty* in 2007 (Klein, Moss, and Edwards 2015; World Intellectual Property Organization 2020). That being so, we will

demonstrate that the rapid progress from an unstable ecosystem where piracy was rampant to one in which copyright in China's online video industries is being afforded more sophisticated protection, is very much in line with the country's commitments to upholding and fully exploiting this global IP regime.

## The challenges of online copyright protection

It is not only in China, though, that governments have had to find ways of protecting the copyright of online creative content as a means of complying with these international regulations. Media industries that grew up in the analogue age have struggled to cope with the migration of media content to digital platforms as digital content can be easily copied, distributed, shared, and illegally downloaded by millions of people (Chen 2021). In the 1980s and 90s several anti-piracy campaigns and warnings were issued as a means of deterring people from copying or purchasing illegal VHS tapes. The RCA/Columbia VHS cassettes campaign 'If it isn't red, it isn't real' (Dan Openings 2014) as well as the 'Beware of Illegal Video Cassettes' campaign (Clavicula 2015) created by the UK based Federation Against Copyright Theft (FACT) are good examples of campaigns that placed warnings personalized with the logos of different home video companies at the beginning of many cassettes. However, these campaigns seem antiquated in an era where the digitisation of cultural content enables copying on an industrial scale.

The moves towards the global privatisation of information in the 1990s were the logical extension of the decision by the US President Bill Clinton's administration to take the Internet out of public ownership in the middle of that decade (McChesney 2013). The US government's subsequent 1996 Telecommunications Act initiated a comprehensive deregulation of the telecom sector, including digital media platforms and their content (Hesmondhalgh 2007). Not surprisingly, the GATT (General Agreement on Tariffs and Trades) process and the establishment of the WTO are viewed by many as the means by which western entertainment conglomerates used their copyright protections to aggressively encroach on hitherto under-exploited transnational markets (Klein, Moss, and Edwards 2015). This growing international trade in cultural products was an integral part of state-led post-industrial strategies which sought to reduce the manufacturing sector and elevate the informational economy (Castells 2010).

The UK's New Labour government picked up the baton and developed an industrial strategy which centred on thirteen designated 'creative industries'. Its mapping document for the music industry identified the opportunities that the Internet afforded for the UK music industry in global markets, but added that success would be dependent on the extent to which target countries strengthened their copyright regimes (Department for Media, Culture and Sport 1998). Over the next few years, many other nations and regions carried out their own creative industries mapping exercises, reinforcing the global trend towards post-industrial forms of economic development (Flew 2012). By now, these industries were sometimes referred to as 'copyright industries' (Garnham 2005, 15). Inevitably, the World Intellectual Property Organization (WIPO) arrogated for itself a greater role in the development of these industries at the global level, as evidenced in its 2003 report on 'copyright-based industries' (World Intellectual Property Organization 2003). The United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme's (UNDP) launching of the first of their comprehensive *Creative Economy Reports* in 2008 was not only the UN's imprimatur on the extension of creative industry policies beyond the developed world, but also demonstrated its strong support for the continuation of strict global copyright regimes (United Nations Conference on Trade and Development (UNCTAD) and United Nations Development Programme (UNDP) 2008).

It is noticeable that even those who are sceptical of the assumption that strict copyright regimes encourage creativity concede that the way in which original content circulates in online networks must be managed in such a way that protects the expressed ideas of creators (Hartley, Wen, and Li 2015; Throsby 2008). The music industry is particularly vulnerable to the easy

replication of songs without any loss in fidelity, as is evidenced by the significant drop in the industry's global income from 1999 until around 2014–2015 (Krueger 2019; International Federation of the Phonographic Industry 2021). Similarly, in the online video industry, technologies which facilitate multiple replications are also impacting negatively on sales. This is borne out by figures which show that the revenue from the US home-viewed video market declined by over 17% from 2000 to 2014 (Taplin 2017, 278). The response to this has been to develop more aggressive antipiracy campaigns such as the 2004 Motion Picture Association of America's (MPAA) *'Piracy. It's a Crime'*, which compared piracy with stealing private goods, and the FACT's *'Piracy is a Crime'* in the UK, which associated piracy with terrorist organisations that force immigrants to sell pirate DVDs (Klein, Moss, and Edwards 2015).

Governments have also responded to this issue with policies attempting to tighten copyright protection and the introduction of more punitive measures to combat infringement. These campaigns and policies, however, have not always been successful or taken seriously by the public. This is demonstrated by two different examples. First of all, the failure to enforce the law, as demonstrated by the Stop Online Piracy (SOPA) and Protect IP (PIPA) acts in the USA in 2012, and the French Hadopi law of 2009 that should have suspended the Internet connection of those violating copyright online; after a review in 2013, preventative fines were introduced to replace the connectivity suspension (Klein, Moss, and Edwards 2015). Secondly, the online parodies of the different antipiracy campaigns produced by users and widely distributed online in channels such as YouTube are evidence of public scepticism of these measures (Klein, Moss, and Edwards 2015). The effect of this is illustrated in the continuing existence of significant amounts of online piracy in the audio-visual industry: Johnson (2020) cites figures from a U.S. Chamber of Commerce's Global Innovation Policy Center report in 2019 which estimate that '26.6 billion views of U.S.-produced movies and 126.7 billion views of U.S.-produced TV episodes every year' are of pirated content. These failures to convince the public that online piracy is harmful to online entertainment industries demonstrate the difficulty of introducing effective legislation which will convince the public that copying is a serious crime punishable by law, and deter them from doing it.

One of the main reasons why these campaigns have largely failed is the widespread perception that copyright enforcement benefits large multinational corporations rather than creative professionals in the film industry (Klein, Moss, and Edwards 2015). The US government's 1998 *Digital Millennium Copyright Act* (DMCA) not only extended copyright generally from fifty to seventy years after the death of the creator, but, after lobbying from Disney and others, also introduced separate, longer extensions for corporations (Coyle 2020). As well as providing some evidence for the view that copyright protection largely benefits large corporations, Coyle (2020) argues that it stifles innovation for the sake of defending those who can no longer utilise their own creative works. The need for less stringent copyright restrictions is particularly important for those trying to get a foothold in the market. This is essentially how Hollywood developed in the early twentieth century, as independent film companies moved to the west coast of America to escape the Motion Pictures Patent Company's cartel on the eastern seaboard (Boldrin and Levine 2008). Stringent copyright regimes can also imperil the spread of knowledge, especially where there are restrictions in the use of material for educational purposes (Hartley, Wen, and Li 2015). This has a particular impact on people in poorer parts of the world, where there are expensive licences for academic journals and the imposition of global copyright rules on indigenous forms of knowledge (Klein, Moss, and Edwards 2015). For all these reasons, a large section of the paying public is sceptical of the merits of copyright protection.

How, then, might the desire to legitimately reward creators of cultural content be reconciled with the need to be able to exploit copyrighted material for the purposes of diffusing knowledge and encouraging innovation? The European Union's (EU) 2019 Digital Single Market Copyright Directive represents a serious attempt to do just that. While it does not advocate the undermining of existing copyright protections, it nonetheless seeks to enable users to better exploit original works:

The directives that have been adopted in the area of copyright and related rights contribute to the functioning of the internal market, provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and other protected subject matter can take place. That harmonised legal framework contributes to the proper functioning of the internal market, and stimulates innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market. The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore (European Union 2019, 1).

This is manifest in measures to create additional exceptions for the use of copyrighted material in educational settings, and to bolster the rights of content creators for fair remuneration from digital platforms. The EU's Copyright Directive offers a viable alternative to the Digital Millennium Copyright Act's (DMCA) strong focus on protecting rightsholders, particularly where they are large American entertainment companies. It also underscores the folly of assuming that there is a uniform 'western' approach to copyright protection, with the EU Copyright Directive's imposition of greater obligations on platforms to identify content which violates copyright subtly deviating from the DMCA's expectation that platforms need only take action after being notified by rights holders (Boutelle and Villasenor 2021). This demonstrates that, even within the WTO- and WIPO-driven international regime, there is some scope for forging flexible approaches to copyright protection and exploitation, especially with regard to safe harbour protections, and something which should be very much considered when analysing the Chinese model.

The debate in China traditionally has focused on the need for flexibility around copyright enforcement to allow the local 'copycat' culture to enhance creative industries' innovation (Keane and Zhao 2012), as explained in the next section below. Against that, this paper argues that there has been a significant move away from a copycat model to one in which the protection of copyright is ever more important in the Chinese creative industries, a trend which should be viewed within the context of what was discussed above about China's obligations as a full member of the WTO.

## **Developments in copyright law and enforcement in China's online media industries**

It has been argued by some scholars that online piracy in the Chinese media industries is difficult to prevent, so business models should not only reflect but celebrate this (Montgomery 2009). This is the justification for the social network model of production that we critically evaluate in more detail below. This model allows for the type of replication of content that the DMCA seeks to outlaw. Evidence for the positive role that imitation can play in innovation comes from Luckraz's (2008) study of how, when ideas are copied freely, it spurs on innovators to continually develop new ones. All this reinforces the view that, in developing countries particularly, below a certain threshold of innovative capacity within the national jurisdiction, strict copyright regimes might not be as effective in developing innovation as more relaxed regimes.

This could explain the development of new media practices in China which subvert IP, the most famous of which is Shanzhai. Originating in the manufacturing sector in Shenzhen, Shanzhai products are essentially lower-cost copies or modified versions of those from famous Chinese and international brands. This practice started in markets like those selling mobile phones and graduated to more creative/cultural content (Hartley, Wen, and Li 2015) such as the Shanzhai Spring Festival Gala (Xu 2016) or Shanzhai soap operas (Ho 2010). These practices have caused much interest among scholars, especially those from western universities (Hartley, Wen, and Li 2015). Indeed, Montgomery (2009) cites the high levels of creative content piracy, especially in online music and film, on the Chinese Internet to argue that economic models based on generating income from IP are not feasible. Some have stressed the greater functionality and adaptability to local consumer tastes that Shanzhai affords (Landsberger 2019; Qin et al. 2019), while Lindter (2020) emphasizes how using open-source software and the hacking of proprietary systems can produce prototypes that enable myriad users to deploy and modify in ways in which strict IP regimes prohibit. Montgomery and her

former colleagues at Queensland University of Technology's Creative Industries Faculty have advocated the use of the social network market model in China as opposed to IP-driven forms of innovation (Hartley, Wen, and Li 2015; Montgomery 2009). In this model, IP is not a consideration for products in these markets; and, as with Shanzhai products, knowledge is shared, ingenuity merely mimics others' IP, and products are sold for lower prices. The advocacy of Shanzhai models of production is, unconsciously or otherwise, based on the supposition that China is one of those developing nations that suffers, rather than benefits, from strict IP regimes.

Notwithstanding its commitment to the TRIPS agreement, it could be argued that if China has not reached the level of development where its innovative industries can compete successfully in global markets, then this might be a sensible economic model for the Chinese media industries. However, while the origin of the major Chinese platforms could be seen as examples of imitation—for example Alipay cloning Paypal, and Baidu's design imitating Google's—the same platforms today show clear evidence of innovation: Alipay's unique online payment experience being a case in point (Custer 2014). And, notwithstanding its central role in the trade dispute between the United States and China at the time of writing, it should be noted that in 2014 alone Huawei was the leading filer of all international patent applications, beating Panasonic into second place (World Intellectual Property Organization 2015).

This demonstrates that, even as some western scholars continue to express admiration for Shanzhai models of production, China has decisively shifted away from that economic model; indeed, Chinese scholar Jie Gu has even asserted that piracy effectively ended in the Chinese online video industry in 2014 (Gu 2018). This is evidence of China's seriousness in abiding by its WTO obligations and integrating into the global market (Arrighi 2007; Pang 2012).

Historically high levels of piracy in China (though it is not unique in having this problem) can blind us to the long-term trend towards ever greater IP protection. The collapse of export markets after the onset of the global financial crisis in 2007–8 accelerated China's move away from a dependence on low-cost manufacturing towards high tech manufacturing, financial services, and the creative industries, and other sectors where IP protection is extremely important (Li 2011). China's model of the creative industries is very much dependent on the 'cluster' model (Keane 2011) which implies a concentration of interconnected businesses. Irrespective of whether or not one thinks this is indeed the most effective means of developing those industries, evidence points to a link between strengthened IP rights and agglomeration/clustering in that sector (Dong, Zhu, and Hu 2015).

Institutional and legislative changes over the past few years, including the opening of IP courts in Shanghai, Beijing and Guangzhou in 2014–15 (Chon, Hausman, and Shmailov 2016), have supported this move towards the protection and exploitation of IP. The Copyright Law's (of China) long-delayed amendments propose a significant tightening of enforcement powers and higher penalties for infringement (Thomas 2017). However, it has to be noted that the seriousness of combating copyright violations in the media and other creative industries by the Chinese government has been demonstrated further in its recent and third revision of the Copyright Law, which took effect on 1 June 2021 (Jyh-An and Yangzi 2021). Notable specific amendments have been assessed as 'being bold' in relation to its provisions on digital transmission and consumption (Wang 2021). These amendments create a positive legal basis for copyright owners to safeguard their rights in a digital age. These include a ten times increase up to a 5 million RMB maximum in the limit for the penalty for copyright violations, a classification of cinematographic works, television works and other audiovisual works as 'audio-visual works', and the provision of different copyright ownerships (Wang 2021). This redefinition of categories affords better copyright protection to previously hard-to-define works in a digital age. In the hiatus since the proposed amendments were released in 2014, the new IP courts have made significant advances in the enforcement of IP protection (Chon, Hausman, and Shmailov 2016). According to Chon, Hausman, and Shmailov (2016), such significant changes are demonstrated by an increase both in applications for registering IP rights and court filings involving IP matters. Civil and administrative cases filed in Chinese IP courts increased from 42,931 to 105,440 from 2010 to 2014, which outnumbered any other jurisdiction around the world. It is worth noting

that 70–80% of these cases were filed by foreign IP rights holders. While the bulk of this growth predates their opening, the IP courts have not only helped to manage the increasing number of cases, but also given the general sense that copyright holders have more confidence in the system of enforcement, both domestically and internationally (Thomas 2017).

In 2015 the Beijing IP court alone dealt with 63 first instance civil cases in which plaintiffs from outside mainland China had a 100% success rate (Zhichan Beijing 2016). And in 2016, about 87,000 of IP-related civil cases were specifically related to copyright (Ma 2017). The chief judge of the IP court of the People's Supreme Court, Yuanming Qin, reported that in 2020 alone, there were around 4.7 million IP related cases, of which 70% were copyright related: 70% of these copyright cases were Internet-related cases. At the same time, 2020 also saw a 23% increase in new copyright registrations (Music Weekly 2021). These new changes support Thomas's assertion that foreign rights-holders' chances of bringing a successful case against infringement is virtually the same as domestic rights-holders, a significant change from the preceding ten years (Thomas 2017).

As is illustrated with the ongoing trade dispute between the US and China, these types of actions are considered reciprocal; providing they adhere to the IP rules in the countries in which they operate, Chinese companies' IP is protected in other jurisdictions under TRIPS and other international IP treaties' principle of national treatment, as is the IP of foreign companies in China (Qin 2019). Online video service Xunlei learned this the hard way, when its attempt to enter the US stock market in 2011 was unsuccessful because seven American record companies took legal action against it for instances of copyright infringement. This encouraged it to move definitively away from a business model that was blasé about copyright violations to one based on licensed content; its reward being a NASDAQ listing in 2014 (Gu 2018). This attentiveness to copyright protection has facilitated partnerships between Chinese and US online platforms, as is the case where the copyright of several Netflix media products is licensed to Baidu's video streaming site iQiyi, with the airtime of new seasons of Netflix's TV series in China paralleled in other countries (Frater 2017).

There is also a correlation between restrictions on 'sensitive' content and IP protection in China. The increase in the number of government-led crackdowns whose dual aim is to strengthen copyright and content control, which we will detail below, along with the opening of the three IP courts mentioned above would suggest that this is indeed the case. This echoes the observation by Chinese scholars that this dual aim comprises the growth of IP-dependent creative industries and platforms, and ever stricter IP regimes and implementation thereof (Gu 2018). Generally then, in terms of typologies of developing and developed economies it would seem that, with regard at least to IP and innovation, China can be considered in the latter category. According to Mathew Alderson, partner and entertainment lawyer at Harris Bricken in Beijing 'Copyright is no longer something imposed on China by the U.S. It is now a tool in Chinese hands' (Ma 2017). And, as highlighted above, this shift is also increasingly targeting domestic companies that violate the IP of overseas firms, as the awarding of \$250,000 to US shoe company *New Balance* in a 2017 verdict demonstrates (Wee 2017). The film industry in China is also becoming more dependent on innovative online platforms where IP protection is key to development (Barracough 2016). This decisive turn towards the greater enforcement of IP protection has often been driven not only by the government but by lawsuits from the very platforms that seek to gain most from generating money from their IP. As the following section will demonstrate, a review of the different lawsuits that have helped shape the Chinese online video environment since 2008 shows a positive correlation between copyright enforcement and the development of online media platforms in China.

### **Lawsuits and the rise of Chinese online video platforms**

While the legislative developments outlined in the previous section have given the opportunity to platforms such as BAT's to rival in size their counterparts in Silicon Valley (Pham 2017), they have also given other online platforms more confidence in their capacity to protect and exploit the copyright of the content that they host. In particular, they have enabled the development of platforms

specifically devoted to online videos such as Letv.com and pptv.com and, more recently, social media platforms such as Bilibili and TikTok. These platforms have been emboldened by this legislative support for the protection of copyright, such that they are increasingly using lawsuits as a means of redressing infringements. Indeed, we can witness a profound shift from earlier clamp-downs on pirated video content carried out directly by the government, to a situation today where that type of intervention is complemented by an increasing number of legal actions by the copyright-holders themselves. This could not happen without the establishment of a legal framework that has been tested and proven for years in a number of cases related to China's creative industries (Chen 2021).

One of the earliest government-led campaigns against online video piracy was the closure in 2008 of several major P2P video-sharing sites, most of which had been set up a couple of years earlier (Tao 2012; Zhao and Keane 2013). This official anti-piracy campaign not only prevented the illegal online broadcasting of the Olympic Games, but also helped the major legal platforms that specialize in the distribution of online movies and other content to develop in a properly managed copyright system (Liao and Li 2008). Zhao and Keane (2013) see the current Chinese online media industry environment as a consequence of the 2008 government crackdown on the P2P video-sharing sites mentioned above and the introduction in the same year of the Administrative Provisions on Internet Audio-Visual Program Service by the State Administration of State Administration of Radio, Film and Television (2007), and the Ministry of Industry and Information Technology's (MIIT) establishment of a licence system for online video providers to transmit A/V programming. It is arguably the case that the 2008 clean-up and the introduction of the MIIT Provisions have been key moments in the development of the Chinese online media industry in the sense of providing a better regulatory environment for the commercial development of online video platforms. Two follow-up documents are also believed to have a significant impact on the online video industry, namely the *Notice Concerning Issues Related to Strengthening Management Over Internet Television Programme Services with Television Sets as Receiving Terminal* (State Administration of Radio, Film and Television 2009), and *Opinions on the Implementation of the Radio and Television Intellectual Property Rights Strategy* (State Administration of Radio, Film and Television 2010). Based on these regulations, a considerable number of Korean and US TV dramas distributed via online platforms such as Youku, Tudou, and Ku6 were removed due to copyright violations, resulting in the emergence of the so-called web TV series as the platforms' strategy to tackle this problem (Zhuang 2013).

The most significant aspect of the government interventions was to provide a legal framework within which the platforms themselves could fight online piracy. We can see the impact of this almost straight away as, in 2008, while Youku and Tudou were already exploring innovative business models which were different from YouTube's User Generated Content (UGC) model (Mo 2008), the production company of the 2008 movie *Super Typhoon* sued the Youku and Tudou video websites for providing on their platforms illegal copies of the movie uploaded by users (Sina 2018). While there is no proof that Youku and Tudou's desire to shift their business model is directly linked to the above-mentioned lawsuit, they were aware of an imminent cultural shift in attitudes towards copyright protection that could have undermined their business. Evidence for this shift can be seen in Haidian, the district of Beijing which houses most of China's online video companies. Here, the number of lawsuits taken out against infringers of the copyright of this industry's content surged from 114 in 2008 to 949 in 2011 (Gu 2018). Another significant and related development was the foundation by Sohu and other online video companies, as well as advertisers and copyright holders, of the 'Chinese Anti-piracy Video League' as a means to fight online video piracy (Chen 2009; Zhao 2019). In a sense this constituted what Zhao (2019, 71) has referred to as the 'privatisation of government capacity'. As such, it marked the increasingly aggressive use of lawsuits by major online video providers, mainly in relation to UGC that infringed their copyrighted content. The focus on UGC meant that the 'safe harbour' argument was frequently utilized by online video platforms to disclaim their responsibilities for the infringement of copyright. The National Copyright Administration of the People's Republic of China's (2006) *Regulations on Protection of the Right of*

*Communication through Information Network* have very similar provisions to the US's Digital Millennium Copyright Act: 'under the [Digital Millennium Copyright Act]'s 'safe harbour' provisions, any service or site that makes a minimal effort to address the concerns of copyright holders is immune from liability for piracy or theft' (Taplin 2017, 184). Despite these similarities, the US generally seems to apply 'safe harbour' even when it seems clear that platforms like YouTube and Google benefit financially from content for which copyright permission has not been obtained both indirectly and, in the money accrued from advertising, directly (Lawrence 2019; Taplin 2017). The reason for this is that the US's more libertarian approach to the development and management of digital media platforms results in a relaxed regime not only of copyright protection but also in the managing of sensitive content, particularly where First Amendment rights are applied (Krueger 2019; Taplin 2017; White 2014). As mentioned earlier, this contrasts with the EU's moves to better protect content creators through its 2019 Copyright Directive. China's approach in terms of policing content and IP is more similar to that of the EU, which explains why arguments about 'safe harbour' do not have the same traction. As we demonstrate in our later example of the Chinese government intervening to protect online video industry business models, the quid pro quo for large corporate platforms' policing of content is that the legal system tends to favour them in rejecting the 'safe harbour' defence when that content's copyright is infringed.

By 2014, the direct closure by the government of fan groups which shared pirated content occurred alongside numerous and significant industry-led interventions, like the legal actions taken by Tencent, Sohu, and LeTV which led to the removal of Kuaibo's P2P online video service QVOD (Gu 2018).

While we do not deny the current presence in China of pirate sites – mostly in the form of cloud downloads used to obtain content unavailable in the country or because of users' still immature understanding of copyright regulations –, what we argue here is that despite it seemingly becoming easier to copy and share content, the enforcement of copyright protection has become much more effective in China since around 2009 (Asia Video Industry Association 2018).

## **New business models in China's online video industry**

There is a positive correlation between the various lawsuits above described and an alteration of the business models in the affected online video content industries. This can be seen in the above-mentioned 'Chinese Anti-Piracy Video League' suing in 2009, among others, the video websites Youku and Tudou (Chen 2009) for providing illegal TV series. This case is of particular interest as the two advertisement-providing companies Pepsi-Cola and Coca-Cola were named in the lawsuit, because, even though they were unaware of the practice, their commercials were played immediately before pirated videos (Chen 2009). It is not surprising, therefore, that, while continuing to derive most of their revenue from advertising, both platforms – Youku and Tudou – shifted their business model to purchasing and offering authorized content that was more attractive to advertisers, and by building partnerships between 2008 and 2011 with major mainland Chinese and international video companies such as the China Film Group, Shanghai Film Group, and MBC in Korea among others (Zhao and Keane 2013).

This move has also created the ideal environment to innovate. In June 2009 Youku produced the first Chinese web series, the *Hip Hop Office Quartet* (Youku n.d.), almost three years before the first co-production attempt made by Netflix with *Lilyhammer* that was launched in February 2012 (Brian 2012).

This trend was followed by other online platforms such as Baidu that, since 2010, has provided different licensed video content through its video site iqiyi.com and developed partnerships with the China Film Group, Huayi Brothers Media Group, and Beijing Satellite TV among others (Zhao and Keane 2013). In 2011 iQiyi produced its first original TV series, *Online Love*, which earned over 10 million RMB through advertisement, and its first original online reality show, *Horror Warning*, which achieved over 12 million views (Iqiyi 2011).

This new business model based on providing licensed and in-house produced content to the audiences was parasitic on a series of lawsuits which pressurised online video providers into protecting the copyright of purchased and produced content. Indeed, between 2010 and 2012 there were a number of lawsuits between video websites such as Youku, Tudou, Ku6, Tencent, Sohu and Baidu which rapidly inter-changed roles from plaintiff to accused, which mainly involved the provision of popular TV series whose copyright had been purchased by others (Ding 2010). This period marks a clear shift from a UGC YouTube-like business model to a television-like service built mostly on an ad-supported business model, but also partially on a pay-for-view basis. This was evidenced by the fact that in 2010 Youku already had a software programme which thoroughly deleted from their platform user-uploaded pirated videos and prevented the uploading of third-party copyright video content (Youku 2010;). Youku's open commitment to protecting the interests of copyright holders (Youku 2011) by supporting the UGC Principles (UGC Principles n.d.) was certainly commercially rewarding, as in 2012 the company expanded its international partnerships by signing licensing agreements with Twentieth Century Fox, Lionsgate, CBS, and NBC Universal Films. In the same year iQiyi announced in an official press release that Chinese online video distribution had shifted from the era of UGC into an era of professionally produced Internet content (Iqiyi 2012).

The period between 2013 and 2016, characterised by the above-mentioned lawsuit by Tencent against QVOD (The Supreme People's Court 2019), could be seen as the consolidation stage of the new business models adopted by these online video providers, focusing on copyright acquisition and advertisement-derived revenue. Several lawsuits between 2013 and 2016 focused on advertisement-removing software (Sohu 2015; Fei and Zhou 2016; Liu 2016). These allow certain websites to provide hot links to the videos of another website without commercials. Therefore, users did not have to watch the advertisement placed before the original content and hence the companies that purchased the copyright of these videos were losing revenue. This phase saw Chinese online video providers united against the developers of these pieces of software and the web browsers implementing them. As we will see below, it is of particular interest that these lawsuits were characterised again by an 'unusual' interpretation and application of the law by several Chinese courts that protected the ad-based content model of online video providers (Fei and Zhou 2016). This inclination to protect the ad-based content providers' business models by the Chinese courts is once more different from the US and EU inclination (see Belanche 2019). In a similar case,<sup>2</sup> The German High Court ruled that, in the interests of free competition, ad-blockers should not be compelled to desist (Seidel 2020). In the US, similar decisions were made on First Amendment grounds, but also under the terms of the Communications Decency Act of 1996 which state that users should be able to filter unacceptable content (Fei and Zhou 2016). Chinese courts, however, recognised the ad-supported business models of the online video providers as a legitimate business model which, unlike in the US and Germany, the legal system should protect. Accordingly, the advertisement-removing software developers and browsers were deemed liable for damages (Fei and Zhou 2016). This decision essentially was made on the grounds that continuing to allow advertisement-removing software to be used would have resulted in online video platforms' abandoning their ad-supported business models and switching to an exclusive reliance on a pay-for-view model which the vast majority of their users might not support. (Fei and Zhou 2016). With this decision Chinese courts have essentially established a framework for copyright protection and exploitation that legitimises the business of Chinese online video platforms and helped consolidate their global reputation. This is actually the case with Baidu, which, according to an article of Wayne Ma (2017) published by the Wall Street Journal, is 'one of Hollywood's best customers, striking licensing deals with major studios such as 21st Century Fox, Warner Bros. and Paramount Pictures [having] spent more than \$1 billion on content last year'.

Within this online environment, video platforms were able to gradually introduce a pay-for-view model providing content at affordable prices. According to eMarketer (2018), audiences' willingness to pay for entertainment is increasing and in 2017 the subscriptions for VOD services in China grew

by more than 80%. This was a trend that was already spotted by Zhang (2017) one year before, who reported figures from iQiyi which showed a growing number of verified VIP members: 5 million in June 2015 and over more than 20 million one year later. While at the national level 'the number of paid subscribers on domestic video sites had reached 75 million, up 241 percent compared with the previous year, and nine times that of its US counterpart' (Zhang 2017).<sup>3</sup>

### Most recent developments

It is worth noting that a significant change has taken place in the Chinese online video industry during the pandemic, as people spent more time watching short videos than digital TV platforms. New entrants such as Bilibili and TikTok (owned by ByteDance) have become new competitors to BAT, which now has to compete with the aforementioned new entrants and their services, which use a short video format that exploits audiences' fragmented attention and consumption to drive market growth worldwide (Tribune News Service 2021; Zhang and Negus 2020).

In 2021, more than 70 film and TV production firms, Tencent, Youku and iQiyi included, collectively issued a petition to urge social media platforms which share short videos to better comply with their own copyright obligations (Yuan 2021). According to the 2020 *China Internet Short-video Copyright Monitoring Report* (cited in Yuan 2021), between January 2019 to October 2020, 12,426.cn,<sup>4</sup> a third-party big-data driven copyright monitoring centre, identified 30 million alleged copyright infringing cases by short videos (deemed to be less than 1 minute and/or mash-up videos less than 20 minutes). After sending the take-down notices, nearly 13 million videos were removed, which prevented an estimated direct economic loss of 27,200 million RMB. And, as indicated previously, new entrants relying on mash-up or short-videos are part of the game of grabbing Chinese consumers' attention (Chen 2021). According to the chief judge of the IP Court of the National Supreme Court Qin Yuanming, copyright cases accounted for more than 70% of the 4.66 million alleged infringing cases that went to court (Music Weekly 2021). This is another evident case where Chinese digital copyright holders can and indeed are protecting their rights through litigation.

### Conclusion

The legal and business issues described above have provided a more conducive environment for new media industries, with the BAT (Baidu, Alibaba and Tencent) companies being particularly adept at using copyright to 'bundle' different types of audio-visual content and thus make their platforms more attractive by offering a multiplicity of content at a low cost (Barraclough 2016), or for free. This has meant that copyright has become an important means of income generation for China's new media companies, indicated in the rapid growth in subscription revenues for online video from less than \$850 million in 2015 to an estimated almost \$5 billion in 2018 (Brzeski 2018). This acceleration is manifest in the successful entry of its companies into the global marketplace but also in the increasing development of copyright products in mainland China. The development of a multiplicity of business models based on the exploitation of copyright is important given the fact that advertisement-supported business models are nowhere near as lucrative as models in which money is paid directly to platforms (Krueger 2019).

As stated at the beginning of this paper, some have expressed their reservations about this trend, arguing that China is too closely tied into a system of global copyright regulations which it had little influence in fashioning (Kalantzis-Cope 2018; Pang 2012). Nonetheless, China does seem to flourish within this global copyright regime and turning the clock back to an ecosystem dominated by Shanzhai products would be difficult to do as it would be incompatible with China's current economic trajectory and its continuing commitment to its WTO obligations. However, one consequence of this (and similar to the US and EU media landscape) is that the Chinese media market is increasingly dominated by platforms similar to Apple, Spotify, Netflix and Amazon, most notably in

the form of the BAT companies. Like platforms in the so-called western model, the strengthening of BAT represents a move towards new monopoly forms. However, as this paper has demonstrated, the strengthening of copyright protection and the enforcement thereof in China has enabled other online video platforms to flourish too: Sohu TV, M1905, the video-on-demand service Xunlei Kankan, Letv, pptv, Bilibili and TikTok are just some of them.

One of the advantages that the China new media ecosystem has over countries with a more libertarian philosophy like the US is that the concept of 'safe harbour' is not being used as a means of denying copyright holders their legitimate remuneration. What China *does* have in common with other countries with highly developed IP regimes is the same sort of difficulty in trying to ensure that a reasonable proportion of the money generated from copyright is given to actual creators as well as copyright holders and online platforms. In some respects, China has some work to do before it can catch up with developments elsewhere (Zhang 2016).

Nonetheless, like our point on safe harbour above, we see signs of optimism in China's highly advanced electronic micro-payment ecosystem which does in theory have the potential to direct myriad streams of small payments to original creators (Filippo et al. 2019). This, alongside the provisions in the newly revised copyright law, promises to further revolutionise business models in the Chinese online video industry.

## Notes

1. This was amended and took effect from 1 June 2021. What is relevant to the online video industries in this last version is the change of wording from 'film or film-like works' to 'audio-visual works' which is more compatible with the scope and interpretations of the copyright law in offering protection to short videos and short movies.
2. Basic Law, Arts. 2(1), 5(1) second sentence, 12(1); Act Against Unfair Competition, Secs. 2(1) Nos. 1 and 3, 3(1), 4 No. 4, 4a(1) and (2), 8(3) No. 1. 'Ad Blocker II (Werbeblocker II)'. *JIC* 50: 630–642 (2019). [10.1007/s40319-019-00822-z](https://doi.org/10.1007/s40319-019-00822-z).
3. For an example of how business models in another creative industry, online literature, changed as a result of the removal of a major peer-to-peer platform in 2016, see Li, Liao and Xie (2021).
4. Supervised by the NCAC, China copyright association and other relevant authorities, 12426.cn is a third-party copyright service organization that provides one-stop value-added services including copyright certification, copyright monitoring, electronic evidence collection, copyright enforcement and copyright distribution for the copyright owners and authorities. See more, <http://www.12426.cn/about.html?l=en>.

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