
How to Copy Right

Is Piracy Productive?

Patent Progress

Steven Tepp

In their essay “Fake It Till You Make It” (July/August 2013), Kal Raustiala and Christopher Sprigman urged the United States to “relax” when it comes to the flagrant disregard for intellectual property laws in China. The authors make two essential arguments: first, that the United States in its early days, like China today, was a “pirate nation,” and second, that copying drove the United States’ economic growth. As China’s economy develops, they say, so, too, will its “balance of interests.” Like the United States before it, China will rely less on copying and “adopt a less permissive approach” to copyright infringement—not in response to U.S. prodding but on its own initiative.

Although the authors accurately describe U.S. attitudes toward foreign intellectual property rights before 1891, they misinterpret the results. By deciding to fully recognize foreign copyrights in 1891, the United States actually reaped significant financial rewards. The move opened up entirely new markets to U.S. products, spurring cultural and economic exchanges that helped make the United States the commercial powerhouse that it is today. A Chinese campaign against piracy need not follow further economic growth; it can spur it.

A DEAD END

The authors correctly note that the United States failed to provide copyright protection to foreign creative works through most of the nineteenth century. But they draw from that history the wrong conclusion: that piracy promotes creativity.

If anything, history proves the opposite. The U.S. House Committee on Patents argued as much in an 1890 report: “Since such American publishers pay nothing to the English authors whose stories they appropriate and publish, other American publishers can not afford to pay American authors for writing stories.” Consequently, many U.S. writers struggled to establish reputations in the first place, let alone profit from sales abroad (British publishers reciprocally pirated U.S. works).

Lawmakers understood then, as they should now, that piracy of works from abroad discourages creativity at home. In 1891, at the height of its status as a pirate nation, the United States passed the International Copyright Act, which established new protections for foreign works.

What followed, in stark contrast to the prior century, was a boom in creative expression that accelerated U.S. economic development. With the addition of subsequent copyright laws, the United States became the world’s leading creator in fields ranging from motion pictures to computer software. Today, U.S. authors and innovators drive industries that support more than 40 million American jobs and account for nearly three-quarters of all U.S. exports.

Those who lived through the age of unchecked American piracy recognized it for what it was: a dead end for creativity.

Today, the United States wants China to do nothing more than what it once did for itself.

WHEN THEFT IS THEFT

Raustiala and Sprigman mislead readers by conflating two very different acts: incremental innovation, in which newcomers improve on and supplement the work of their predecessors, and outright copying. Both Chinese and U.S. intellectual property law provide inventors with many avenues to legally obtain licenses and permissions from those whose achievements they wish to borrow. The resulting work often proves worthy of protection in its own right.

But this happy cycle has little in common with actual theft. Chinese pirates and counterfeiters routinely obtain copies of blockbuster movies, popular music, and other products before they are even lawfully released to the public. They make use of increasingly well-designed websites that deceive U.S. and Chinese consumers into believing that they are buying legitimate goods.

Sadly, the authors would have China's population settle for HiPhones and Guxxi in place of legitimate Chinese versions that could one day compete fairly with U.S. equivalents. And they make no mention of substandard products capable of harming—even killing—Chinese customers. In 2004, counterfeiters sold a bogus baby formula that caused 50 Chinese babies to die of malnutrition and twice as many to suffer severe health effects.

The dangers of China's knockoff economy, of course, extend beyond China's borders and into U.S. markets, threatening public health and even national security. Between 2007 and

2010, U.S. customs officials intercepted roughly 5.6 million fake microchips, many of which came from China and were destined for commercial aviation companies or military contractors. In 2010, federal prosecutors charged a Florida-based company with selling the U.S. Navy thousands of bogus Chinese microchips that could have caused system failures in jets, submarines, and missiles. The U.S. Food and Drug Administration warned last year that unsafe versions of the cancer-fighting drug Avastin had infiltrated the U.S. drug supply. And such incidents are not uncommon: in 2009, Chinese-made goods accounted for roughly 80 percent of the counterfeit products seized in the United States.

Ironically, by minimizing the dangers of Chinese copying, the authors lag behind the latest thinking in China. In recent years, the Chinese government has begun to significantly update its patent, trademark, and copyright laws. Officials ranking as high as the vice-premier level have overseen special enforcement campaigns of unprecedented duration and scope. Most recently, the government adopted a judicial interpretation that provides guidance to all courts in China as to when companies bear responsibility for copyright piracy on their websites. If fully implemented, this guidance would put China on a par with the leading nations of the world. Major Chinese businesses have also made important strides in observing foreign copyrights on their own. In the last few years, the search engine Baidu and the auction website Taobao have closed licensing deals with foreign record and film companies and voluntarily adjusted their internal procedures to remove

counterfeit products at the request of the legitimate rights owners.

Despite these promising signs, China still has a long way to go, especially in its enforcement of intellectual property rights. If China is determined to copy its way to an innovation economy, it should focus on emulating the United States' actual path to success: tapping into the creative potential of its own citizens.

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Raustiala and Sprigman Reply

Steven Tepp offers the conventional wisdom about Chinese copying: the “flagrant disregard for intellectual property laws in China” drastically undercuts innovation and economic growth there and in the United States. China should, in his view, follow Washington’s advice and get serious about protecting intellectual property.

Yet China is unlikely to do so, and for good reason: although copying can indeed hurt creativity, it can also spur it, and create new markets. By making goods cheaper, copying expands access to learning, literacy, goods, and technology—all of which are especially important in a highly unequal country such as China. For these reasons, Beijing has strong incentives to stay the course.

Because Chinese copying is rooted in a powerful economic and social logic

and not nearly as harmful as many believe, continuing to battle China on the topic is, as we argue in our essay, “not worth the political and diplomatic capital the United States is spending on it.” Tepp misses this main point. An obsession with intellectual property rights distracts the United States from addressing the many larger issues in its uniquely significant bilateral relationship with China.

That intellectual property issues are so high on Washington’s agenda in its dealings with Beijing is mostly due to the political influence of U.S. businesses. Neither exact copying, which is typically labeled as “piracy,” nor copying by enhancing originals, which we call “tweaking,” is a grave threat. In China, even outright piracy does far less harm than many suppose. Many Chinese who buy pirated movies, for example, simply cannot afford the originals. Such piracy, therefore, does not result in lost sales. If anything, by building a taste for Western culture and goods, Chinese consumption of copies today may ultimately result in more sales for Western companies in the future, as China grows richer.

By continuing to harangue Beijing about copying, Washington also opens itself up to charges of hypocrisy. Tepp concedes that the United States itself was once a major violator of foreign intellectual property rights. Yet although Tepp is correct that the International Copyright Act became law in 1891, he offers no evidence that this statute was the magic ingredient that ignited an explosion of American creativity. And in reality, the act was far less protective of foreign works than Tepp suggests. Until the mid-1980s, for example, it was still perfectly legal to make unauthorized

copies of books that were not manufactured in the United States or Canada.

By 1891, moreover, the United States was already one of the world's wealthiest nations in terms of per capita GDP. By contrast, the World Bank ranks China today as 90th in per capita wealth. Tepp's claim that "the United States wants China to do nothing more than what it once did for itself" is simply incorrect. What Tepp seems to want, rather, is for China to do as the United States says, not as it actually did.

Tepp also challenges our basic claim that copying can promote creativity. We don't disagree that intellectual property laws have an important role to play in both the U.S. and the Chinese economies. We argue instead that copying has unappreciated virtues. The great success of industries as diverse as fashion and databases—in which substantial copying is perfectly legal—provides abundant evidence that copying can coexist with creativity.

Too often, U.S. policymakers readily assume that intellectual property protections should be as strong as possible. But like so many government regulations, intellectual property laws demand close scrutiny to determine how they actually work—and how the market adjusts when they do not exist. That is why we read the recent moves to update Chinese laws quite differently than Tepp did. Chinese practices, whether related to intellectual property or the environment, rarely reflect formal laws on the books. Moreover, had China really undergone meaningful change, U.S. businesses would not still be pushing so hard to stop Chinese copying.

We do agree wholeheartedly with Tepp about one thing: counterfeit

products such as fake drugs and fake airplane parts can cause great harm. We support vigorously enforced consumer protection laws to prevent such dangers. Tepp, however, conflates counterfeits with copies. The HiPhone and Xiaomi phones, which are branded differently from the original products they imitate, are copies; fake Prada sunglasses and fake Patek Philippe watches are counterfeits. Counterfeits misappropriate brand names, whereas copies rework designs but are clearly from different producers. In our original essay, we never used the word "counterfeit," since it was not our subject. We focused instead on China's vibrant knockoff economy and its social and political implications.

China will not change its approach to intellectual property rights easily or rapidly. Eventually, however, that approach will evolve. In the meantime, the U.S. relationship with China is too important to jeopardize over forces the United States can't control—and doesn't need to. 🌐