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Global reuse and adaptation in the creative industries - Three further arguments against intellectual property based on lessons from China

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Global reuse and adaptation in the creative industries – Three further arguments against intellectual property based on lessons from China

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Abstract. This paper reviews the theory of intellectual property (IP) in the creative industries (CI) from the open system evolutionary economic perspective. We argue that many current confusions about the nature and role of IP and dysfunctions of extant IP regimes in the CI can be traced to three widely overlooked aspects of the open system growth of knowledge context of IP in the CI: (1) the effect of globalization; (2) the dominating relative economic value of reuse of creative output over monopoly incentives to create input; and (3) the evolution of business models in response to institutional change. We conclude that a substantial weakening of copyright will, in theory, produce positive net public and private gain due to the evolutionary dynamics of all three dimensions.

Keywords: intellectual property, creative industries, economic evolution, China

1 Introduction

In their 2005 essay Marieke van Schijndel & Joost Smiers deliver an important challenge to academic and artistic communities, asking them to consider the impact of a radical re-formation of the entire copyright system, to ‘imagine a world without copyright’ as it is now understood. Van Schijndel and Smiers call on their readers to begin exploring approaches to ownership, creative production and distribution that would better serve the needs of creators and users living and working in today’s world (Van Schijndel & Smiers, 2005:1). In this paper we hope to take up their challenge, at least in part. Drawing on our experiences researching the role of copyright in the development of China’s domestic film and music industries and work on economic models of the creative industries, we explore the role of copyright in the creative industries from an open-system evolutionary perspective.

We argue that Western intellectual property theory fails to recognise the open-system nature of knowledge growth in the creative industries. Furthermore, overly restrictive IPR regimes act to prevent interactions between creative producers and reduce the pool of creative resources that can be built upon,

reducing overall growth effects in the creative economy. This is particularly evident in a digital environment, where there is potential for creators to quickly draw upon a global pool of information and material in the production of new works.

We will begin with some general observations about the shortcomings of current approaches to copyright, before going on to address three important aspects relating to the role of copyright in the creative industries. These are: (1) the effect of globalization, and specifically the internet and ICT; (2) the relative economic value of reuse of creative output versus monopoly incentives to create input; and (3) the co-evolution of business models and institutions in response to technological change. Finally, we will draw some conclusions about the theoretical relationship between copyright protection, production and innovation in the creative industries.

2 Some debates in intellectual property law

One of the challenges that all debates about intellectual property reform in a digital era must confront is the gulf between much of the theoretical justification for copyright law and the rapidly changing and globalising nature of creative practice and entrepreneurship. In an era of technologies for communication and creation that operate across global networks, rather than within national borders, the usefulness of approaches to copyright based on concepts of creativity that favour individual genius, originality and authorship developed in highly specific Western cultural, economic and technological circumstances is questionable.

Global trade in content and culture is big business: Cultural and creative industries are estimated to account for 7% of the world's Gross Domestic Product (GDP) (UNESCO 2005, p.9). Trade in cultural goods almost doubled between 1994 and 2002: from US\$39.3 billion in 1994 to US\$59.2 in 2002 (UNESCO 2005, p.9). In 1996 'cultural industry' sales: film, music, television, software, journals and books, became the US' largest export. Between 1977 and 1996 US 'copyright industries' grew three times as quickly as the overall economy (Miller et al. 2005, p.10). In this context global systems for protecting intellectual property rights have taken on new significance as mechanisms for facilitating trade between nations and protecting the economic interests of established exporters of intellectual property products.

According to many, the global information economy cannot function without copyright protection. Copyright acts as a mechanism for converting creative works into instruments for the expression of capital 'much like real estate, bonds, stock, licenses, franchises, precious metals and so on' (Bettig 1996, p.36). Wang (2003) argues that copyright infringement in the form of 'piracy' may be understood as the major threat to industries that rely heavily on copyright (Wang 2003). The UK's Department of Culture, Media and Sports

defines the creative industries as: ‘...those that are based on individual creativity, skill and talent. They also have the potential to create wealth and jobs through developing and exploiting intellectual property’ (DCMS 2008). Many of the industries that fall within the creative industries definition are also those industries that have traditionally been regarded as ‘core copyright industries’ – including the motion picture industry, the recording industry, book, journal and newspaper publishing, as well as computer software and interactive games (Allen Consulting Group 2001). It would thus seem logical, at first glance, that strengthening the intellectual property rights that allow creative goods and information to be traded on a global scale will help to strengthen these industries.

However, as mentioned in the introduction, the global nature of trade in these products, and the apparent need for a single system that makes this trade possible presents major challenges. These problems are particularly evident in relation to the introduction of Western-style copyright law in developing nations such as the PRC. It is well documented that US based film and music industry lobbies have influenced the current international protection framework (Wang 2003; Arup 2000; Miller et. al. 2005). Few commentators contest the fact that the copyright law now in place in China and other new signatories to the TRIPs agreement reflects values and expectations established in the United States, and to a lesser extent, Europe.

While China’s formal copyright legislation now accords with OECD norms, levels of enforcement remain low and many users of copyrighted material remain sceptical of the benefits of copyright to China. China’s copyright law must, like all other law, operate in the context of the PRC’s political, economic, historical and cultural environment. According to Seidman and Seidman (1994):

inevitably, people choose how to behave, not only in response to the law, but also to social, economic, political, physical and subjective factors arising in their own countries from custom, geography, history, technology and other, non-legal circumstances (Seidman & Seidman 1994, p.45).

There are signs that low levels of copyright enforcement have combined with other factors, including cultural policies that favour censorship and control over competition, to prevent access to domestic markets for many international copyright owners (Montgomery 2007). While established exporters of copyright material are being held out of the market, local producers, entrepreneurs and creative amateurs have been exploring new ways of monetising content within the Chinese environment (Montgomery & Fitzgerald 2006; Montgomery 2007). This environment includes very low levels of copyright enforcement in relation to physical media and online distribution. Businesses eager to find ways of making money in China have had little choice but to develop business models capable of generating income in that context.

China's experiences are, in many ways, typical of the difficulties associated with attempts to introduce western-style copyright in developing economies more generally. From a user's point of view, the ease with which copyright material can be obtained through particular channels, its price, the likelihood that they will be prosecuted for purchasing it from a vendor at the end of the street rather than from an authorized distributor, the quality of the product, whether they are likely to be wracked with guilt if they purchase an unauthorized copy, all affect purchasing decisions. It is thus inevitable that local circumstances, including cultural attitudes and distribution networks will have a profound impact on perceptions and implementation of copyright. In an era of user-generated content and increasing participation by communities of amateurs in digital production and sharing of creative works, issues of unauthorised use are no longer confined to the viewing or consumption of the work of professional creative producers (Burgess & Green 2008). Permission has become a major problem for those engaged in the production of new work, whether they are amateurs or professionals (Lessig 2004, Vaidhyathan 2003).

Siva Vaidhainathan (2003) notes the inability of the American copyright system to deal with cultural diversity, a major shortcoming in an age of global distribution, as well as increasingly borderless production and re-use. Vaidhyathan suggests that American style copyright penalizes creative traditions that openly embrace copying as a natural part of creative innovation. In Vaidhyathan's view, concepts of individual creation and the ownership of sounds or images are often artificial and fail to reflect the realities of the creative process and copyright law, as it operates in the United States, is ethnocentric. The current US copyright regime favours established artists and media companies at the expense of creativity – particularly as it occurs within communities descended from non-European traditions. Vaidhyathan believes that US copyright law fails to reflect the complex process of creative practice or the organic relationship between 'creativity' and artistic influence. As a result, artistic and cultural diversity are stifled. Even in the United States:

Ethnocentric notions of creativity and a mal-distribution of political power in favour of established artists and media companies have already served to stifle expression – the exact opposite of the declared purpose of copyright law (Vaidhyathan 2003:148).

Vaidhainathan observes that it is entirely possible for an individual to use the sounds, ideas or images of another artist in the production of an 'original' product. Western copyright systems have chosen particular, specific ways of dealing with these issues – namely fair use provisions. Although Vaidhyathan specifically discusses the practices of groups descended from West African creative traditions, the points that he makes are equally relevant to traditional concepts of the role of copying within other, non-Western artistic communities, including China (Alford). Cohen (2006-07) makes a convincing case for the inclusion of more dynamic concepts of 'creativity' in copyright theory than currently exist in either rights-based or economic approaches, arguing for greater engagement

with social science literatures by legal scholars (Cohen 2006-7:1153). Cohen argues that:

For all their differences, rights theories and economic theories share a set of first order methodological commitments that foreclose other, potentially more fruitful approaches to the interactions between copying, creativity and culture. Questioning those commitments opens the way for approaches that enable both a more complex consequentialism and a more concrete specification of the rights that should attend participation in the creative processes. (Cohen 2006-7:1153).

Far from being abstract concepts that have little impact on creative practices, legal definitions of 'creativity' and 'originality' directly affect artistic development. Vaidhyathanan cites music sampling as one specific example of an instance in which the law's narrow interpretation of the term 'creativity' has had a dramatic impact on emerging creative practices. In Vaidhyathanan's words:

The death of tricky, playful, transgressive sampling occurred because courts and the industry misapplied stale, blunt, ethnocentric, and simplistic standards to fresh new methods of expression (Vaidhyathanan 2003, p.144).

Criticisms of Western approaches to intellectual property are also made in relation to cultural imperialism and the perpetuation of systems which protect established corporate owners and exporters of copyright at the expense of developing nations and broader 'public' interest. The framework of rights identified by Drahos and Braithwaite (2002) provides a useful mechanism for understanding the risks and benefits of the extension of Western-style copyright systems to the developing world. According to these authors the existence of strong intellectual property protections is not necessarily a prerequisite for the development of well performing domestic intellectual property industries in developing countries. On the contrary, intellectual property protection raises the costs of creativity and may even retard the development of local IP industries. Although they focus mainly on the impact of patent legislation in their specific case studies, many of the points made apply equally to the development of local copyright dependent industries.

The Chinese government's decision to use the term 'cultural creative industries' rather than simply 'creative industries' highlights the tensions that are inherent in the translation of western concepts of creativity into non-western cultural contexts. In spite of an urgent desire to become part of an international creative economy and the adoption of copyright legislation that largely accords with international standards (Montgomery and Fitzgerald 2006), China's policy-makers are acutely aware that the past cultural and creative achievements continue to play a central role in China's emerging creative and cultural identity. According to Keane (2007):

Rather than downgrading the 'spiritual' component of great works, fine art and historical sites ... culture is retained as the leading term. The cultural creative industries model embodies artefacts of value, produced from tradition, celebrated as

cultural and political identity, and packaged for international consumption (Keane 2007: 155-6).

It is clear, then, that in an age of global flows in content and culture, copyright faces an almost impossible task. While international trades in cultural goods now form an attractive and, for some, lucrative portion of the economy, the concepts upon which copyright relies so heavily: 'creativity' and 'originality' are resistant to internationalisation and cannot be easily transplanted into new cultural, economic, artistic, social and technological contexts. Given the global nature of new technologies for making, distributing and using creative works such as the Internet and information and communication technologies (ICTs), it is thus important to consider the extent to which copyright is either necessary to or helpful for the development of the creative industries.

2.1 Economics of intellectual property

The economics of IP are well known and need not be overly rehearsed here (an excellent survey can be found in Dixon and Greenhalgh 2002). The central argument is that because new ideas are nonrivalrous (Romer 2002), then under perfect competition (price equals marginal cost) equilibrium supply is zero. A competitive market undersupplies new ideas (Hirshleifer 1971). Intellectual property aims to realign these incentives by creating an artificial monopoly to enable producers of ideas to capture monopoly rents that at least cover their fixed costs of production. The standard example is new drug development, in which fixed (sunk) costs may run to hundreds of millions of dollars. The benefits of IP are thus a positive supply of a socially valuable good (new ideas) and the costs relate to induced market distortions (rents). In principle, an optimal level of IP protection will exist that balances these costs and benefits at both the micro and aggregate level (Gilbert and Shapiro 1990; Cohen, Nelson and Warsh 2000).

However, the economics of IP has come under increasing scrutiny in recent years along two distinct paths. The first lies in growing recognition that different industries and sectors use IP in different ways. Intellectual property in pharmacology (patents) works differently to IP in music (copyrights). There are several reasons why such differences arise and why they matter. An important distinction is the sometimes extreme differences in fixed costs between different activities. This relates not only to the direct costs involved, but also to opportunity costs (Potts 2008). Another important difference lies in the extent to which different business models may be adopted and the extent to which rents may be created without relying on legal protection. Along this line, many economists have come to far less favourably on the role of copyright (and especially within the creative industries) as solving a supply problem but more as a pure source of rent and distortion (Klein, Lerner and Murphy 2002; Romer 2002). It is noteworthy that a parallel debate is occurring with the study of the economics of 'open-source' production and innovation (see Lerner and Tirole 2002).

The second is the arguments advanced by Michelle Boldrin and Kevin Levine (2002, 2005, 2008) and based on the work of Liebowitz (1985). Boldrin and Levine's argument amounts to the notion that intellectual property needs to be distinguished from *intellectual monopoly*, particularly with respect to the right to control subsequent use. As they explain:

'Intellectual property has two components. One is the right to own and sell ideas. The other is the right to control the use of those ideas after sale. The first, sometimes called the right of first sale, we view as essential. The second, which we refer to as downstream licensing, we view as economically dangerous.' (Boldrin and Levine 2002: 209).

They develop a series of models under differing competitive conditions in order to show that competitive markets themselves are a viable institutional mechanism to induce the creation of a socially optimal quantity of new ideas. They conclude that the copyright mechanism is under most circumstances a highly inefficient mechanism for achieving the goal of rent creation for idea producers.

In section three below, we shall propose three further economic reasons in support of this direction. Our arguments are based on special properties of the creative industries, as in the first set of cases for weakening, yet we arrive at similar conclusions to Boldrin and Levine.

2.2 Intellectual Property in Creative Industries: Why is it so problematic?

As Van Schijndel and Smiers have already noted, some useful practical solutions to the overly restrictive nature of copyright in a digital environment have already been found – most notably the General Public License (GPL) and Creative Commons (CC) (van Schijndel & Smiers 2005:3). However, these authors allude to, but do not make explicit one of the key limitations of such responses to the broader question of copyright's role in a larger creative economy: in the twenty-first century, pools of content generated by amateurs have the potential to act as a powerful resource and driver of innovation for commercially focussed firms within the creative industries. Building on the creative works of others and quickly and easily drawing on a global pool of content represent some of the most significant benefits to creative workers and industries of these.

At present, amateur creators are taking the greatest advantage of the potential offered by new technologies, especially in places such as China, but also elsewhere in the world because they are simply ignoring restrictions associated with copyright, drawing on a global pool of raw materials and re-using, re-creating, re-mixing and sharing these without concern for the property rights of others. Creative Commons has provided an environment within the wider Internet within which these activities can be undertaken legally. However, a large proportion of license users choose non-commercial CC licenses (Creative Commons 2008). Non-commercial CC licenses explicitly prevent the re-use of

their work for commercial purposes without permission, creating an artificial wall between the creative resources generated by amateurs and the commercial potential that entrepreneurs and the business community are interested in.¹

As Ruth Towse observes,

'Creativity is central to the cultural or creative industries. It plays the equivalent role in these industries to that of innovation in other sectors of the economy. Just as firms in manufacturing have outlays on research and development (R&D), so firms in the cultural industries search for new ideas and talented workers - artists - to create and supply them (Towse 2001:1-2).

The potential for entrepreneurial organisations within the Creative Industries to benefit from the creativity produced by amateur communities, and to act with greater efficiency themselves by increasing the pool of knowledge and raw material that they might build upon through the Internet seems enormous. However, at present, professional content-creators are largely prevented from exploiting existing creative resources to the same degree as amateur producers because they are much more likely to fall victim to legal action if they attempt to exploit an end product that has violated the copyrights of others.

3 Three further aspects of the unimportance of intellectual property as exemplified by the creative industries

It is our argument that the creative industries illustrate the case for the substantial weakening of intellectual property. Our reasoning is economic in nature, and reaches the same sorts of conclusions as advanced by Boldrin and Levine (2002, 2005, 2008). Yet we arrive at our conclusions for different reasons, as our argument is centred around the study of the creative industries insofar as it seems demonstrative and representative of the sectors of economic activity that, simultaneously: (1) are predominantly global; (2) derive value from reuse of ideas as much as the creation of globally novel ideas; and (3) are part of the attention economy (Lanham 2006) and thus are highly flexible in terms of business models. This might at first seem a rather narrow set; which it is, in being somewhere between one-twentieth and one-tenth of all economic value creation. But it is also a rapidly growing set of activities, growing at about twice the rate of aggregate economic growth (Potts and Cunningham 2008).

These three further factors do not displace other arguments for the economic benefit of weakening IP law, but rather augment them with further dimensions of

¹ For some critiques of the CC non-commercial license see: Moller, E. (2005) 'Are Creative Commons-NC Licenses Harmful?' *Podcasting News* [Online]. Available at: http://www.podcastingnews.com/archives/2005/10/are_creative_co.html [Accessed 14 March 2008]. Hancock, T. (2006) 'The case for a Creative Commons 'Sunset' Non-Commercial licence module' *Free Software Magazine* [Online]. Available at: <http://www.freesoftwaremagazine.com/node/1566> [Accessed 14 March 2008].

cost. Yet at the same time, they call into question many extant notions of how we understand the economics and law of creative industries. There is an obvious conundrum here, as the very definition of the creative industries refers to intellectual property (DCMS 1998) or copyright, as a common synonym for creative industries is copyright industries. Thus our proposal to highlight the creative industries as an exemplar of the unimportance of intellectual property may seem at first sight perverse.

Yet we think the problem here is in the definition of creative industries itself, and that the extent of political capture and rent seeking associated with strengthening of IP law has had a not insignificant effect on the very conception of creative industries. And while it is not the purpose of this paper to engage in definitional dispute, we do believe that a better definition follows from the set of industries involved in *social network markets* (Potts, Cunningham, Hartley, Ormerod 2008) which are essentially an *attention economy*, not a *property economy*.

3.1 Intellectual property in the creative industries is a global issue

Intellectual Property in the Creative Industries, as with all *nonrivalrous goods* (Romer 2002), is a global as well as a local issue. This is not a cliché or truism, as there are many sectors of economic activity that are almost entirely local (e.g. infrastructure, education, health). But the creative industries operate globally, and this induces the economic effects of copyright. The reason for this connection is obvious but still important to emphasise: namely, most companies and consumers operate globally (i.e. producing or consuming, or both, in global markets) yet, in doing so, they are almost entirely operating under national (local) law. This gives rise to differential costs and benefits that, in effect, makes it always better, in the language of game theory, to 'play' cooperate locally, but to 'play' defect globally. Intellectual property combined with global distance results in a 'mixed strategy'. We think the equilibrium of that 'game' or strategy set is the universal non-cooperation, meaning that the dominant strategy for all players in a competitive environment is to act 'as if' intellectual property was weak and ineffective. This property arises because of global considerations and is illustrated in the creative industries.

As intellectual property grows in significance in economic value, this aspect becomes increasingly important in business strategy. And while certainly arguable, our contention is that the vanguard of this is the creative industries, which are almost by definition serving global markets (Howkins 2001, De Vany 2004). Creative industries firms, even small ones, are often 'born global': whether in production, markets or both. And while this provides opportunities for value creation in production collaboration and specialization, along with the general benefits of large markets, it also immediately involves problems in dealing with protection of intellectual property (e.g. copyright violation) in far-away places that might prove prohibitively expensive to protect, or at least have higher 'unit' costs

than local enforcement. This results in what is, in effect, a Nash equilibrium in which even though firms may be nominally operating locally under effective (low-cost) IP laws, in the global markets they operate in they may not be. Both consistency and rationality therefore dictate strategically behaving *as if* they were operating everywhere in the high-cost IP world. Global businesses (or economic activities in general) result in global behaviour, and this strategy soon begins to dominate.

This gives rise to a curious economic property of the interaction between IP law, global markets and business strategy, namely that the presence of strong, effective and efficient IP law *may not matter*. This is because strong and effective IP law only matters if it is like that everywhere, i.e. globally. A corollary is that distance effects, whether spatial, cultural or political, in terms of costs of transactions and enforcement of property rights are negligible. Law moves slowly and takes a long time to harmonise to a global equilibrium; for the most part, it is in a continuous state of disequilibrium. Therefore, to the extent that the creative industries are mostly global, and that global IP law is mostly in disequilibrium (and also to the effect that 'distance costs' are non-negligible), then we would expect that the dominant strategy for firms in the creative industries is to play the 'high-cost' IP strategy: this involves business models and consumption behaviours oriented 'as if' IP was weak.

The implication is that, under such circumstances, which are precisely the circumstances of the creative industries, particularly as they operate in relation to the Internet, IP may not actually matter very much. And if that is the case then the costs of high IP protection may be larger than previously estimated due to both the rents created and the market distortions that result.

Intellectual property in the creative industries is a global issue in the sense that they extensively involve global innovation, production and consumption. This occurs across national boundaries of law in respect of letter and enforcement. Differences in these, combined with monotonically increasing costs of property protection and enforcement (in order to capture property rents) as distance grows, result in a dominant strategy of behaving as if IP was weak everywhere. An example of this is the universal problem of global enforcement of IP laws, and the reason it has such political profile in the first place. A global market defines the maximum of these costs when there is simultaneously different jurisdictions of operation and enforcement of law. The upshot is that while IP laws work well in a local-local context, in local-global and global-global contexts IP law is rationally ignored and ineffective. This is, we suggest, and without irony, in fact a better definition of the creative industries than the standard DCMS definition of 'creativity in-IP out', but rather as: *the set of industries, due to global context, for which IP is a problem to be solved, not a solution to a problem.*

3.2 Incentives for creativity and value from re-use

Our second point is that the creative industries highlight not just the economic value of creativity and origination, for example entrepreneurial artistry and vice versa, but also the significant economic value created from the re-use of ideas in general and copyrighted material in particular. This point is of course general and the underlying axiom of modern economic growth theory, namely due to spillovers from new ideas. Yet our point is subtly different, as the creative industries are not so much dealing with new ideas, but with particular instantiations or actualizations of new ideas and the re-use of these particular instantiations. For example, when a journalist writes a story about the relation between bananas and republicanism, it is not the banana-republic connection that is protected by copyright, but the particular work in which the connection is made.

In the economics of ideas and the information theory, growth theory (Romer 1994) and market theory (Boldrin and Levine 2008) that it is based upon, the focus is on the idea connection (bananas-republicanism) rather than the copyrightable content, i.e. the particular story. Yet, intellectual property law applies over the specific story about bananas and republicanism, not the banana-republic connection. So, in the economic model, it is the idea-connection that is the source of value (Dopfer and Potts 2008), whereas in the legal model, it is the instantiation of the idea. The economic model leads to focus on how to construct incentives to create new ideas. The legal model seeks to implement these, and to do so by connecting it to cultural, social and political states and processes.

However, there is also a 'third' option, which follows the conjecture that the novelty creation aspect might not be the most important part, but rather that it is not the *re-use* of the idea, which is of obvious social benefit, but the re-use of the particular instantiation or actualization of the idea that has the greater social economic value. It is of course the case that intellectual property law aims to confront this reuse of instantiations aspect by forcing (market negotiated) rents on such production situations. This logic is supported by the *Coase Theorem* in public choice theory that states that the allocation of property rights does not matter to the efficient distribution of resources, so long as property rights are allocated (and transactions costs are negligible). Creative commons, for example, is an additional clause in this contract to specify particular uses that are not subject to transaction. However, this is a market model of re-use in production (as a factor input) or re-use in consumption (as utility), but not of re-use in innovation, or of re-use in which production is by definition innovation, as in content production. This is an important and much overlooked distinction that is highlighted in the creative industries, which although certainly produce value by being creative in the classic and normative sense of producing new ideas and thus novelty, also produce substantial value through the re-use of instantiated content into new mediums, messages and formats. Intellectual property law both evolved and was designed to incentivize value creation driven by origination and to protect the resultant 'property'. It was never designed to foster value creation by re-use (a point also emphasized by Boldrin and Levine 2002). Yet the value

created in the creative industries is significantly composed of, if not dominated by, value creation in reuse.

The original value creation model leads to an exclusive focus on the incentives to produce new ideas (i.e. the banana-republicanism connection). This results in the economics of intellectual property being defined in terms of: (a) the trade-off between creating incentives to introduce new ideas; as against (b) the efficiency loss due to the creation of an artificial monopoly.

This situation arises because ideas are non-rivalrous goods (Romer 2002) with positive and sometimes very high fixed costs and low or negligible marginal cost. Thus, under perfect competition in which price equals marginal cost, the equilibrium supply is zero. Yet the production of new ideas always generates a net social benefit due to the spill-over effects of these ideas. This is the classic market failure argument that is resolved in one of two ways: (1) public funding of the production of ideas; or (2) the creation of artificial imperfect competition in the form of a temporary monopoly that enables the producer of the idea to recoup through monopoly rents the fixed cost and some proportion of variable cost. Intellectual property is obviously the latter path, and widely favoured over option (1) because it preserves market incentives.

Economists mostly accept this as the full and proper analysis of intellectual property in relation to new ideas and the re-use issue is simply then a derivative concept that amounts to the injunction: let there then exist a secondary market. Intellectual property law follows the economists on this in logic, and intervenes only to create a raft of possible exceptions. It is our view, however, that the creative industries effectively demonstrate the implications of the opposite of this model, namely of a world in which most economic value comes from re-use, which can occur in many different ways, and over which many different business models may apply.

The creative industries illustrate several key points. First, creativity is not in short supply; it is not incentive constrained under perfect competition. The standard market failure model argues that under perfect competition, sunk fixed costs of production, and low marginal cost of replication, we should expect to see zero or low creative supply. We should expect to observe a positive correlation between strength of intellectual property and creative supply. Yet even though that may be the case in pharmaceuticals, it is manifestly not the case in creative industries. If anything, the problem is the opposite: namely, an over supply of creative input, not because of, but in spite of intellectual property and due rather to the shifting opportunity costs of creative behaviour (Potts 2008a).

Second, the economic value of re-use should be the central value creation point of analysis. We argue that this point extends over both public good and private good analysis, and over both law and economic considerations. Yet the economic issue of re-use follows a cultural theme of for whom and to whom, and

of how this mechanism is constructed, and how the benefits are distributed. Yet the central finding of this analysis is that re-use is, in effect, a species of business model adaptation.

Third, there are both private and public gains to reuse. The private gains accrue to the production of communication, and in which the identity of the original source is itself a source of value (it is not generally plagiarism) due to the social network prominence of the selected instance of reuse. The classic academic example of re-use is referenced quotation, which is a paradigmatic model of the value of re-use in a native social and cultural context. Explicit laws are not necessary to enforce this intellectual property. Re-use thus functions publicly as a private good, and vice versa.

Fourth, there are diversity and entrepreneurship arguments to re-use. On the face of it, re-use would seem to represent a species of replication that dynamically considered would drive a force of standardisation toward uniformity as dominant re-use predominates with increasing returns, reality is different because each instance of re-use occurs within individual minds or agents that have particular, and often unique, systems of other ideas that this re-used idea will be combined with. The net result is that re-use of a particular idea-actualization will interact with extant variety in 'hosts' so as to produce increased variety and with that exploration of entrepreneurial opportunity space. Examples of this in creative industries, from jazz music to YouTube, are almost definitional.

Fifth, there are feed-forward into other industries arguments to re-use. This argument is strongest in the general sense of flow of ideas from one domain to another (e.g. from ideas about chemistry and its industries to ideas about biology and its industries). But it can also occur in the context of instantiated content and its industrial flows (or, as often, transmogrifications). This also be autocatalytic, as when visual art is used in visual art, as well as being *exocatalytic*, to coin a term, as when content in one domain is reused in another, as when visual art is used in advertising, or when music is used in performance. The creative industries, while being as autocatalytic as any industry in the sense that its current technologies and markets shape the development of its future technologies and markets, are unusually dominated by exocatalytic reactions in which contiguous developments are as important if not more important than past paths. Re-use thus generates a new and as yet unanalysed kind of increasing returns and path dependency that is topologically complex.

Sixth, there are consumer co-creation arguments to re-use that also associate with culture and identity arguments (Banks and Potts 2008; Potts 2008b). The central point here is that re-use is a strategy in many sorts of games, and indeed especially in simultaneous games. Banks and Potts (2008), following Page and Bednar (2007), have identified this as an aspect of multiple games theory. Open innovation and production models rely on, and indeed exploit, the re-use of knowledge, and in doing so explore the space of possible business models

premised on such assumptions. The creative industries are again in the vanguard of this discovery process.

3.3 Business models adapt to legal systems

Our third point is effectively the conclusion of the previous two, namely of the global implications of creative industries economics and the re-use implications of creative industries property. Yet, while there is a certain derivative logic in this, we make a case for testing this point through the examination of emerging creative industries in environments where levels of connectivity are rising rapidly and copyright enforcement is weakest, such as mainland China. Comparative analysis between creative industries in nations with weak copyright systems, such as China, and those with strong copyright systems, such as the United Kingdom and Australia will make it possible to examine respective case studies of weak and strong IP.

We suggest that different IP regimes result in differential efficiency outcomes, which is the otherwise standard assumption, but rather that *business models evolve* and adapt to intellectual property rights institutions as to contextual milieu and not, importantly, the other way around. Business models and legal systems both co-evolve, but in the short run (and the long run is but the sum of all the short runs) it is business models that adapt to legal systems. The ideal place in which to examine this process from a comparative perspective is the People's Republic of China, where there are signs that businesses are developing approaches that are not unduly impeded by very high levels of copyright violation.

We advance this as a further argument that intellectual property may matter less to the development of creative industries than has previously been assumed, because to a large extent whatever it is, business models will adapt. The difficulties associated with attempting to control unauthorized copying and distribution of physical media, as well as music distributed through the Internet in China, have prevented music industry business models common in the United States and Western Europe from flourishing in the PRC. In their place, new approaches to the monetization of content are emerging. So far, these have mainly relied on advertising, artist management and public performance to generate revenue, rather than royalties from the sale of physical copies of music. 'Mobile music' is also quickly becoming an important trend in the distribution and monetization of music in China.

Technological change is exogenous, continuous and unpredictable. Yet business models are endogenous, discrete and manageable, although always experimental at some frontier. This is why business models adapt to exogenous events such as new technology, which often happens fast, as well as to new law, which often happens slowly, in exactly the same way (Beinhocker 2006). Business models are a form of (social) technology that has been widely

overlooked both by economists and legal theorists. The implications have been significant, as we have sought to elucidate in this paper, in respect that some basic dynamic relations have been misunderstood by being artificially posed in a static context in which business models are fixed.

Yet this dynamic is precisely the variable that makes every particular configuration of intellectual property rights institutions optimal under some behavioural configuration. It is widely assumed that ‘the market’ executes this function, which it does, but it is the adaptation of business models that is the market dynamic that produces this result. Without business model adaptation, it really would be the case that different intellectual property laws mattered. However, with business model adaptation, the converse follows: intellectual property laws don’t matter if (and only if) business models change faster, more effectively and more efficiently than legislation.

In the early days of the recorded music industry in the West², expensive equipment was required to turn sounds into physical products that could be sold in a mass market. Making multiple copies of physical media required specialised equipment and the production and distribution of physical music products – records – could generally be controlled and monitored. This created opportunities for Record Labels – entrepreneurial organisations that would invest in the production and promotion of music, capable of taking advantage of economies of scale, and connecting musicians with a market. In return for access to capital, equipment, expertise and distribution channels, labels demanded a share of profits generated through licensed sales.

Two factors were critical to the structure of the industry: the existence of assignable intellectual property rights in original creative works – ‘copyright’ – and physical technologies that made *controlled* mass production and distribution of music possible. Although developments in physical technology, such as cassette tapes and home tape-recorders, presented some challenges to the industry’s ability to control copying, these changes occurred after markets, industry structures, professional organisations and group collection infrastructures had become established. As such, the industry was able to respond to these developments in a systematic way and incremental developments in analogue technologies of copying did little to disrupt its overall structure.³

In China, on the other hand, technologies for mass reproduction and consumption of recorded music became available in the absence of copyright law,

² Concepts of ‘East’ and ‘West’ are complex and contested. However, for convenience, we will use the term ‘West’ to refer to Anglo-European liberal market economies where copyright systems are relatively well established and commercial music industries have access to institutional infrastructure such as group collection societies.

³ Digital technologies and the Internet have had a much greater impact on the industry. Peer-to-peer file sharing has allowed consumers to circumvent centralised distribution models, challenging copyright owners’ ability to control and monitor copying and distribution.

an organised domestic music industry or clear legitimate channels for the distribution of most foreign content. These technologies also became available as China was transitioning from a soviet-style planned economy to a market-driven system. High levels of demand for popular music, combined with readily available technologies for mass reproduction and consumption and an absence of legitimate distribution channels contributed significantly to the rise of a black market in music products and highly sophisticated 'pirate' distribution networks. It has been estimated that levels of copyright violation remain as high as 95 percent (MPAA 2004, Ke 2005, Chillout 2005, Xu 2005).

Major international labels have, to a large extent, been prevented from dominating the market in China by their inability to adapt to an environment in which record labels and copyright owners are unable to maintain a legally granted monopoly on the production and distribution of music. The difficulties that major players in the global music market have faced in attempting to function in China highlight the extent to which the success of established approaches to commercial music depend on the existence of strong intellectual property systems and coordinating organizations' and institutions capable of administering these rights on behalf of copyright owners.

The difficulties associated with controlling distribution in China have been compounded by the spread of the Internet, personal computers and cheap MP3 players: technologies that are challenging approaches to the control and monetisation of content globally. Although approaches to the distribution of music through the Internet in China are changing,⁴ it has been estimated that close to one hundred-percent of music downloaded from the internet onto personal computers or portable devices such as MP3 players occurs without permission from or payment to copyright owners (Daniel, 2007). Not only are new technologies being adopted with enormous speed across China, they are being embraced fastest by groups traditionally considered most likely to pay for music. Young, educated city-dwellers with relatively high disposable incomes are now the group most likely to have access to broadband internet connections, cheap MP3 players and next-generation mobile devices. According to Kaiser Kuo, a founding member of *Tang Dynasty* and current director of digital strategy for advertising group *Ogilvy*:

...so many of [the] people who are interested in music are also internet users. If you look at 20-24 year olds alone in China, the penetration of Internet usage is over 40%. It's about 43.4% according to the last survey. And in urban areas, if you were to leave out rural China, I'm sure that it is upwards of 70%. It's enormous. So all these people, the young urbanites in China are all Internet users and everybody knows where to go to

⁴ One example is the recent Google initiative that it will allow access to free MP3s via Google searches in China. Music would be monetised through advertising and revenue would be split between record labels and Google. See: CHAO, L. Google aims to crack China with music push. 2008. *Wall Street Journal* [online] February 6. [Accessed February 10 2008]. Available from World Wide Web: <http://online.wsj.com/public/article/SB120226551059746565-0vyKcwz51BK_oNVjAhjtOABMBAs_20080307.html>

download music. It's no mystery at all. There's no reason to go and buy any of it. So [record labels] have gone from the frying pan into the fire. They hadn't even put a dent in pirate physical copies before P2P and MP3 downloading came along (Kuo, 2007).

Although the structures that define China's commercial music industry are still crystallizing, it is already possible to see important differences between the way it has functioned in the West and the way that it is functioning in China. The Chinese government has been reluctant to abandon cultural policies that place heavy emphasis on the pedagogical and political role of cultural activities, often to the detriment of firms operating in the emerging cultural industries.⁵ In spite of this, opportunities for commercially driven cultural industries are increasing. Nonetheless, Commercial cultural and entertainment industries are a relatively new development in China and it is not surprising that it has taken time for legal and institutional conditions necessary for commercial cultural industries to develop.

As Nimrod Baranovitch discusses, while an edgy, often political 'indie' rock and punk scene emerged during the 1980s and early 1990s, tolerated and even tacitly supported by the government, these changes were not a result of the state's loss of interest in music as a tool of propaganda. Rather they represented a shift in the state's approach to influence and control in the context of new technologies and a changing media environment (Baranovitch 2003). Baranovitch argues that by maintaining its control over television broadcasts and large scale concerts the Chinese government was able to limit the commercial viability of artists it did not explicitly endorse:

... in the mid 1990s the state was adopting new strategies, techniques, mediums and styles of control rather than just watching its control dwindle. Chinese MTV is one such new form of control, which implies that new technologies are not necessarily only a threat to the state, but can also be used by it to exert control (Baranovitch 2003, p.271).

Baranovitch argues that the Chinese government's monopoly control of broadcast media, combined with ubiquitous piracy, has ensured that the state has been able to maintain enormous power over the development of the domestic music industry. Low levels of copyright enforcement have meant that musicians have been unable to survive on album royalties. Instead, they have been forced to rely on concerts and personal appearances for a large portion of their income.

Because government approval is required for large concerts, China's authorities have been able to exercise enormous control over the income-generating opportunities for musicians. The government also continues to control all broadcast media outlets, making it possible for it to severely restrict publicity of artists it considers dangerous or distasteful. According to Baranovitch, this has allowed the Chinese government to maintain a disproportionate influence over

⁵ The impact of restrictive cultural policies is not limited to the music industry. It has also had an impact on the ways in which film, television and book publishing industries function.

popular content. Although alternative material – some of it dealing with politically sensitive topics – is available in China, the popularity of this music has been limited by the availability of promotional channels.

However, interviews conducted in 2005 with music industry executives from both domestic and international labels, as well as media professionals working for Chinese radio suggest that commercial opportunities for music businesses are increasing. Political sensitivities, while still a factor, are not preventing the growth of a commercially driven music industry. According to Jade Wang, Deputy Channel Director of Easy FM – a music program broadcast by China Radio International, although a state driven music sector still exists, it is not a major part of the commercially driven popular music industry (Wang 2005). In the 21st century government funded cultural troupes serve a different market, producing televised ‘gala’ events for Chinese New Year or Communist Party anniversaries, as well as live song and dance performances.

Radio stations are much more likely to play music by pop singers, produced by commercial labels. While Chinese radio would not play music that was overtly anti-government or anti-party, the focus of their programming is entertainment rather than politics (Wang 2005, Pulley 2004).

As a government run radio station, from the first day we set up our domestic broadcasting we have been playing popular music rather than music productions with lofty messages, such as socialism (Wang 2005).

Faced with soaring economic growth, China's music industry has shifted its focus away from politics, firmly towards profit. There is a sense that there is plenty of room for record labels to make money from non-political music – and little point in attempting to promote overtly political content when consumers are just as happy with love ballads and snappy pop tunes such as ‘Mice Love Rice’.

Policies originally intended to control heterodox content in China have had another important impact. It is arguable that they have created barriers to the legitimate domestic market for foreign content producers, increasing incentives for the production of domestic content and reducing competition within the legitimate market for domestic music.

In order to release an album, domestic artists require a ‘publishing number’ which can only be obtained through a licensed publishing company. Foreign companies cannot obtain a publishing licence, and so they have no choice but to collaborate with a Chinese partner in order to distribute music. Foreign albums must apply for pre-release censorship by the Ministry of Culture – a process that takes significantly longer than simply applying for a publishing number from a licensed distributor (Zhao 2005). This has been a factor in Huayi's decision not to release foreign albums at this stage. Zhao describes the process:

It is very hard to release foreign albums in China. In order to get a publishing number you have to apply to the Ministry of Culture's censorship committee – song lyrics, album design all have to be approved by the censorship committee. It probably takes 2-3 weeks. Then if there is no religion, no sex, no bad language, the Ministry of Culture may say OK. Sometimes they will say that certain tracks are not suitable to be released, so individual tracks have to be removed. That system doesn't apply to domestic albums. Domestic albums just deal with the book number system. Publishing companies themselves are able to issue the numbers. That process will only take 4-5 days (Zhao 2005).

There can be little doubt that policies ostensibly intended to prevent heterodox content from being distributed is having a more impact on the commercial viability of some forms of content than on the population's ability to obtain unapproved material. As 'piracy' figures attest, illegal distribution networks remain an important source of content for many. Furthermore, in addition to presenting copyright challenges, the Internet is a powerful source of unauthorised content:

If you want anything, if you are a fifteen year old high school student and you want to get hold of any kind of music, music videos, documentaries, TV programs – go online! They are available. Censorship is not going to stop you (Huang 2005).

In the twenty-first century, pop-idols, piracy, digital technology, music downloading, and mobile technology are rapidly combining to create one of the fastest developing commercial music scenes in the world. Popular music – both foreign and local - is circulated widely. But in spite of the obvious dynamism of the Chinese market, foreign hopefuls have been disappointed by the failure of major international record labels to secure much anticipated profits or market dominance in China. It is estimated that international artists still account for less than 10% of the overall digital revenue of major labels operating in China (Daniel, 2007).

This is an obvious source of frustration for international record label executives and the governments of countries with established copyright export industries. The success of China's domestic music industry within its own market might also be looked upon as an encouraging sign by those who had feared that the expansion of Western-style intellectual property systems would have a negative impact on the domestic cultural industries of developing countries, re-enforcing the global dominance of existing cultural exporters such as the United States (Drahos and Braithwaite 2002; Arup 2000).

Why have the experience and accumulated content owned by major international record labels counted for so little in China? The simple answer appears to be that international labels have built their business models around the notion that an artist can record music, which can be sold independently of the physical presence of the artist in any particular market. Business models that rely heavily on public performance and personal appearances by artists, and which are unlikely to produce revenue on a large scale from the sale of physical units,

provide limited opportunities for international labels hoping to break into the Chinese market. Few established Western artists are willing to devote large amounts of time to concerts and advertising within China and, in any case, most contracts signed by artists with major international labels do not include artist management or concert revenue. Even for Chinese pop-stars and their labels, performance and public appearances can be difficult to manage and present scalability problems (Zhao 2005).

Although there have been some successes for international labels operating in China – particularly with artists from Hong Kong or Taiwan - the absence of an easy market for copyrighted music products has led to disappointing growth in market share. In part, this has been the result of a circular logic: it is not possible to make money by licensing copyright in China, so Western labels have devoted few resources to promoting their products in that market. Matthew Daniel, Marketing Director of China's leading digital distribution company *R2G* recently summed up the problem to record industry executives attending the 2008 MIDEM conference:

It has to be realized that the vast majority of labels at MIDEM are probably currently unscathed by piracy in China and that's likely because their music is so obscure in the Chinese consciousness that they have not even had the dubious honour of gracing the servers of China's notorious MP3 search engine, Baidu. Piracy in China often gets a lot of attention but many forget the other Ps of marketing and these are the basics that labels intending to come into China should first focus on. For dramatic effect, let me first quote Tim O'Reilly when he said that "Obscurity is a far greater threat to authors and creative artists than piracy" (Daniel, 2007).

The problems that have plagued foreign copyright owners attempting to sell content in China have given domestic musicians and music industry entrepreneurs time to explore alternative approaches to generating income from music. Live performances, advertising and personal appearances have emerged as important revenue sources for the domestic industry. Ed Peto, Beijing-based promoter and music consultant observes:

... While the traditional record label model isn't exactly going through a golden age in the west, it never even had a golden age in the Middle Kingdom (Peto, 2007).

This situation has provided domestic musicians and labels with an advantage. While major international labels have been unwilling to invest heavily in the promotion of international artists in a market where returns cannot be guaranteed, local artists and labels have been actively working to develop business strategies capable of generating income in spite of very high levels of piracy. One strategy for doing this has been to rely on personal appearances by artists, which cannot be replicated. As a result, there is less emphasis on producing popular albums, and more emphasis on gaining popularity and profile through single hits that lead to lucrative product endorsement and live appearance or performance deals:

... in foreign countries there is a clear line between publishing deals and record deals. But over here you would often find a record label playing all of the different roles as a record company, as artist management, as a publisher. They sign all round deals with their talent. They do make sure that once they invest in one field they recoup it from every form possible (Wang 2005).

In contrast to western markets, where artist management and music are generally separate, in China assigning a record label with management rights is considered one of the most important aspects of an artist's contract, forming a vital income source for domestic labels (Zhao 2005). Artists such as the Huayi-signed Yu Quan duo can earn up to 200 million RMB (US\$25 million) a year in performance fees (Zhao 2005). However, even for Chinese labels, relying on personal appearance and advertising revenue presents practical problems. Relying on personal appearance by artists limits scalability. Neither advertising nor personal appearance fit well with the 'long tail' approach, which, in other markets, allows back-catalogues to continue generating revenue for labels and artists long after the artist has been eclipsed by the latest trend.

It is unlikely that the genie can be put back into the bottle when it comes to the existence of established piracy networks in China. However, supplying music directly to mobile devices is providing a distribution channel that can be centrally controlled. Just as analogue technologies allowed a limited number of firms in Europe and the United States to control the physical production and mass distribution of music for much of the twentieth-century, mobile networks make it possible for a few key players to control distribution of music to mobile devices in China. According to Kaiser Kuo, a founding member of the Chinese heavy metal group Tang Dynasty, which is often credited with the title 'first heavy metal band in China':

[Labels] have a very different job here. Their job now needs to be entirely focussed on digital and they should be looking toward full song mobile downloads [Kuo 2007].

The rate at which this new distribution method is being accepted by mobile phone users in China and the lack of alternatives for controlled mass distribution and centralized revenue collection for music copyright owners suggest that mobile music is likely to emerge as the most important source of income for the commercial music industry in China. Record labels emerged as the most powerful group in the Western recorded music industry, controlling access to capital, production of physical music products and distribution channels and demanding intellectual property rights in return. It appears that in China, mobile operators are on track to play a similar role.

China's emerging commercial music industry provides a fascinating case study for media scholars, copyright theorists and those interested in the ways in which creative industries function. There are signs that China's domestic music industry has been able to turn high rates of unauthorised copying and distribution to their advantage, pursuing business strategies capable of succeeding in the context of a weak copyright system. Rather than falling victim to globally dominant exporters of intellectual property, China's domestic music industry has

successfully developed a market for local content, using the legacies of censorship and cultural control to its advantage. The result is a dynamic industry that is actively exploring the potential of new consumer groups from low-income backgrounds living in both rural and urban areas. However, perhaps in contradiction to our theoretical argument, the existence of a formal copyright law that allows creators to license their works to record labels and mobile operators is now playing a significant role in the development of a lucrative market in mobile music. The importance of a means of controlling access to content – a distribution bottleneck - in spurring large-scale commercial activity within in the music industry seems equally obvious in China, and may provide important lessons for legal and cultural theorists eager to see successful approaches to commercialisation of culture that do not rely on monopoly structures. These are areas for further investigation.

All rent seeking involves, in some way or other, the tacit presumption that business models are parametric, like law. This is of course no less true in the creative industries as in other industries. Yet the creative industries present much clearer examples of the rejection of this assumption because, simply, they do it so often. Indeed, entire languages develop to accommodate this (e.g. in TV, 'format change', etc). Instead, once we recognise that business models are not parameters about which law seeks to form and solidify, but rather continually adaptive technologies that take particular structures of law as aspects of the business environment, we arrive at a much clearer perspective on the relation of intellectual property to economic systems.

These three reasons are effectively the same reason in three different dimensions. They all point to the same diagnosis of the problem in a failure to account for open system evolution and adaptive response that plays out over global dimensions (as opposed to local), re-use dimensions (as opposed to origination), and to business adaptation (as opposed to assumed structure). In each case, this points in the same general direction of greater IP freedom as a path to greater (aggregate) value creation. This is the conclusion we reach in this paper as based on both theoretical (economic) considerations of empirical comparisons of different jurisdictions of IP law in the creative industries, namely that evolution is the central process to understand and that this process is most plainly manifest in business model adaptation.

4 Conclusion

This paper began with an examination of the legal case for radical reformation of the copyright system. We then moved to consider the current economic theory for this case (e.g. Boldrin and Levine 2008) before exploring this specifically in the case of creative industries, from which we extracted three further arguments: global markets, re-use and value creation, and business model adaptation. We

think these three factors have been widely overlooked, and that there re-inclusion into the intellectual property value debate may be of value.

Our model of globalization emphasised the strategic implications of other nations not having the same high standards of IP protection and efficacy of use. Our model of re-use sought to emphasize the economic value of incentives to re-use as compared with the economic incentives to create. We argued that in the creative industries (although perhaps less so in industries such as biotech, engineering, etc) the re-use value of not just ideas but instantiations is both publicly and privately much larger than the potential loss of novelty creation through weaker IP (as artificial monopoly). Our third model was of the implications of adaptation in which we argued that business models adapt faster than institutions of IP, and that this ordering determines dynamic outcomes. In effect, any IP regime will appear optimal under some adapted set of business models. In this case, the argument for optimality must favour weaker, i.e. less constraining, IP regimes. Adaptation of business models thus mitigates many of the arguments for stronger or particular IP regimes.

We conclude that the creative industries are a special case, but an illustrative case, because their key properties in relation to global context, knowledge re-use and adaptive business models are properties that are likely to become more common throughout the economy, not less common. The study of their economic aspects and their legal aspects is thus plainly of value in itself, but the study of the interaction between these domains, we suggest, provides a further point of perspective. This is what we have endeavoured to do in this paper. Our tentative conclusion is that the creative industries in theory, as illustrated with supporting evidence from China (although much more work is required here), have far less reliance on intellectual property than hitherto assumed.

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