

**INCURABLE OR REMEDIABLE? CLUES TO UNDOING
THE GORDIAN KNOT TIED BY INTELLECTUAL PROPERTY
RIGHTS ENFORCEMENT IN CHINA**

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1. INTRODUCTION

Over the past two decades or so, China has demonstrated a strong desire to be involved in the global trading system and has established a sound legal framework for intellectual property rights ("IPR") protection. An extensive theoretical literature has examined the impact of the global IPR protection framework on Chinese IPR legislation and the stepped-up efforts China has endeavored to make in bringing its domestic laws into conformity with its World Trade Organization ("WTO") commitments. Now it is generally accepted that the gap between the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") and China's intellectual property laws has been greatly narrowed.¹

While "China has implemented its WTO obligations on time, and in some cases ahead of schedule,"² the testing of empirical

¹ See, e.g., Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437, 487 (2004) (discussing that "China has eagerly consummated international treaties and has adopted strong domestic [intellectual property legislation] . . . to attract technological innovations"); Warren Newberry, *Copyright Reform in China: A "TRIPs" Much Shorter and Less Strange Than Imagined?*, 35 CONN. L. REV. 1425, 1446 (2003) (concluding that "reforms brought China's copyright regime into compliance with the TRIPs Agreement and the Berne Convention"). Some commentators have given even more optimistic appraisals, asserting that China's intellectual property laws have approached an advanced level in the world.

² EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA, EUROPEAN BUSINESS IN CHINA POSITION PAPER (2005).

evidence as to effectiveness of enforcement has been little-explored. A broad consensus is developing that it is the enforcement rather than legislation that prevents China from fulfilling its TRIPs obligations. Attempts have thus been made to examine the stubborn enforcement problems in China;³ however, there is little work of significance addressing the multifaceted issues related to IPRs enforcement with a more incentive-based explanation than merely applying a cultural approach. Moreover, strategic solutions to the existing enforcement problems have been little explored.

This Article seeks to capture the significance and dilemmas associated with IPR protection in China and to demystify the the enforcement problems. Section 2 assesses shortcomings of the IPR enforcement regime and sheds new light on enforcement problems by exploring and explicating various obstacles associated with IPR enforcement. It argues that China's cultural uniqueness, institutional impediments and economic insufficiency formed knotty points of the enforcement deficiency. Apart from the common reason of insufficient economic development, the IPR enforcement problem in China is a unique political phenomenon resulting from the systemic dystrophy fundamental to Chinese institutional development. The goal of IPR enforcement in China is thus achieved, in a great measure, through political advocacy rather than a legal process. In this scenario, the West should find ways to identify real problems and resolve specific difficulties without merely displacing their Chinese counterparts elsewhere. Having identified issues of enforcement difficulties, Section 3 summarizes a four-stage approach to mitigating the counterfeiting menace and undoing the Gordian Knot. The four-stage approach suggests that the West should try to foster and facilitate shifts of China to initiate a virtuous circle of improved IPR protection.

2. ENFORCEMENT PROBLEMS: A PRISMATIC LENS

Technically, upon the WTO accession, Chinese intellectual property laws as a whole are adequate for the prevention of the IPR infringement. However, as shown in the United States Trade

³ See, e.g., Geoffrey T. Willard, *An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, The Current System and Prospects for the Future*, 6 IND. INT'L & COMP. L. REV. 411, 435 (1996) (stating that "China's intellectual property laws are now among the world's most comprehensive and modern").

Representative Annual Report, the problem of counterfeiting and piracy in China remains out of control.⁴ As a consequence, "Washington's warnings against Chinese piracy of films, music, software, medicine and machines have become a diplomatic mantra."⁵ At present, China is still considered to be one of the world's largest exporters of fake goods.⁶ Much has been done in an effort to eradicate the problem, but the counterfeiting and piracy seem to have become a persistent ailment and a perennial conundrum. The sticking point is clear: laws without enforcement are wasted paper, as are rights without remedy.⁷ No panacea for counterfeiting and piracy is available. China will have no option but to gear up to fulfill its international obligations, and it is to the related difficulties to which we now turn.

2.1. A Square Peg for a Round Hole: Individual Rights Advocacy Under Collectivist Ideology

In stark contrast to a liberal notion of individual rights in the Western sense, Communism, the unprecedented socialist experiment advocating equality and liberty in the twentieth century,⁸ substantially influenced cultural perceptions and reshaped moral landscape in modern China.⁹ As China expert Dr. Robert Weatherley has pointed out, Karl Marx deemed the individual as a "species being" who exists as an intrinsic part of the society to which he or she was born.¹⁰ Upon the establishment of

⁴ See UNITED STATES TRADE REPRESENTATIVE, 2005 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 3-5 (2005), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file293_8580.pdf (last visited Nov. 23, 2008) (outlining China's legal obligations to the WTO and their shortfalls with regard to such obligations).

⁵ Chris Buckley, *On Piracy, an Advocate for China's Progress*, INT'L HERALD TRIB., Oct. 4, 2005, available at <http://www.ihl.com/articles/2005/10/04/business/IPRjudge.php> (last visited Oct. 19, 2006).

⁶ Robert Marquand, *China's Pirate Industry Thriving*, CHRISTIAN SCI. MONITOR, Jan. 9, 2002, available at <http://www.csmonitor.com/2002/0109/p6s1-wosc.html> (last visited Nov. 23, 2008).

⁷ Willard, *supra* note 3, at 435.

⁸ See A DICTIONARY OF MARXIST THOUGHT 102-05 (Tom Bottomore ed., 1983) (providing a definition for communism).

⁹ See Brigitte Binkert, *Why the Current Global Intellectual Property Framework under TRIPS is Not Working*, 10 INTELL. PROP. L. BULL. 143 (2006) (arguing that current perceptions of intellectual property in China lag behind those in the Western world).

¹⁰ ROBERT WEATHERLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* 93, 104 (1999) (examining the

the People's Republic of China ("PRC") in 1949, the central government repealed the entire corpus of existing legal regime and transplanted a new legal system based on the Soviet model.¹¹ While IPR is an outcome of a market economy, Marxism-Leninism provides a basis for a theory that "private capital is a means to exploitation."¹² As a consequence of the ideological predisposition, the philosophy of sharing wealth became the dominant force in shaping modern Chinese identity, and the IPR regime was deeply embedded in the notion that individual rights are most readily defended as effective means to state ends.¹³ Accordingly, China's IPR protection regime was built upon the foundation that sustains "the balance between collectivist and individualist thought,"¹⁴ and the "harmony of interests . . . between the individual and the state."¹⁵ Since collective dominance has outweighed the interests of individual rights for decades,¹⁶ for the sake of maintaining a stable and harmonious community, citizens are strongly promoted to consciously—and sometimes unconditionally—relinquish any rights in favor of the society.¹⁷ It is not surprising that collectivist ideology is apt to erode the foundation upon which IPR as a form of individual right is built.¹⁸

As a logical consequence transplanting IPR regime in China amounts to fitting a square peg in a round hole, making it "more of a wish list for foreign investors than a realistic and effective system" of global enforcement for IPR, despite the fact that China's economic reforms have been impressive.¹⁹ Although the law has

relationship between individual rights and the superiority of collective interests, and harmony of interests under the Marxist ideology).

¹¹ Willard, *supra* note 3, at 417.

¹² Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. 63, 79–80 (2002).

¹³ WEATHERLEY, *supra* note 10, at 128–31.

¹⁴ Bejesky, *supra* note 1, at 446.

¹⁵ WEATHERLEY, *supra* note 10, at 49.

¹⁶ See Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359, 367 (1995) ("In the dominant western conception, individual rights precede interests and the balancing process. In contrast, the Chinese conception of rights as interests to be balanced more readily lends itself to the view that rights are . . . granted by the authorities").

¹⁷ WEATHERLEY, *supra* note 10, at 105–07.

¹⁸ Bejesky, *supra* note 1, at 447.

¹⁹ See Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 IND. J. GLOBAL LEGAL STUD. 449, 450 (2001)

been introduced and implemented, there is an inertial way of thinking among some of China's leaders to view IPR as a major barrier in obtaining modern technologies necessary for continued economic development.²⁰ Indeed, it is still an influential discourse in China that in accepting reluctantly the incompatible obligations for the protection of foreign IPR, China, together with other developing countries, are vulnerable to being exploited.²¹ Ironically, while China is depicted by the American critics as a "land of unethical pirates," in the eyes of some Chinese, the United States appears as a "land of money-grubbing monopolists."²²

In addition, China's perception towards IPR has been influenced by inherent nationalist sentiments.²³ To a great extent, this nationalist sentiment was an actual reaction to the long-standing indignities and "humiliation that China suffered under the hands of Western imperialism,"²⁴ particularly after China's decisive defeat in the Opium Wars which commenced in the mid-nineteenth century.²⁵ It is much more apparent when it comes to the distinction and interaction between what is foreign and what is

(arguing that China's intellectual property regime lacks the social infrastructure to support it).

²⁰ See Andrew J. McCall, *Copyright and Trademark Enforcement in China*, 9 *TRANSNAT'L LAW*. 587, 593-603 (1996) (describing the initiatives taken by the United States Trade Representative to engage the Chinese government in IPR).

²¹ See *id.* at 593-94 (claiming that the developing nations view the importation of intellectual property as a means of the developed nations to dominate and explore the developing world); see also Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership*, 21 *FORDHAM INT'L L.J.* 1941, 1982 (1998) (discussing that "China shares economic disincentives to the vigorous enforcement of intellectual property rights with many other developing countries").

²² Alexander C. Chen, *Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People's Republic of China*, 25 *AIPLA Q.J.* 1, 8 (1997).

²³ See Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 *B.U. INT'L L. J.* 1, 25-27 (2001) (discussing the source of Chinese frustration with IPR).

²⁴ *Id.* at 25 (citation omitted).

²⁵ The Opium Wars, also known as the First Anglo-Chinese War, took place between Great Britain and the Chinese Qing Empire from 1839 to 1842 with the aim of protecting British opium trade in China. The Anglo-Chinese War initiated a long history of Chinese political and social chaos and their antipathy to European imperial hegemony that arguably still has remnants. See *CHINA: A HISTORICAL AND CULTURAL DICTIONARY* 237-38 (Michael Dillon ed., 1998) (providing a brief summary and timeline of the Opium Wars). See also, YONGNIAN ZHENG, *DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY, AND INTERNATIONAL RELATIONS* 154 (1999) (illustrating the role in which the Opium Wars played in defining modern Chinese nationalism).

domestic, in a state that had long been isolated from the outside world. Fuelled by socio-economic torment and nationalist sentiments, Chinese instinctively vented their grievances on foreign enterprises.²⁶ The most recent example was the large protests boycotting Carrefour, the French retail group, following the interrupted Olympic torch relay in Paris in the mid-April 2008.²⁷

It rings true that, in China, the principle of intellectual property contravenes the fundamental ideals upon which collectivist society is built, and the protection towards foreign proprietors tends to arouse nationalist sentiments. Not surprisingly, implementation of IPR is undertaken with reluctance. Although China has integrated rapidly into the world economy upon obtaining its WTO membership, public ownership holds steady and China remains a Communist country in terms of constitutional ideology.²⁸ These deeply ingrained notions have not been rooted out entirely and still, consciously or unconsciously, influence comprehension and perception of intellectual property rights in China.

2.2. *Lord Ye's Fondness of Dragons: Economic Prosperity and Democratic Hysteresis*

More than two thousand years ago in ancient China, a county magistrate in Chu Kingdom was called the Lord Ye (*Ye Gong*) who was reputed widely as a great lover of dragons.²⁹ The Lord Ye was so fascinated with dragons that the dragons were painted or

²⁶ See Yu, *supra* note 23, at 23–24 (discussing the consequences of the Chinese worldview).

²⁷ Ji Shaoting & Li Jianmin, *Protests Erupt at Carrefour Outlets in China*, China View, May 1, 2008, http://news.xinhuanet.com/english/2008-05/01/content_8085889.htm (last visited Nov. 23, 2008).

²⁸ See XIAN FA [People's Republic of China Constitution], art. 6, (1982) (P.R.C) (“[t]he basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of ‘from each according to his ability, to each according to his work.’ During the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the coexistence of a variety of modes of distribution.”).

²⁹ See XIAO MIN, JINGDIAN CHENGYU GUSHI 1: YE GONG HAO LONG [CLASSICAL CHINESE IDIOMS 1: LORD YE'S FONDNESS OF DRAGONS] 1–156 (2001).

carved on his walls, pillars, beams, furniture, window lattices, and ceilings.³⁰ In addition, all his robes and bed nets were embroidered with different images of dragons.³¹ The real dragon in heaven heard of his infatuation and, on a stormy night, descended to earth and paid him a visit.³² The dragon glided down to Lord Ye's house, poked its head into the window, leaving its long tail out in the yard. At this sight, the Lord Ye was scared out of his wits and fled in panic.³³ This story shows that Lord Ye was not genuinely fond of dragons but merely *images* of dragons—he professed love of what he actually feared (*ye gong hao long*).

It so happens in modern China that the national leaders are in just such an ambivalent and self-contradictory position in terms of China's political transition.³⁴ While many critics have linked economic changes to greater political freedom in China,³⁵ the reality is that China is currently standing at an ideological, social, and political crossroads: the intersection of a splendid economic landscape marred by lagging political reform.³⁶ Like two lines askew, China's economic and political infrastructures are contrastingly divergent. Alleging to carve their own niche in their institutional reform, Chinese leaders routinely insist that Western democracy is not a panacea for China's unique problems. The assumption that the spread of Beatles music and Mercedes Benz cars throughout China is a token of the triumph of Western democracy is elusive.³⁷

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See Wei-Wei Zhang, *China's Political Transition: Trends and Prospects*, EURASIA BULLETIN (2003), at 11-14 (discussing China's recent attempts to reform the economy without reforming the political system and the problems caused by such an attempt).

³⁵ John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT'L ECON. L. 735, 774 (1999).

³⁶ See Zhang, *supra* note 34, at 11 (asserting that Chinese economic reform may better be described as "great economic reform with lesser political reform").

³⁷ See *id.* at 12-13 (warning of the differences between economic and political change); see also Randall P. Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 536 (2002) (noting that there are differences in fundamental values between Western democracies and Asian countries).

On one hand, Chinese leadership maintains that the Western style of democracy is not suitable for the fundamental realities (*guoqing*) of China.³⁸ Political reform has thus been characterized by incrementalism and progress made only by the trial and error method.³⁹ Despite pious declarations of good intentions about political reform, the process of democratization seems to have stagnated.⁴⁰ Democracy remains the rhetoric of the political elites, and those challenging the authoritarian system and competing the party's dictatorship continue to draw fire against themselves.

On the other hand, however, there has been growing awareness and concerns that the ongoing economic reform may have released a Pandora's Box of unintended consequences.⁴¹ This dilemma has made Chinese leaders solicitous in initiating substantial political reform. Although the principle of democracy has been incorporated into the Constitution of the P.R.C., China is fond of democracy in the way of Lord Ye: China accepts the fame of democracy but hesitates to embrace its spirit. As a result, despite the ostentatious self-labeling as a socialist "rule of law" state,⁴² without endorsing the spirit of liberal democracy, the "rule of law" in China unsurprisingly remains symbolic and problematic.

Over the past decades since the "door" was opened, the enormous transformation of the political, social and economic landscape has fundamentally reshaped the moral standards of Chinese citizens.⁴³ As a consequence of the mere economic reforms, individual aspirations of the citizens are fostered and fulfilled without a corresponding regulatory system. Against the backdrop of economic transition, Chinese leaders have found

³⁸ INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, BUILDING OF POLITICAL DEMOCRACY IN CHINA § I (Oct. 19, 2005), available at [http://english.people.com.cn/whitepaper/democracy/democracy\(1\).html](http://english.people.com.cn/whitepaper/democracy/democracy(1).html).

³⁹ *Id.* § VI; see also ZHENG, *supra* note 25, at 1160-61.

⁴⁰ See Xianglin Xu, *Yi Zhengzhi Wending Wei Jichu de Zhongguo Jianjin Gaige [China's Political Reform is Preoccupied by Incrementalism]*, 5 STRATEGY & MGMT. 1 (2000) (arguing that China's slow progress on social issues can only be expedited with political reform).

⁴¹ Zhang, *supra* note 34, at 12.

⁴² See XIAN FA art. 5 (1982) (P.R.C) (stating that the People's Republic of China is building a socialist rule of law system).

⁴³ See HARRY HARDING, POLITICAL REFORM IN PACIFIC CENTURY: THE EMERGENCE OF MODERN PACIFIC ASIA 403 (1992) (describing the political, social, and economic changes in post-Mao China).

themselves in a great quandary and have to confront the grievous crises brought about by rapid yet unbalanced economic development.⁴⁴

Due to the precaution of the government in bringing its political evolution into line with its economic prosperity, the Chinese central authority runs the risk of precipitating social turmoil and upheaval.⁴⁵ The cascading societal and political problems have, in many circumstances, frustrated the efforts of ordinary Chinese citizens to earn their living through normal channels.⁴⁶ In order to survive the upheaval, people have to contemplate every possible approach they deem workable. As China scholar Stanley Lubman has stated, “[r]elations among Chinese are changing, as new networks of personal relationships appear as [a] means of getting things done.”⁴⁷ The shift is exacerbated by the weakness of ethical constraints and the shared personal standards that might otherwise have provided a normative framework for interpersonal communications and commercial transactions. Ironically, the money fetishism⁴⁸ that Karl Marx criticized over a century ago may now have been substantiated and venerated as a recognized credo of many people who are, or used to be, his faithful disciples.

As a consequence of the unbalanced reform, traditional values have been eroded and replaced dramatically by utilitarianism, which found fertilization in a set of socio-economic conflicts deriving from the dysfunctional institutional evolution. The peculiar utilitarianism gives rise to moral decline, eroding

⁴⁴ See generally, U.S. INST. OF PEACE, *MUDDLING TOWARD DEMOCRACY: POLITICAL CHANGE IN GRASSROOTS CHINA* (2008), prepared by Anne F. Thurston, available at <http://www.usip.org/pubs/peaceworks/thurst23/thurst23.html> (describing China's recent development challenges).

⁴⁵ See Zhang, *supra* note 34, at 12 (mentioning potential social unrest as a result of early rapid reforms).

⁴⁶ See Martin King Whyte, *Chinese Popular Views about Inequality*, The Woodrow Wilson Ctr. Asia Program Special Report no. 104, 5 (2002), available at http://www.wilsoncenter.org/topics/pubs/asiarpt_104.pdf (describing the situation of laid-off workers of state-owned enterprises).

⁴⁷ Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW J. INT'L L. & BUS. 383, 404 (2000).

⁴⁸ See KARL MARX, *KAPITAL* 31-37 (Friedrich Engels ed., 1952) (showing that money fetishism attributes powers to an alien force that dominates social affairs. It is the illusion that money has its own productive powers, particularly in politics, and is fetishized to the extent that its power to solve problems is considered as inherently natural, believing that money is a “radical leveller” invading all spheres of social life).

traditional bases for social cohesion and undermining ethical foundation sustaining IPR protection.

All these issues call for a more sophisticated and accountable government and demand a more liberalized political sphere, which would be a systematic and strategic approach to tackling some of the new inequalities than such periodic outbursts of rioting and demonstrations.⁴⁹ However, many commentators remain less optimistic about China's commitment to adhering to the notion of liberalization and the rule of law.⁵⁰ The only practical way to influence the process of democratization in China is to work cooperatively and closely with the central government, but even here the consequences remain uncertain.

Apart from the cascading societal and political problems that have reshaped the philosophical thinking of Chinese citizens, China's rigid authorities over the functioning of religion contribute to the sprouting and growing of utilitarian impulse and subsequently hinder its ability to establish an effective enforcement mechanism. The father of modern international law, Hugo Grotius, asserted that, in the same sense that international law maintains religious toleration, religious toleration sustains a stable international order.⁵¹ Freedom of religion is considered by many to be a fundamental human right.⁵² As an entrenched international

⁴⁹ Anthony Saich, *Beijing's Balancing Act on Reform*, FIN. TIMES, Nov. 4, 2002 (mentioning that substantive political reform would strengthen the legitimacy of party rule, and a "more democratic system would provide a residual legitimacy that might help the regime to negotiate the difficult transition ahead.").

⁵⁰ Indeed, over the past years, flurries of expectant hopes have been repeatedly dashed by the eventual resurgence of conservative forces, raising a perennial question: how could China be able to continue transforming itself into a more liberalized and democratic country? See Karen Halverson, *China's WTO Accession: Economic, Legal and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 363-65 (2004) (demonstrating the intractability and inflexibility of China's political reform).

⁵¹ Myres S. McDougal et al., *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination*, 74 MICH. L. REV. 865, 879 (1976) (echoing the sentiments of Grotius that "[t]he trends toward religious freedom and equality within national communities have...have brought about transnational expectations of religious liberty that, in turn, have strengthened national practice. Building upon the doctrine of natural rights as a source of transnational authority, Hugo Grotius (and other prominent international lawyers after him) emphasized that, in the same sense that international law is important to the maintenance of religious toleration, is religious toleration indispensable to a stable international order.").

⁵² The Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948, at the Palais

human right, it is recognized in all the important international human rights treaties and remains the focus of debate in a variety of international human rights bodies.⁵³ While the Chinese Constitution explicitly guarantees a citizens right to “freely choose and express their religious beliefs” and make clear their religious affiliations,⁵⁴ the Chinese government has demonstrated a continued reluctance to be flexible in its religious policies and provide a minimum guarantee for religious freedom. Dominated by socialist atheism, religion in China is commonly viewed as a

de Chaillot in Paris, France, defines freedom of religion and belief as follows: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.” See Universal Declaration of Human Rights, G.A. Res. 217A(III), ¶18, U.N. Doc A/810 (Dec. 10, 1948) (outlining the basic principles of the modern human rights regime).

The International Covenant on Civil and Political Rights, a U.N. treaty based on the Universal Declaration of Human Rights created in 1966, expands its prior statement to address the manifestation of religion or belief. Article 18 of this Covenant includes four paragraphs relating to religious belief:

- 1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching, 2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice, 3) Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, 4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

International Covenant on Civil and Political Rights, art. 18 G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) 999 U.N.T.S. 171, 6 I.L.M. 368.

⁵³ See LEONARD M. HAMMER, *A FOUCAULDIAN APPROACH TO INTERNATIONAL LAW: DESCRIPTIVE THOUGHTS FOR NORMATIVE ISSUES* 73 (2007) (discussing the freedom of religion).

⁵⁴ Article 36 of the Chinese Constitution stipulates that “Citizens of the People’s Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination.” XIAN FA art. 36 (1982) (P.R.C).

perpetuation of feudal superstitions and has been somewhat monsterized.⁵⁵ The tight control over religious practice has isolated Chinese religious believers from the rest of the religious world, which in turn largely accounts for the lack of ethical belief among a large percentage of the population, particularly the younger generation, both in the rural and urban regions. As a result, a large percentage of the population, particularly the youth, lacks religious beliefs and the ethical support that those beliefs provide. In the meantime, with the disintegration of Communism as a means of meeting social aspirations, there are few adherents of Marxism, resulting in a situation where China has entered upon a period of a "belief vacuum."

The freedom of religious belief is a universal and essential human right. Although religion and law are usually viewed as two elements of moral values with distinct social identities, in reality, religious faith and legal order inevitably interact.⁵⁶ Of course while it is too arrogant to assert that morality would be impossible without religious belief, it may be true that, under religious principles, individuals are more inclined to adhere to an ethical code and bind themselves by social, legal or moral ties. The imposition of law by its own force or momentum is tenuous. Without religious belief and faith, there would be no developed multidimensional systems to provide a firm foundation to enable an enduring belief in law and, as such, no self-disciplining consciousness to constrain counterfeiting and piracy.

Another generic reason for the observed instability is the government's inability to safeguard the freedom of speech. Freedom of speech is a fundamental personal liberty, and is regarded as one of society's most cherished rights.⁵⁷ However, while China has undergone dramatic economic and social changes, the central government has endeavored to maintain strict control

⁵⁵ See CONGREGATIONAL-EXECUTIVE COMMISSION ON CHINA, ANNUAL REPORT 16-20 (2002), available at <http://www.cecc.gov/pages/annualRpt/2002annRptEng.pdf>.

⁵⁶ See, e.g., HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 209-20 (1993) (describing the linkage between religion and legal order).

⁵⁷ See Symposium, *Achieving A Workable Definition of Free Speech: A Symposium on the Nature and Scope of the Constitutional Guarantee of Freedom of Expression*, 47 J. URB. L. 395, 396 (1969) (mentioning that freedom of speech is essential to democracy).

over the media.⁵⁸ China adopts an extensive licensing system to monitor publication of news and opinions on matters of public concern, and the authorities place severe restriction on imported movies, books, and audiovisual products.⁵⁹ Chinese mass media, which is criticized as the mouthpiece (*houshe*) of the Party, has been squeezed into the mission of issuing propaganda.⁶⁰ A recent example is the proposed national emergency law which has drawn a great deal of attention in China since June 2006.⁶¹ This proposed law, which has the alleged objective of enhancing disaster responsiveness and ensuring administrative responsibility,⁶² includes a media clause that would impose heavy fines on news media reporting without authorization on natural disasters, public health incidents or industrial accidents.⁶³ A major controversy was stirred up over this media clause of the emergency law, particularly for those approaching this issue from the standpoint of liberal press theory. Apart from traditional media, the government has a longstanding set of policies restricting information and has particularly attempted to implement controls to prevent the public's access to politically sensitive information by the mandatory use of internet filtering technology.⁶⁴

⁵⁸ See CONGREGATIONAL-EXECUTIVE COMMISSION ON CHINA, *supra* note 55, at 32-33 (demonstrating that although people in China are generally free to express their discontent with their government, anyone wishing to publish sensitive information or ideas may face legal and economic barriers).

⁵⁹ For a precise discussion of the rules and regulations of information control policy in China, see Anna S. F. Lee, *The Censorship and Approval Process for Media Products in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 127 (1997); Mary L. Riley, *The Regulation of the Media in China*, in CHINESE INTELLECTUAL PROPERTY: LAW AND PRACTICE 355 (Mark A. Cohen et al eds. 1999); Yu, *supra* note 23, at 28-32.

⁶⁰ See *id.*, at 29 (noting that the media is among the most heavily regulated industries in China).

⁶¹ See *Emergency response law "will ensure accurate info"*, XINHUA NEWS AGENCY, July 4, 2006, available at http://news.xinhuanet.com/english/2006-07/04/content_4790522.htm (last visited Nov. 29, 2008).

⁶² *Id.*

⁶³ *Id.* (reporting that Article 57 stipulates that "News media violating certain rules to report the development and handling of emergencies without authorization, or releasing fraudulent reports, will be fined between 50,000 yuan (U.S. \$6,250) and 100,000 yuan if the reports lead to serious consequences.").

⁶⁴ See Jonathan Zittrain & Benjamin Edelman, *Hard Law School Empirical Analysis of Internet Filtering in China*, available at <http://cyber.law.harvard.edu/filtering/china>.

In China, “freedom of speech” is a *de jure* right prescribed by the Constitution.⁶⁵ However, it is not *de facto* an inherent individual liberty, but rather a hypocritical vehicle for citizens to sing a collective song of praise. Many Chinese are vulnerable to publish information that authorities might deem sensitive.⁶⁶ As a result, “coin it in silence” (*men sheng fa da cai*), which means making fortunes quietly without being associated with politics, has been embraced as a motto by many Chinese. In this circumstance, unless genuine effort is being taken by the government, it would be naturally assumed that people are well positioned to reap the benefits of piracy as a means of “making fortunes quietly.”

2.3. *Neither Fish Nor Fowl: Private Rights under Public Ownership*

Private property rights are among the fundamental concepts upon which Western civilization rests and IPR was born out of a predominantly Western concept of private property rights, individualism, and personal freedom.⁶⁷ In an international context, the objectives of TRIPs are to promote liberalization of the global trading system while ensuring the private monopoly rights of intellectual property proprietors by curbing counterfeiting and eliminating piracy.⁶⁸ The first sentence of the preamble of the TRIPs Agreement affirms these goals by explicitly identifying the need to protect private interests by committing members to a shared objective of “[d]esiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights.”⁶⁹

⁶⁵ See XIAN FA, art. 35 (1982) (P.R.C) (according to article 35 of the Chinese Constitution, Chinese citizens “enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration”).

⁶⁶ See Yu, *supra* note 23, at 29 (noting the Chinese government’s view that politically sensitive materials in the media could destabilize the regime and are thus regulated tightly).

⁶⁷ See Eric M. Griffin, *Stop Relying on Uncle Sam! – A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 182 (1998) (illustrating that in Chinese culture, copying is not seen as harmful but instead as a form of flattery).

⁶⁸ General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs], Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81.

⁶⁹ *Id.* at pmb. (emphasis omitted).

However, influenced by communist ideology and collectivist mentality, the Chinese community has traditionally classified private rights as individualization, which is considered disgraceful and shameful.⁷⁰ Unlike most developed countries which hold sacred private rights, emphasizing their abstract and universal nature, the Constitution of China does not explicitly address IPR.⁷¹ It does, in contrast, place a strong emphasis on the public interest in terms of rights and responsibilities.⁷² Despite the fact that Marxist fundamentalism has been superseded by the new “pragmatic” Chinese leadership, the legacy of communitarian thought in itself has entrenched inertia. As Weatherley explains, one possibly significant point to be drawn from the Chinese practice and preference of defining rights is the unequivocal rejection of the concept that rights are universal.⁷³ In a similar vein, Palmer observes that, a notable characteristic of China’s legal landscape is “the government’s establishment of the interrelated doctrines of legal equality and political inequality in the context of civil obligations.”⁷⁴ The comprehension of general private rights is nascent and, as such, the legislation for protecting them is in some senses rudimentary. Despite the introduction of a 2004 amendment to China’s Constitution that provides protection to private property,⁷⁵ China still has a long road ahead to streamline their policies and deepen their ongoing reforms, such as integrating the amended provisions into existent laws and regulations.

⁷⁰ Indeed, in Chinese society, values to the individual are secondary to the values that would accrue to the communities. While China is gradually re-introducing notions of private ownership, the process is likely to be lengthy and tortuous. WEATHERLEY, *supra* note 10, at 93.

⁷¹ See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 18-21 (1967).

⁷² See XIAN FA arts. 10, 13 (1982) (P.R.C.) (emphasizing the “public interest” in terms of expropriation and requisition of land and private properties).

⁷³ See WEATHERLEY, *supra* note 10, at 107 (stressing the importance of the collective interest over that of the individual).

⁷⁴ Palmer, *supra* note 19, at 454.

⁷⁵ On March 14, 2004, China’s NPC adopted a series of landmark amendments to the state Constitution, including special provisions that deliver protections to human rights and private property rights. For example, Article 33 of the amended Constitution has a third paragraph inserted, which reads “The State respects and preserves human rights.” See Xian Fa, art. 33 (2004) (P.R.C.), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381906.htm (last visited Nov. 21, 2008).

2.4. *Institutional Anachronism: Centralized Bureaucracy and Dispersed Responsibilities*

It is an interesting phenomenon that the management of counterfeiting and piracy has, in many circumstances, outstripped official punitive measures.⁷⁶ Regardless of the financial aspect, the low efficiency of the entrenched bureaucracy is an important reason. The continued rhetoric of those who lobby for external pressure against China over a strengthened domestic enforcement reveals an overwhelming degree of ignorance about the “Chinese exceptionalism” in implementing international norms through the conservative and bureaucratic colossus.⁷⁷

Effective enforcement calls for optimal allocation of responsibilities and resources among different authorities to ensure transparency and accountability at various levels. Unfortunately, China’s vertical administrative system demonstrates significant scope for overlapping jurisdictions between enforcement institutions, which exhibit a substantial degree of heterogeneity across regions and result in parallel enforcement mechanisms.⁷⁸ A notable challenge in practice falls in the determination as to who asserts jurisdiction over the enforcement, which, in many instances, results in continuous bureaucratic turf battles among various national ministries and between central and local government administrations.⁷⁹ For example, the Ministry of Commerce (“MOFCOM”)—Chinese chief negotiator equivalent to the United States Trade Representative (“USTR”)—acts merely as a coordinator over enforcement agencies and has no direct authority over domestic enforcement as the USTR does. This has led to

⁷⁶ See *Transitional Review Mechanism of China*, Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/371 (Aug. 29, 2002) (evaluating the transparency and transposition of Chinese trade regulations and noting the strong capabilities of pirates and weak official punitive actions).

⁷⁷ ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 2, 22–34 (2005) (noting that the application of foreign pressure as diplomatic tool, has to be tailored into China’s circumstances).

⁷⁸ Daniel C. K. Chow, *Enforcement Against Counterfeiting in the People’s Republic of China*, NW. J. INT’L L. & BUS. 454–55 (2000).

⁷⁹ Daniel C. K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L. Q. 1, 32 (2000).

instances where effective enforcement has been frustrated and counteracted by bureaucratic rivalries.⁸⁰

Having successfully carried out its mission of promoting a positive result from the WTO negotiations through the domestic bureaucracy, MOFCOM has "exhausted its political capital" and has little goodwill on which to rely to ensure effective implementation of the result.⁸¹ Accordingly, it has entered into a new phase of implementing these established agreements, and thus it is the turn for other ministries such as the State Administration for Industry and Commerce ("SAIC") to translate these agreements into action.⁸² However, due to the lack of expertise and because of the customary departmental protectionism, the latter is liable to impede appropriate initiatives and therefore decrease working efficiency.⁸³

Not surprisingly, since its establishment in the late 1970s, the Trademark Office has remained under the control of SAIC, rather than being brought within the responsibility of the State Intellectual Property Office,⁸⁴ which oversees only the patent matters.⁸⁵ The Trademark Review and Adjudication Board ("TRAB"),⁸⁶ which should be independent from the Trademark Office, is nevertheless under the control of SAIC.⁸⁷ For example,

⁸⁰ See Chow, *supra* note 78, at 453 (noting problems of interpretation, application, and enforcement of the law due to a huge government and regulatory apparatus).

⁸¹ Mark L. Clifford, *China's Fading Free-Trade Fervor*, BUSINESSWEEK ONLINE, June 5, 2002, http://www.businessweek.com/bwdaily/dnflash/jun2002/nf2002065_4830.htm.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ The Chinese Patent Office was established in 1980 and was renamed as the State Intellectual Property Office in 1998. See, e.g., SIPO, State Intellectual Property Office of the P.R.C., http://www.sipo.gov.cn/sipo_English/ (last visited Dec. 1, 2008).

⁸⁵ Jay Sha, *Summary of Changes of Chinese Trademark Law*, Jeekai & Partners, Beijing China (2001).

⁸⁶ The TRAB, an administrative organ established by SAIC, is responsible for the review and adjudication of trademarks with respect to the determination of the attribution of the trademark, exercising the right of final adjudication on matters of trademark review. A decision of the TRAB is, however, subject to judicial review. See Rules for Trademark Review and Adjudication, (promulgated by the State Admin. of Indus. and Commerce, Sept. 17, 2002, effective Oct. 17, 2002) LAWINFOCHINA, http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2199&col_no=119&dir=200603 (last visited Nov. 21, 2008) (P.R.C.).

⁸⁷ Sha, *supra* note 85.

“prior right” or malicious anticipatory registration of marks of fame is stipulated in the Trademark Law (2001)⁸⁸ in an effort to prohibit the registration of any mark copying or imitating other prior lawful rights.⁸⁹ These “prior rights” are only recognized and accepted by some authorities. The registration of business names, for instance, is managed at different administrative levels and, at a local level, limited to a certain geographical area.⁹⁰ The business name registration is governed separately and the resistance to recognition of such “prior rights” is far from rare among local AICs which are in charge of the registration.⁹¹

The Administration for Quality Supervision, Inspection and Quarantine (“AQSIQ”), which replaced the former State Bureau of Quality and Technical Supervision, is also empowered to handle infringements of registered trademarks as part of its duty to ensure Chinese product quality and standards.⁹² However, since the

⁸⁸ See Trademark Law arts. 9, 31 (promulgated by the Standing Comm. Fifth Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983) LAWINFOCHINA, <http://www.lawinfochina.com/Wbk/displayModeTwo.asp?id=5&keyword=> (last visited Dec. 11, 2008) (P.R.C.).

⁸⁹ See Alexis Weissberger, Note, *Is Fame Alone Sufficient to Create Priority Rights: An International Perspective on the Viability of the Famous/Well-Known Marks Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 739, 771 (2006) (discussing recent changes in Chinese trademark law attempting to provide protection for unregistered but well-known foreign marks); Sha, *supra* note 85.

⁹⁰ In China, the SAIC is responsible for the approval of business names containing such indications as “Zhongguo” or “Zhonghua” (both meaning China), “Guojia” (state) or “Guoji” (international), as well as those excluding geographical indications. Accordingly, local AICs are responsible for the approval of business names containing a certain geographical indication at the same level. See Provisions for the Administration of Enterprise Name Registration (promulgated by State Admin. for Indus. and Commerce, July 22, 1991, effective Sept. 1, 1991) Fagui Huiban, (P.R.C.) (outlining procedures for name registration for enterprises).

⁹¹ Sha, *supra* note 85.

⁹² In order to keep pace with international standards in light of the accession to the WTO, a new legal and administrative enforcement organ named the General Administration of Quality Supervision, Inspection and Quarantine was established in April of 2001 through the merger of the existing State Administration for Entry-Exit Inspection and Quarantine and the State Quality and Technical Supervision Bureau. The AQSIQ in turn created the Standards Administration of China (“SAC”) and the China National Regulatory Commission for Certification and Accreditation (“CNCA”), both of which operate under the supervision of AQSIQ. The AQSIQ also supervises the WTO TBT Inquiry Centre, which operates as a liaison between China and the WTO. For more information, please see the AQSIQ website, General Administration of Quality Supervision, Inspection and Quarantine of P.R.C., <http://english.aqsiq.gov.cn/AboutAQSIQ/> (last visited Dec. 1, 2008).

AQSIQ can only enforce the Product Quality Law, the most an IPR proprietor can expect is the fake goods being confiscated or destroyed without remedy.

Similar problems can also be identified with regard to copyright. The National Copyright Administration (“NCA”) of China, the State Council’s copyright administrative control department, is responsible for, *inter alia*, the implementation of national copyright laws and international treaties, investigation of infringement cases, administration of external copyright relations and guidance for local authorities.⁹³ However, the NCA shares a “two in one” (*yige bumen liangkuai paizi*) administrative mechanism with the General Administration of News and Publication. The operation of this dual structure has inevitably led to insufficient resources and expertise and its arbitrary and incoherent decisions. Moreover, some enforcement bodies, such as SAIC and the NCA, have seen cutbacks in staff and resources over the past years in light of the streamlining and restructuring initiatives of the government.⁹⁴ For example, as of early 2005, China’s Trademark Office, which had a backlog of 20,000 long-pending trademark cases, was still hearing complaints which were filed in 1999.⁹⁵

In July 1994, the Chinese government established within the State Council the Intellectual Property Executive Conference (“IPEC”), with similar subordinate committees at both the ministerial and provincial levels.⁹⁶ The IPEC is intended to address major IPR issues and related strategies, decision-making, legislation and enforcement, and international consultation.⁹⁷ However, evidence has mounted that it lacks necessary resources to carry out its organizational mandate.⁹⁸ The Acting Office of

⁹³ National Copyright Administration of the People’s Republic of China, <http://tinyurl.com/62vgow> (last visited Nov. 21, 2008).

⁹⁴ Chris Buckley, *Pushed on Patents, China Shoves Back*, INT’L HERALD TRIB., Jan. 14, 2005, at 13.

⁹⁵ *Id.*

⁹⁶ Duan Ruichun, *China’s Intellectual Property Rights Protection Towards the 21st Century*, 9 DUKE J. COMP. & INT’L L. 215, 217 (1998).

⁹⁷ *Id.*

⁹⁸ Wei Lu, *Jiaqiang Xietiao Jizhi Jianquan Zhishi Chanquan Quanli Gongzuo Tixi [Consolidate the Coordinating System to Improve the Intellectual Property Rights Management]*, SIPO, Oct. 10, 2003, http://www.cpo.cn.net/zcll/dtbd/gndt/t20031010_20092.htm (mentioning that, having been incorporated into the SIPO, the IPEC ceased to work in 1998 due to the lack of recourses backed by high-level political support).

IPEC was initially attached to the Ministry of Science and Technology and was soon transferred to the renamed State Intellectual Property Office in 1998. Since then, the IPEC ceased to function at the state level.⁹⁹

Ten years later, in 2004, the State Council set up another similar IPR enforcement mechanism named National Working Group for IPR Protection (“NWGIPR”), where Vice Premier Yi Wu was nominated as the Director.¹⁰⁰ This “Working Group” is composed of various administrative and judicial authorities, namely the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Commerce, Ministry of Public Security, State Administration for Industry and Commerce, National Copyright Office, State Intellectual Property Office and General Administration of Customs.¹⁰¹ NWGIPR is intended to enhance cooperation and coordination of IPR enforcement throughout the country and oversee the handling of major cases involving IPR protection.¹⁰²

One significant development, compared with the IPEC, is that, under the uniform deployment of the NWGIPR, a cross-department IPR enforcement collaboration mechanism has been established to maximize communication and coordination among different dimensions.¹⁰³ The Acting Office of the NWGIPR, in conjunction with other relevant departments, has formulated and released China’s Action Plan on IPR Protection 2006, and China’s Action Plan on IPR Protection 2007.¹⁰⁴ Under the uniform leadership of the central government, the NWGIPR has initiated a nationwide publicity campaign, aiming at altering and reshaping

⁹⁹ *Id.*

¹⁰⁰ See *Chinese Vice-Premier on China’s IPR Protection*, PEOPLE’S DAILY, Jan. 14, 2005, http://english.peopledaily.com.cn/200501/14/eng20050114_170654.html (announcing Chinese government’s resolve to protect intellectual property rights).

¹⁰¹ See Ruichun, *supra* note 96, at 217 (referring to IPEC’s collaboration with an inter-agency task force).

¹⁰² *Id.*

¹⁰³ Wu Yi, Vice Premier, State Council (P.R.C.), the China-U.S. IPR Roundtable (Jan. 13, 2005) <http://bzb2.mofcom.gov.cn/aarticle/speechactivity/200506/20050600134741.html> (last visited Dec. 1, 2008).

¹⁰⁴ See *China’s Action Plan on IPR Protection 2006* (P.R.C.), <http://www.china.org.cn/english/China/167370.htm> (last visited Dec. 1, 2008) (defining China’s goals for protecting intellectual property rights in 2006); *China’s Action Plan on IPR Protection 2007* (Working Group Office, Apr. 6, 2007) (P.R.C.), <http://www.china.org.cn/english/China/207534.htm> (last visited Dec. 1, 2008) (outlining China’s 2007 intellectual property rights protection plan).

public perception towards IPR protection.¹⁰⁵ Pursuant to the requirement of the central government, all provinces, autonomous regions and municipalities have established their own branches of NWGIPR as state executive agencies overseeing the enforcement of IPR in various regions.¹⁰⁶

To form such a cross-ministry entity comprising several competent ministries and judicial authorities is without doubt a major undertaking. As a sign of greater efforts to protect IPR, subsequent to the establishment of the NWGIPR, the State Council launched a prolonged anti-infringement campaign scheduled from September 2004 to August 2005.¹⁰⁷ During the campaign, special attention was given to seven areas where large amounts of fake products were identified—Beijing, Shanghai, Zhejiang, Jiangsu, Shandong, Guangdong and Fujian.¹⁰⁸ According to the statistics, during only the first two months of this campaign, the police investigated more than one thousand IPR infringement cases, involving 550 million Chinese Yuan (equivalent to 66.5 million U.S. dollars).¹⁰⁹ Meanwhile, the Beijing Administration for Industry and Commerce (“AIC”) recently cracked down on Xiu Shui Market, a renowned tourist spot adjacent to embassy area where many named brands were available at a fraction of the normal retail price.¹¹⁰

To launch a nationwide campaign is, without doubt, an effective way to crack down on IPR infringements and this has proved to be one of the most potent approaches to handling counterfeiting and piracy in China. Indeed, in such a country where politics is prioritized and propaganda plays a big part, gearing up the state’s massive bureaucratic apparatus and whipping up widespread sentiments and supports are common

¹⁰⁵ Ministry of Commerce, People’s Republic of China, *Marked Progress was Made in IPR Protection Work in China*, Jan. 20, 2005, available at <http://preview.english.mofcom.gov.cn/aarticle/counselorsreport/europereport/200501/20050100015005.html>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 2005 Daji Daoban Yinxiang Zhipin Zhuanxiang Xingdong Chuzhan Gaojie [The Cracking Down Campaign Has Met its First Goal], SHDF, available at <http://www.gapp.gov.cn/cms/html/21/367/200512/444748.html>.

¹⁰⁹ Chinese Vice-Premier on China’s IPR Protection, *supra*, note 100.

¹¹⁰ See *Xiu Shui Partially Demolished*, PEOPLE’S DAILY, Nov. 14, 2004, http://english.people.com.cn/200411/13/eng20041113_163780.html (announcing the destruction of Beijing’s famous Silk Market).

ways for the government to advance a hard-to-discern goal. This explains the circumstances in which campaigns for IPR protection are normally organized and coordinated by a mixed executive group consisting at key members of different department agencies and, sometimes, even judicial bodies are included in this mixed executive group.¹¹¹ However, this kind of anti-infringement campaign is policy-oriented in response to the external diplomatic pressure, and thus has only intermittent and temporary effect.

2.5. *Climbing a Tree to Seek Fish: Pursuing Transparency in "Camera Obscura"*

Transparency is an important WTO principle,¹¹² and, to this end, maintenance of a case-reporting system for both administrative and judicial mechanisms is a necessity.¹¹³ Without such a system, powers are apt to be abused and efficiency hindered.¹¹⁴ Transparency as a WTO principle had been anticipated to be used as leverage to promote predictability and significantly alter the image of China's legal system upon its WTO accession. While China has been implementing systematic reform towards its legal system, this expectation appeared to be over-optimistic.

Indeed, despite the public enthusiasm for building the principle of rule of law in administration and judiciary, transparency in both administrative and judicial mechanisms in China remains elusive. For example, the government's legal gazette often fails to provide updated notice of changes in administrative rules and regulations and the public has no steady and direct access to legal databases.¹¹⁵ Moreover, the particular nature of China's legal system is largely reflected in what is

¹¹¹ In China, the judicial body at the central level consists of the Supreme People's Court and the Supreme People's Procuratorate.

¹¹² Key WTO transparency provisions include GATT Articles 3 and 10, and TRIPs Article 63, which contain substantively similar obligations involving trade in goods, services and intellectual property respectively.

¹¹³ Yonehara, *supra* note 12, at 100.

¹¹⁴ *Id.* at 101.

¹¹⁵ See Reiko R. Feaver, Comment, *China's Copyright Law and The TRIPs Agreement*, 5 J. TRANAT'L L. & POL. 431, 455-56 (1996) (describing lack of transparency of Chinese rules and regulations). See also Yonehara, *supra* note 12, at 101 (stating that the government's failure to note changes in administrative rules and regulations in the legal gazette does little to create an opportunity for the rule of law).

categorized as internal (*neibu*) provisions and interpretations, which are normally unavailable to the public and which may be in contradiction with published laws and regulations.¹¹⁶

The lack of transparency, to a large extent, can be attributed to the Chinese cultural preference for organizing systems by human relationship instead of regulation.¹¹⁷ Political compromise and consensus are usually reached in “smoke-filled rooms” rather than in a public arena. In a system driven by personal favors characterized by “attaining objectives in camera obscura” (*anxiang caozuo*), transparency becomes problematic. As a consequence, the enforcement of IPR by relevant agencies has become a major structural problem within the bureaucracy, a system with a high degree of discretion based largely on “back door” political manipulation.¹¹⁸ The intention of circumventing the excessive bureaucratic red tape leads to reluctance in addressing IPR infringements, and many IPR proprietors have to seek remedy and assistance without going through legal proceedings.¹¹⁹

2.6. *Political Autocracy and Economic Decentralism: Central Government is Ambitious Whereas Local Authorities are Ambiguous*

With its comprehensive legislative structure, China has the good will to eliminate infringements, but the central leaders sometimes have difficulties convincing local authorities and controlling their commercial behavior.¹²⁰ In local regions, the saying goes, “The mountains are high, and the Emperor is far away” (*shan gao huangdi yuan*).¹²¹ The vast extent of land and the

¹¹⁶ Patrick H. Hu, *The China 301 on Market Access: A Prelude to GATT Membership?*, 3 MINN. J. GLOBAL TRADE 131, 144 (1994).

¹¹⁷ *Id.*

¹¹⁸ See Lubman, *supra* note 47, at 390-91 (discussing the broad discretion granted to Chinese administrative agencies and their potential for arbitrariness).

¹¹⁹ See Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 11 (1998) (comparing China and Russia’s intellectual property regimes and piracy with respect to economy, political history and ideology, culture, and adequacy of the legal system to enforce the regimes).

¹²⁰ Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can’t Make It Drink*, 37 VA. J. INT’L L. 223, 253 (1996).

¹²¹ Yonehara, *supra* note 12, at 82 (internal citation omitted).

sheer size of China's population constrains effective monitoring of implementation of the national strategy towards IPR protection.¹²²

The intractability encountered by Chinese central policymakers in bringing their initiatives into full play has been a common problem in China.¹²³ Ironically, the massive spread of regionalism may have been inadvertently fostered by the central government in Deng's era,¹²⁴ as one short-term strategy to encourage certain people and certain regions¹²⁵ to prosper before others.¹²⁶ Since the end of the 1970s when the "open-door" policy was initiated, Chinese leaders have viewed the devolution of central authority to local regions as a necessary means of fostering economic growth.¹²⁷ Local authorities have been equipped with considerable decision-making power in establishing necessary institutions and conducting independent economic activities.¹²⁸ It is the policy of decentralization and differentiation that fueled the emergence of the Special Economic Zones ("SEZ") in the southern provinces.¹²⁹ In the decade since the SEZ was set up, "the Chinese political structure has been transformed from one that was once reputed for its high degree of centralization and effectiveness into one in which the center has difficulty coordinating its own agents' behavior."¹³⁰

¹²² *Id.*

¹²³ Donald Clarke, *Private Enforcement of Intellectual Property Rights in China*, 10 (2) NBR ANALYSIS 33 (1999).

¹²⁴ In 1978, the landmark Third Plenary Session of the Tenth Central Committee of the Communist Party encouraged local political autonomy and the economic decentralization as a strategy to recover the national economy. *See, e.g., CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM* 5 (David S. G. Goodman & Gerald Segal eds., 1994) [hereinafter *China Deconstructs*] (noting that "[d]ecentralization and the introduction of market force suggest in general terms that the centers of the economic power are moving away from the centre to the localities and away from the CCP and the government").

¹²⁵ This differentiated policy reflected Deng Xiaoping's well-known motto, "allowing certain part of the country to be developed first (rang bufen diqu xian fu qi lai)." Coastal and border areas were encouraged to make full use of their geopolitical locations and comparative advantages in an effort to attract foreign trade and investment. *Id.* at 2.

¹²⁶ Willard, *supra* note 3, at 417.

¹²⁷ *See, e.g., CHINA DECONSTRUCTS, supra* note 124, at 2; *see also* Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L. J. 1, 17 (1996) (describing the relationship between rule of law and intellectual property rights).

¹²⁸ CHINA DECONSTRUCTS, *supra* note 124, at 2-5.

¹²⁹ *Id.* at 2.

¹³⁰ Lubman, *supra* note 47, at 385 (quoting Shaoguang Wang, *The Rise of the Regions: Fiscal Reform and the Decline of Central State Capacity in China*, in THE

When the central government released its rigid control over the local authorities in an effort to facilitate economic growth, the steady growth of regional power bases and the gradual erosion of central authority turned out to be a nightmare that Chinese leaders would never have considered possible.¹³¹

In this context, it is not surprising that central government works in earnest while local authorities remain unconvinced that a result will follow. As a consequence, central government is naturally facing domestic resistance in its effort to promote IPR protection.¹³² Driven by economic interests vested in different regions, relevant organizations and departments are more or less playing the role of conniving with the spread of the counterfeiting and piracy. Cutting off the profit chain behind the counterfeits is key to curbing the problems.¹³³

The central government has attempted to “delocalize” (*shouquan*) power over the past years.¹³⁴ In September 2006, Chen Liangyu was ousted from his position as the Party Commissioner of Shanghai.¹³⁵ This has been arguably interpreted as a concrete step of the central government to tackle regionalism.¹³⁶ While measures are being taken, doubts still remain as to whether local protectionism can be eradicated eventually. Here little is possible without creating a truly independent legal system immune from administrative interference. There has, however, been little hint of making this a reality in the near future.

WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY 87, 109 (Andrew G. Walder ed., 1995).

¹³¹ *Id.*

¹³² Cheng, *supra* note 21, at 1979.

¹³³ *Id.* at 1982–83.

¹³⁴ See, e.g., Zhongyang Jiang Ba “Ren Cai Wu” Cong Difang Shouhui [The Central Government will Delocalize the Power in Managing Human, Material and Financial Resources], IFENG NEWS, Nov. 16, 2006, http://news.ifeng.com/mainland/200611/1116_17_33594.shtml.

¹³⁵ See Wu Zhong, *Out from Under Jiang’s Shadow*, ASIA TIMES, Sept. 27, 2006, <http://www.atimes.com/atimes/China/HI27Ad01.html> (mentioning that Chen’s removal “certainly is a great help in checking the increasingly rampant regionalism enabling Beijing’s macroeconomic control policy to be faithfully carried out at the local level”).

¹³⁶ *Id.*

2.7. *Dynamic Intellectual Property under Rigid Education Model*

The educational regime in China often acts in a negatory manner in promoting the evolution of collectivist mentality and instilling an ethos hostile to counterfeiting and piracy.¹³⁷ On the contrary, it fuels the perception that the concept of intellectual property is exotic (*bolaipin*) and that intellectual creation is the property of human civilization.¹³⁸ As a result, while intellectual property has become popular jargon in China, the overwhelming majority of Chinese officials and citizenry do not genuinely comprehend the general principles of intellectual property law and would be antipathetic to theories about the role of intellectual property law in encouraging creativity and contributing to economic well-being.¹³⁹

Moreover, the special Chinese education model is largely built on faultless recitation of classical works in a process of rote learning,¹⁴⁰ which is typically considered as mechanical memorization.¹⁴¹ Those who can recite the classical works and cram for their examinations are usually assured academic success and public recognition.¹⁴² In such a force-fed environment, students are ingrained with a plenitude of information and treated as subservient repositories of knowledge.¹⁴³ This education model arguably hinders original thought and fosters a tendency of imitation rather than creation.¹⁴⁴

2.8. *“Rule of Law” or “Rule by Law?”: Struggle of the Judiciary in Adhering to “the Correct Political Orientation”*

In China, the standards adopted by the courts for calculating economic damages tied to piracy—an essential factor for making

¹³⁷ Lingdi Zhu, *Cong Majang Duize de Bentuxing Kan Zhongguo Zhishi Chanquan Fa Yizhi* [Legal Transplant of Intellectual Property Law in China: Reflections from the Indigenous Nature of the Rule of Majang], LEGAL DAILY, Dec. 2, 2004, available at <http://www.china.com.cn/chinese/OP-c/719075.htm>.

¹³⁸ *Id.*

¹³⁹ Cheng, *supra* note 21, at 1998.

¹⁴⁰ Griffin, *supra* note 67, at 183.

¹⁴¹ See N. Wingrove, China Traditions Oppose War on IP Piracy, 38(3) Research-Tech. Mgmt. 6-7 (1995) (summarizing the challenges faced by U.S. intellectual property rights proponents in China).

¹⁴² Griffin, *supra* note 67, at 183.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

ultimate prosecutorial decisions—are normally based on the value of the infringing products in the pirate market rather than the value in the legitimate market.¹⁴⁵ As a result, the low value of judicial fines and penalties are frequently viewed as “paltry” and regarded by infringers as “mere cost of doing business.”¹⁴⁶ As has been reported, Microsoft has prevailed in taking legal actions against infringements, resulting in an award for compensation of only \$2,500, which is controversially low.¹⁴⁷ Sega Enterprises sued for punitive damages and a permanent injunction and was awarded \$3,000 as compensation.¹⁴⁸ The lack of commitment towards punishing infringers has only encouraged them to become bolder and put a premium on committing infractions.¹⁴⁹

More importantly, it is culturally acceptable within Chinese society for violators to “openly flaunt the law by relying on protection from friends [and relatives] in government.”¹⁵⁰ Social and personal networks with influential individuals are the most important resources and are usually more effective than legal provisions in seeking appropriate remedies.¹⁵¹ Indeed, as the Chinese proverb goes, “having friends in government is key to quenching everything intractable (*chao zhong you ren hao banshi*).” Although anecdotal, social network (*guanxi*) does play a significant and sometimes decisive role in shaping typical Chinese society.¹⁵² When encountering difficult problems, people tend to pursue solutions through personal relationships rather than legal support as the avenue of first recourse.¹⁵³ The use of such networks to interfere with judicial decisions is common in China. Certain cases

¹⁴⁵ See Excerpt from the IIPA Special 301 Recommendations (Feb. 24, 1997), <http://www.ipr.gov.cn/cn/zhuanti/meiIPzhuanlan/1997interIP301material.doc>.

¹⁴⁶ *Id.* at 29.

¹⁴⁷ Chen, *supra* note 22, at 16.

¹⁴⁸ *Id.*

¹⁴⁹ *Education Key to Protecting Inventors' Interests*, CHINA DAILY, July 26, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-07/26/content_351673.htm.

¹⁵⁰ Willard, *supra* note 3, at 430.

¹⁵¹ See Bejesky, *supra* note 1, at 474 (mentioning that “[p]ersonal connections with key individuals in emerging market countries are often more important than the written law”).

¹⁵² *Id.*

¹⁵³ *Id.*

are specifically categorized as “*guanxi* cases,” and are expected to receive differential treatment and favorable outcome.¹⁵⁴

Moreover, the judicial system in China is still dependent upon local administration in finance and personnel.¹⁵⁵ As Palmer describes, the judicial organ continuously serves as “an abiding stronghold of politicized administration of law,” as it was before legal reform.¹⁵⁶ Under “unified leadership of the Party,” a judge in China is de facto a governmental official, and it is apparent that most of the judges are complacent about the political status quo.¹⁵⁷ As a consequence, courts are still expected to follow instructions articulated by the Party Committee and the government, notably in the interim campaigns against crime, including anti-counterfeiting campaigns, which have proved to be a palliative rather than a cure.¹⁵⁸ Indeed, there is a slogan which has been given wide publicity within the Chinese judicial system: “keeping firmly to the correct political orientation of the judiciary (*jianchi shenpan gongzuo de zhengzhi fangxiang*).”¹⁵⁹ Succumbing to pressures from the local government, judges have politically been trained to be compliant, bearing in mind to “provide escort service” (*bao jia hu hang*) for local economy. Under this scenario, it is not unsurprising that judges may appear partial to local parties and government.¹⁶⁰

3. INITIATE FOUR SHIFTS: CLUES TO THE PERENNIAL CONUNDRUM

The above passage has demonstrated the rooted reasons for the IPR enforcement problems in China. One potentially interesting testing ground that has not been empirically explored in much depth is how to identify the dominating aspect of the targeted

¹⁵⁴ Lubman, *supra* note 47, at 396.

¹⁵⁵ See Cheng, *supra* note 21, at 1992 (discussing the Chinese judicial system’s “inability to render impartial judgments” due to its dependence on local officials).

¹⁵⁶ See Lubman, *supra* note 47, at 398 (explaining that Chinese judges act primarily as bureaucrats).

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ For example, Xiao Yang, the President of Supreme People’s Court, gave emphasis during an interview that the Court must respect the leadership of the Party conscientiously and keep firmly to the correct political orientation. See Xiao Yang, *Kexue Fazhan Fayuan Shiye, Tuoshan Chuli Shi Ge Guanxi* [Improving Judiciary through Coping with Ten essential Relationships], XINHUA NEWS, Jan. 5, 2006, available at http://news.xinhuanet.com/politics/2006-01/05/content_4014729.htm (last visited Sept. 26, 2006).

¹⁶⁰ Cheng, *supra* note 21, at 1992-93.

problem and discover the key to undoing the Gordian Knot. Here this article seeks to demystify the perennial conundrum and provide strategic solutions to the existing enforcement problems.

3.1. *Fostering a Shift in China from Rule by Law to Rule of Law*

Political freedom depends on economic freedom while economic freedom over a lengthy period of time serves as a catalyst for the creation of political freedom.¹⁶¹ China is currently experiencing a critical transition—economic reform has not only given impetus to economic prosperity but also fostered the growth of socio-economic inequality and complexity, such as regional disparities, rampant income gaps,¹⁶² and rising unemployment.¹⁶³ As a result, citizens suffer from spiritual emptiness and utilitarianism dominates many people's minds throughout the country. In addition, the restriction of religious belief and the tough control over freedom of speech have exacerbated the instability of the country. In this context, counterfeiting and piracy are by-products of the defective political infrastructure. Due to this background, it is of great significance for Chinese government to

¹⁶¹ Allison & Lin, *supra* note 35, at 774 (quoting Milton Friedman, *The Relation between Economic Freedom and Political Freedom*, in CAPITALISM AND FREEDOM 7 (1962)).

¹⁶² According to official statistics released by the International Poverty Reduction Centre in China, the absolute number of the poor people and the poverty rate remain staggeringly high despite the overall economic prosperity. By the end of 2004, the number of the poor rural residents who were unable to feed themselves adequately reached 26.1 million. The gap of income between the rich and the poor continued to widen. From 1992 to 2004, the ratio between the income of the urban residents and that of the rural residents increased from 2.33:1 to 3.2:1. See Gao Hongbin, Deputy Director General of the State Council Leading Group Office of Poverty Alleviation and Development, Address at Regional Policy Seminar on Pro-Poor Growth and Scaling Up Poverty Reduction in East Asia (May 18, 2005), <http://www.iprcc.org.cn/item/2006-09-25/50547.html>. China's income gap widened in the first quarter of 2005, with 10 percent of its richest people enjoying 45 percent of the country's wealth, while China's poorest 10 percent had only 1.4 percent of the nation's wealth. See *Income Gap in China Widens in First Quarter*, CHINA DAILY, June 19, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-06/19/content_452636.htm.

¹⁶³ In March 2005, 11 million urban residents, including those entering the workplace for the first time, ex-servicemen and college graduates, were awaiting employment. There are now 13 million unemployed and laid-off urban workers, and large numbers of surplus rural labourers need to find jobs in urban areas. See *China Expects Higher Urban Unemployment Rate in 2005*, PEOPLE'S DAILY ONLINE, Mar. 7, 2005, http://english.people.com.cn/200503/06/eng20050306_175774.html.

facilitate rule of law system and provide its citizenry minimum freedom of expression and religion. It is a stop-gap measure that can easily be undone by a strategic policy that encourages the creation of a sound environment for such development.

Nevertheless, China has demonstrated “a desire to join the global stage,” that will force China to “undergo a tortuous path . . . as it navigates from an isolated socialist country to a market-oriented, centrally-planned regime”¹⁶⁴ where individual liberty and private property rights are protected under the rule of law.¹⁶⁵ The political transition will inevitably continue, driven by China’s continuous economic dynamism, social challenges, and global integration.¹⁶⁶ While it is still too early to predict the future path of political reform in China, there are some encouraging signs that China’s integration with the outside world and the new policy initiatives of building a “harmonious society”¹⁶⁷ might, in time, lead to a stable form of political liberalization.¹⁶⁸

The 1990s have witnessed the beginning of what could well be an unprecedented wave of political reform with Chinese leadership addressing the significance to consolidate legal institutions,¹⁶⁹ “that might curb bureaucratic arbitrariness by defining the scope of administrative authority and providing remedies for the exercise of arbitrary power.”¹⁷⁰ During a visit to the United States in April 2006, Chinese President Hu Jintao sent an unusual signal at a press conference with his pledge to adopt democracy in the near future.¹⁷¹ Hu pointed out that, “in the light

¹⁶⁴ Yonehara, *supra* note 12, at 108.

¹⁶⁵ See Zhang, *supra* note 34, at 13 (describing measures taken by the new leadership that emphasizes promoting rule of law, protecting human rights and private property, and addressing the problems of the masses).

¹⁶⁶ *Id.* at 14.

¹⁶⁷ Proposed by President Hu Jintao, “[t]he CPC and the central government of China have made it an important task to build a harmonious society [*hexie shehui*], which served the fundamental interests of the people.” See *Building Harmonious Society CPC’s Top Task*, XINHUA NEWS, Feb. 20, 2005, http://www.chinadaily.com.cn/english/doc/2005_02/20/content_417718.htm.

¹⁶⁸ Halverson, *supra* note 50, at 363.

¹⁶⁹ As a symbolic move, China’s National People’s Congress amended the Chinese Constitution in 1999 to insert the “rule of law” into that document as a leading principle. See XIAN FA art. 5 (1999) (P.R.C.).

¹⁷⁰ Lubman, *supra* note 47, at 392.

¹⁷¹ At a joint press conference following the Hu-Bush Summit in Washington on April 20, 2006, President Hu noted that China would “continue to move ahead with the political restructuring and to develop a socialist democracy,” and it will

of China's own national conditions and the will of the Chinese people, [China will] continue to move ahead [with] political restructuring and to develop a socialist democracy."¹⁷² Unlike all of the previous statements of Chinese leaders that addressed "China's own national conditions," Hu, this time, emphasized both "China's own national conditions" and "the will of the Chinese people."¹⁷³ While for the time being it is too soon to be certain whether it is a slip of the tongue, a political show, or a consensus of Chinese leaders, the statement at least signaled a political move in the foreseeable future.

In addition, with the globalization of the domestic market and the popularity of the Internet,¹⁷⁴ it has become difficult, if not impossible, for the government to gain control over all spheres of society,¹⁷⁵ and the notion of "rule of law" is slowly filtering into people's minds. China's integration into the global trading system and its participation in the international rulemaking process will profoundly influence Chinese attitudes and ways of thinking.¹⁷⁶ China has no choice but to burn their bridges and carry out its

"further expand the orderly participation of the Chinese citizens in political affairs so that the Chinese citizens will be in a better position to exercise their democratic rights in terms of democratic supervision, democratic management, and the democratic decision-making." Press Release, Office of the White House Press Secretary, President Bush Meets with President Hu of the People's Republic of China (Apr. 20, 2006), available at <http://www.whitehouse.gov/news/releases/2006/04/20060420-1.html>.

¹⁷² *Id.*

¹⁷³ See Dehao Fang, Hu Jintao Zhenggai Shumoing Cang Xuanji [The Implications of Hu's Statement towards Political Reform], ASIA TIMES, Apr. 24, 2006.

¹⁷⁴ Sumner Lemon, Broadband Internet Usage Soars in China, ("The number of Chinese Internet users connecting to the Internet over broadband connections rose by 173 percent during 2003, according to the latest figures released by China Internet Network Information Centre ("CNNIC") in its Semi-annual Survey Report on the Development of the Internet in China.") (Jan. 16, 2004), http://www.infoworld.com/article/04/01/16/HNchinanetusage_1.html. In 2003, China was estimated to have 79.5 million Internet users, up 34.5 percent from 59.1 million users in 2002. See U.N. Conference on Trade & Dev. [UNCTAD], *E-Commerce and Development Report*, U.N. Doc. UNCTAD/SDTE/ECB/20 (2004) (prepared by John Burley), available at http://www.unctad.org/en/docs/ecdr2004_en.pdf (last visited Nov. 28, 2008).

¹⁷⁵ See Halverson, *supra* note 50, at 364-65 (addressing the widespread availability of information over the Internet as an important factor to limit the government's ability in controlling the public).

¹⁷⁶ See *id.* at 332 (stating that China's WTO membership will further deepen its integration into the world economy and strengthen its active role in the international economic arena).

ongoing reform despite the complexity and uncertainty entailed. China has become an institutional laboratory—the largest of its kind in human history—that is freighted with enormous implications for the future of the rule of law.¹⁷⁷

3.2. *Advocating Undiscounted Policy in Lieu of “Tying Policy”*

Tying sale is the practice of making the sale of one product conditional on the purchase of a second distinctive product.¹⁷⁸ It is a quota sale characterized by a combination package which is normally regarded as anti-competitive since it is implied that one or more components of the package are sold individually by other businesses as their primary product; this bundling of goods, therefore, would hurt those businesses.¹⁷⁹ Through the practice of “tying,” the supplier threatens to withhold the key product, thereby increasing sales of products that are considered undesirable.¹⁸⁰

In political terms, a “tying sale” refers to a policy which can only be applied in a conditional manner towards a particular country, while for other countries this restriction is not applicable.¹⁸¹ This conditional treatment serves as leverage to force or lure a country into accepting an unfavorable political decision or arrangement as an exchange for promise of certain performance. Under such circumstances, countries that are being unfairly treated will naturally suspect the sincerity of the motives. Due to lack of mutual credibility, it is difficult to push forward a constructive and cooperative relationship under the “tying” policy.

A noticeable example is the United States’ decision to link human rights and trade when dealing with China.¹⁸² In the

¹⁷⁷ Zhang, *supra* note 34, at 14.

¹⁷⁸ See, e.g., European Commission, Glossary: Tying or Tied Selling, http://ec.europa.eu/comm/competition/general_info/t_en.html (last visited Nov. 13, 2008).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ This “conditional” policy has been described by some developing countries as “double standards.” See, e.g., Randall P. Peerenboom, *Assessing Human Rights in China: Why the Double Standard*, 38 CORNELL INT’L L.J. 72 (2005) (discussing the human rights double standard as applied to China).

¹⁸² See e.g., Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT’L L. & POL’Y 1, 28 (1996) (“[T]he United States . . . preferred the use of unilateral actions such as sanctions. These actions have often linked human rights to trade as in the recent China dispute and in numerous

aftermath of the Tiananmen Square Protests in 1989, many U.S. politicians lobbied to link the normalization of Sino-American trade to improvements in China's human rights record, and profound social and political reform in China.¹⁸³ The U.S. Congress and the Clinton administration continued to grant annual extensions of normal MFN status and Normal Trade Relations Status as leverage to get the concessions they sought from China.¹⁸⁴ In 2004, the EU emulated the United States by linking Market Economy Status ("MES") to IPR and refusing to grant China the MES.¹⁸⁵ The EU Commission insisted that conditions must be met in order for China to be entitled to the MES.¹⁸⁶

other instances."); Robbyn Reichman-Coad, *Human Rights Violations in China: A United States Response*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 163, 185 (1994-95) ("In 1993, President Clinton followed through with his campaign promise to be tough with China and issued an executive order which linked human rights and trade benefits. He stated that China's privileged trade status would not be renewed unless the Beijing government significantly improved its human rights record"); see also, Evan S. Medeiros, *United States-China Relations: Comparative Security and Foreign Policy Processes*, NAT'L COMM. ON U.S.-P.R.C. RELATIONS: CHINA POL'Y SERIES, March 2000, at 1, available at <http://www.ncuscr.org/our-resources/china-policy-series/china-policy-series> (noting that "Sino-American relations have been plagued with a number of difficulties that have complicated the expansion and of further institutionalization of political, economic, and military ties between Washington and Beijing").

¹⁸³ Medeiros, *supra* note 182.

¹⁸⁴ *Id.*

¹⁸⁵ See European Commission, Market Economy Status in Trade Defence Investigations (June 28, 2004), http://ec.europa.eu/trade/issues/bilateral/countries/china/pr280604_en.htm. (last visited Nov. 13, 2008). MES is a technical status granted to a national economy or individual businesses, used by trading partners during anti-dumping investigations, for the purpose of assessing the conditions under which exported goods are produced. *Id.* For a comprehensive analysis of MES and Non-Market Economy Status, see Joseph A. Laroski, Jr., *NMEs: A Love Story – Nonmarket and Market Economy Status Under U.S. Antidumping Law*, 30 LAW & POL'Y INT'L BUS. 369, 370-71, 394-98 (1999).

¹⁸⁶ The conditions include:

- (1) State influence: ensuring equal treatment of all companies by reducing state interference, which takes place either on an ad hoc basis or as a result of industrial policies, as well as through export and pricing restrictions on raw materials;
- (2) Corporate governance: increasing the level of compliance with the existing Accounting Law in order to ensure . . . the usability of accounting information for trade defence investigations;
- (3) Property and bankruptcy law: ensuring equal treatment of all companies in bankruptcy procedures and in respect of property and intellectual property rights; [and]
- (4) financial sector: bringing the banking sector under market rules.

Laroski, *supra* note 185.

The “tying practice” also happens in the area of IPR enforcement in China. The Chinese government has made considerable and remarkable efforts to improve enforcement: the speed and scale of actions would be inconceivable in some other countries, either due to prohibitive costs, inadequate judiciaries, or bureaucratic apparatus and, from the perspective of some legal practitioners, the effectiveness of China’s administrative relief is to be encouraged and commended.¹⁸⁷ China, however, is much more vulnerable to criticism than some other countries because free trade has been adulterated with political elements.

Indeed, it should be a daunting task to separate political and commercial considerations in practice; however, looking back to China’s previous and current reactions, it may be true that this “conditional treatment” appears only to render matters more difficult. Up to this point, in order to facilitate the process of China’s IPR enforcement, trade partners of China are advised to abandon the conditional treatment, and readjust its strategic mentality to be in line with the present status. But how to handle this is a knotty task that should be dealt with prudently.

3.3. *Facilitating Conversion of China from an “IP Imitation” to an “IP Creation” Nation*

As has been demonstrated by both legal scholars and economists, if the establishment of an IPR legal system lacks social foundation on which adequate economic values of the system have been fully realized, the incentives of innovation may recede and the underpinnings that sustain creativities may collapse.¹⁸⁸ Unfortunately, this is what has been happening in some developing countries, of course including China, in the area of IPR protection.

¹⁸⁷ Alan Adcock, *Opportunity Knocks for IP Owners in China*, IAM MAGAZINE, Feb. 1, 2004.

¹⁸⁸ See, e.g., Stefan Kirchanski, *Protection of U.S. Patent Rights in Developing Countries: U.S. Efforts To Enforce Pharmaceutical Patents in Thailand*, 16 LOY. LA. INT’L & COMP. L.J. 569, 598 (1994); Frederick M. Abbott, *The WTO TRIPs Agreement and Global Economic Development*, in PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 3, 4–12 (1997) (discussing that a tolerant IPR policy fuels economic development until the country reaches the stage where IPR protection becomes economically advantageous to a sufficiently strong set of domestic vested interests).

3.3.1. *Lack of Home-grown Intellectual Property*

As Allison and Lin have observed, "China has followed the typical pattern of a developing nation by depending heavily on foreign investment and imported technology before being able to generate substantial internal growth and technological advancement on its own."¹⁸⁹ Indeed, for a long time, China lacked genuine enthusiasm and native intelligence to enforce IPR, since providing substantial IPR protection within the confines of TRIPs Agreement does not render immediate economic benefits to the Chinese economy.¹⁹⁰ For many Chinese companies, strengthened IPR protection implies that domestic enterprises are obliged to pay a colossal sum of royalties to foreign proprietors, thereby resulting in escalating production costs and shrinking profit margins.¹⁹¹ Correspondingly, most Chinese enterprises have been content to making imitation products and have invested little capital and made little effort to develop their own innovative technologies.¹⁹²

However, to create home-grown intellectual property in China is indispensable.¹⁹³ Over the years, Chinese companies have suffered huge losses in the international market as a result of lacking independent intellectual property.¹⁹⁴ According to a survey conducted by Deloitte & Touche, a professional services firm, as of 2004, Chinese manufacturers were compelled to pay license fees ranging from fifteen to twenty-two percent on DVD players that retail for less than sixty dollars.¹⁹⁵ It was also reported that royalty payment to Intel and Microsoft accounted to fifty to

¹⁸⁹ Allison & Lin, *supra* note 35, at 775.

¹⁹⁰ Cheng, *supra* note 21, at 1979.

¹⁹¹ See Hong Kong Trade Development Council, Changes in China's IPR System, 10 Business Alert - China (2000), <http://info.hktdc.com/alert/cba-e0010b.htm>.

¹⁹² *Id.*

¹⁹³ Yahong Li, *The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?* 20 UCLA PAC. BASIN L. J. 101 (2002).

¹⁹⁴ *Id.*

¹⁹⁵ See Press Release, David Schutzman & Evonne Lum, Technology Firms Risk Losing Advantage as China's Influence on Global Standards Reaches Critical Levels: (Aug. 4, 2004), http://www.deloitte.com/dtt/press_release/0,1014,cid%253D56070,00.html.

See also United States Trade Representative [USTR], 2006 Special 301 USTR Report (2006), available at http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html.

seventy percent of the retail price of computers manufactured in China.¹⁹⁶

Apparently, Chinese leaders and entrepreneurs need to enhance the awareness of protection for indigenous intellectual property.¹⁹⁷ A notable example is China's inadequate protection for traditional Chinese medicine (TCM)—the Chinese “national treasure” which has a history of thousands of years.¹⁹⁸ Though having a comparative advantage in TCM products, China has few TCM brands that have established their dominant positions at domestic and global markets.¹⁹⁹ By the December 2005, the trade value of TCM exceeded forty billion dollars in the global market and is growing at a staggering rate of ten percent annually, whereas China home-made TCM constitutes less than three percent of the total value.²⁰⁰ By contrast, TCM enterprises in Japan, Korea, Southeast Asia, and Western Europe purchase raw herbal materials in China and, after rough processing locally in China, transport them into their own countries where the raw materials are refined and the exotics are transmuted into finished products.²⁰¹ Such TCM products are not only placed in the foreign market but also resold to the Chinese market at enormously escalated prices.²⁰² Currently, China's TCM import from Japan, Korea, Southeast Asia, and Western Europe is valued as high as more than one hundred million dollars.²⁰³

Due to the lack of independent intellectual property, there has not been much incentive for lobbies of inventors or authors who would benefit from higher IPR enforcement.²⁰⁴ Correspondingly,

¹⁹⁶ Richard P. Suttmeier & Yao Xiangkui, *China's Post-WTO Technology Policy: Standards, Software, and the Changing Nature of Techno-Nationalism*, 7 NBR SPECIAL REP. 7, 20 (2004) (quoting Sherman So, *Low-cost Chip Is Made for China*, SOUTH CHINA MORNING POST, Feb. 17, 2004).

¹⁹⁷ Li, *supra* note 193, at 101.

¹⁹⁸ *Id.*

¹⁹⁹ See, *China Losing TCM Intellectual Property*, CHINA NEWS NETWORK, December 13, 2005, available at <http://www.chinanews.cn/news/2005/2005-12-13/15742.html>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L. & ECON. 327, 331 (1993) (noting how there is inadequate protection of intellectual property in developing countries at both the substantive law and enforcement levels).

the Chinese government has felt little internal pressure to enforce IPR.²⁰⁵ In other words, Chinese leaders have no explicit political will to substantially enforce IPR. In order to build a healthy ecosystem of innovation, China needs to establish an independent domestic intellectual property industry that is required to move the manufacturing economy up the value chain.²⁰⁶

3.3.2. *Value Chain Restructuring: From "Made in China" to "Innovated in China"*

Enriching homegrown intellectual property intelligence and establishing domestic intellectual property landscape constitute the logic start of the intellectual property value chain.²⁰⁷ Therefore, it is of great importance to facilitate China's transition from a mere consumer of IPR to a net creator, in other words, from "made in China" to "innovated in China."²⁰⁸ Construction of a system balancing protection and exploitation is therefore indispensable for the establishment of a cycle of an intellectual creation.²⁰⁹ It is objectively unlikely that the conversion of China from an "IP imitation" to an "IP creation" nation can be achieved without the process of the innovation capacity building.

Universities and research institutions are expected to harness the potential of their technologies to bridge the gaps of Research and Development (R&D), and to contribute at certain stage in the value chain.²¹⁰ In order to make China an "IP creation" nation, it is necessary to establish a mechanism by which universities and research institutes can create independent and internationally competitive intellectual property to be used to the maximum extent possible in the society.²¹¹ Based on such awareness, China needs to put in place measures with the aim of encouraging the

²⁰⁵ *Id.*

²⁰⁶ A company's value chain is normally defined as "an interdependent system or network of activities, connected by linkages." For further discussion, see Michael E. Porter, *Competition in Global Industries: A Conceptual Framework*, in *COMPETITION IN GLOBAL INDUSTRIES* 15, 20-22 (1986).

²⁰⁷ Bill Barrett & Dave Crawford, *Integrating the Intellectual Property Value Chain*, 20 *NATURE BIOTECHNOLOGY* BE43-BE46 (2002).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Amy Kapczynski et al., *Addressing Global Health Inequities: An Open Licensing Approach for University Innovations*, 20 *BERKELEY TECH. L.J.* 1031, 1090-91 (2005).

²¹¹ Barrett & Crawford, *supra* note 207.

creation of R&D assets at universities and research institutes and establishing a comparative environment in the society.²¹² To this end, China is expected to establish an innovative paradigm where IPR is viewed as an essential ingredient. China also needs to reconfigure and revamp its education system for lateral thinking—“thinking out of the box,” instead of traditional rote learning²¹³—and strive to evolve the nation into a role of being more of a world innovator than a world manufacturer.²¹⁴

3.3.3. *Trend Assessment: “Well Begun is Half Done”*

An old Chinese adage says “well begun is half done.” Most encouragingly, there have been signs which may reflect an auspicious beginning for the emergence of a sound IPR enforcement system. China has initiated the transformation of itself from orthodox Marxism to “socialism with Chinese characteristics (*you zhongguo tese de shehuizhuyi*),²¹⁵ and has demonstrated outstanding dedication and commitment towards embracing a strengthened IPR enforcement system.²¹⁶ As Yahong Li suggests, upon its accession to the WTO, Chinese enterprises depending heavily on imitation of foreign products are liable to suffer from losing market share.²¹⁷ The fierce competition provides the companies with no options but to innovate by reexamining business strategies and reallocating their resources.²¹⁸ In order to survive in the fierce competition characterized by technological contests, these companies have to promote industrial transformations and reinforce their innovation capacities.²¹⁹

²¹² *Id.*

²¹³ EDWARD DE BONO, *SERIOUS CREATIVITY: USING THE POWER OF LATERAL THINKING TO CREATE NEW IDEAS* 205-06 (1992).

²¹⁴ See Jianke Jiang, *Shidai Huhuan Zhishi Chanquan: Fang Guojia Zhishi Chuanquan Ju Juzhang Tian Lipu* [A New Era Calls for an Improved Intellectual Property: An Interview with Tian Lipu, Commissioner of the State Intellectual Property Office], 14 *PEOPLE'S DAILY*, Aug. 25, 2005 (mentioning that China is endeavoring to implement its national intellectual property strategy of revitalizing the state through science and education).

²¹⁵ See Jennifer S. Fan, *The Dilemma of China's Intellectual Property Piracy*, 4 *UCLA J. INT'L L. & FOREIGN AFF.* 207 (1999).

²¹⁶ See Weiqiu Long, *Intellectual Property in China*, 31 *ST. MARY'S L.J.* 63, 97 (1999) (summarizing China's recent achievement in intellectual property rights protection).

²¹⁷ See Li, *supra* note 193, at 109.

²¹⁸ *Id.*

²¹⁹ *Id.*

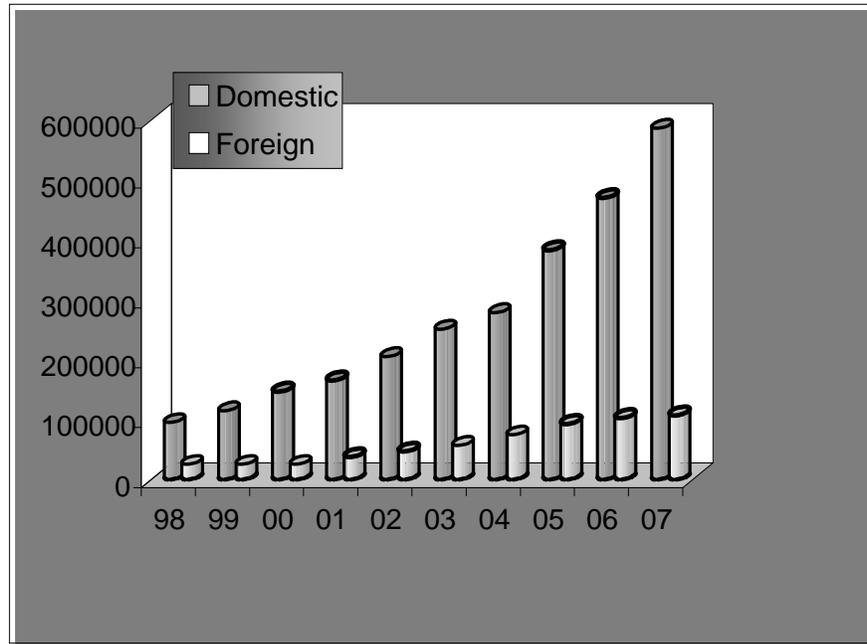
Based on this awareness, over the past decade or so, a momentum of a rapid and continuous development in IPR protection has been maintained in China.²²⁰ According to the statistics released by SIPO, the total number of applications of these kinds of patents reached 694,153 in 2007, an increase of 473 percent compared to 121,150 in 1998.²²¹ As the Figure shows below, while there has been less sign of growth among foreign applicants and this may have more or less blurred any clear profile for the transformation of China from an "IP imitation" to an "IP creation" nation, during the past ten years, applications by domestic applicants have shown an increasing trend, and Chinese patent applications have generally increased at a rapid pace every year since 1998. Statistics also show that, China's exports to Europe are conventionally restricted to low-tech labor intensive products, but recent years have evidenced a gradual increase in output of value-added products such as electronic and information equipment.²²² As of 2005, almost twenty percent of China's exports were classified as high-tech.²²³ All these trends imply that the process of China's transfer from an IP consumer to IP producer has started.

²²⁰ State Intellectual Property Office (SIPO), Applications for Three kinds of Patents Received from home and Abroad(year)->2007, http://www.sipo.gov.cn/sipo_English/statistics/gnwsznb/2007/200801/t20080116_230750.htm (last visited Nov. 28, 2008).

²²¹ *Id.*

²²² See, e.g., Zhongou Jingmao Guanxi [EU-China Trade Relations], available at <http://www.chinacomeu.org/web3/SINO-EU.htm> (describing the development of EU-China trade since 1978 and the role in which technology played in the growth of economic cooperation).

²²³ Larry Elliott, *Bra Wars: Europe Strikes Back*, THE GUARDIAN, Aug. 26, 2005, at 28.

Figure 3.1. China's Patent Application (1998–2007)

Sources from State Intellectual Property Office ("SIPO"), compiled by the author.

3.3.4. *Promoting Transformation of China from Perceived Infringer to Unfortunate Victim*

Under the current international IPR system, developing nations need sufficient incentives to bring their IPR enforcement systems in line with TRIPs standards.²²⁴ At the same time however, the recipient countries must be equipped with necessary scientific and technological capacities so that the local economies flourish.²²⁵ This accumulation process is essential for a developing country to achieve the economic benefits of establishing IPR protections.²²⁶

²²⁴ Allison Cychosz, *The Effectiveness of International Enforcement of Intellectual Property Rights*, 37 J. MARSHALL L. REV. 985, 1015 (2004).

²²⁵ *Id.*

²²⁶ *Id.*

In the case of China, a penetrating strategy entails promoting China's further participation in the global economy and encouraging it to develop its own world class technologies.²²⁷ It is important to encourage an appreciation of the interests that IPR protection can give to Chinese innovators when certain development has been achieved. This will require the establishment of a strong domestic constituency of innovators within China whose interests will suffer both in relation to their own ideas and in terms of access to foreign investment and technology transfer.²²⁸ Only if China continues to protect IPR by its self-sufficient enforcement system without being externally threatened may it be said that the West has found the right key to undoing the "Gordian Knot" and obtaining vigorous enforcement.

4. CONCLUSION

The contemporary Chinese legal system was not inherited from its traditional legal system but was a result of China's continuous legal reform notably commencing since the end of the 1970s. Legal reform in China is an inevitable historical phenomenon and an important component in the process of its unprecedented industrialization and modernization. However, countervailing traditional Chinese cultural traits still run deep in the national consciousness. The enigmatic cultural landscape has shaped a unique model of Chinese philosophies that have undermined China's attempts in upgrading its IPR enforcement mechanism, making the enforcement much more complex and time-consuming.

The lack of transparency behind the enforcement mechanisms reflects China's cultural uniqueness, institutional impediments, and economic insufficiency that are incompatible with IPR foundational requirements. To a large extent, the IPR enforcement problems one may attribute to China's unique. The reasons for the IPR enforcement problem in China are manifold and are interdependent. It is however an interesting and demonstrable fact that the political transition, *inter alia*, is a decisive factor and therefore acts as a pivot. The West is therefore advised to genuinely understand the multifaceted nature of China's

²²⁷ Michael Yeh, *Up Against a Great Wall: The Fight against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503, 521 (1996).

²²⁸ *Id.*

enforcement mechanism. Before China has gone through with its transition from “rule by law” to “rule of law,” the objective of IPR enforcement in China should be achieved, to a large extent, via political communication, coordination and intervention, rather than a legal process.

China has made arduous efforts towards gaining admittance into the international IPR community and has transplanted an elaborate IPR regime that has been proved to be “a castle in the air.” It is not surprising that the existing IPR regime has not completely fit in indigenous social political environment and China still lacks potential motivations to fight IPR infringement effectively. China’s formula for success in IPR enforcement stems, to a great extent, from the highly authoritarian system and its absorbed promotion of coherent institutional reform and rule of law. However, to carry out such a reform in China’s conservative and bureaucratic colossus must be an enormous challenge. Without help, it is unlikely that China will be able to make the appropriate adjustments necessary and build the institutional basis for steady economic development. The West is advised to be patient and supportive during China’s gradual transitional period. This is a learning curve for which there is no panacea. Any attempt for quick success and instant benefit may result in giving up halfway.