

2013

## Navigating Unfamiliar Terrain: Reconciling Conflicting Impressions of China's Intellectual Property Regime in an Effort to Aid Foreign Right Holders

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## **Navigating Unfamiliar Terrain: Reconciling Conflicting Impressions of China's Intellectual Property Regime in an Effort to Aid Foreign Right Holders**

### **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, May 2014; B.A., University of Pennsylvania, 2009. I am grateful to Mark Cohen for introducing me to this subject and for his invaluable guidance in the composition of this Note.

# Navigating Unfamiliar Terrain: Reconciling Conflicting Impressions of China's Intellectual Property Regime in an Effort to Aid Foreign Right Holders

Matthew A. Marcucci\*

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## INTRODUCTION

The People’s Republic of China (the “PRC” or “China”) carries the mantle of one of the world’s oldest civilizations: that of imperial China, a place notable not only for its duration but also for its inventiveness.<sup>1</sup> While the West ultimately gained ascendancy as the primary locus of technological innovation,<sup>2</sup> imperial China bore witness to the so-called “four great inventions”—paper, gunpowder, typography, and the compass—

<sup>1</sup> See Charles L. Miller, *A Cultural and Historical Perspective to Trademark Law Enforcement in China*, 2 BUFF. INTELL. PROP. L.J. 103, 117 (2004).

<sup>2</sup> See, e.g., Andrew Nusca, *Top 10 Innovative Countries; Denmark Leads World in 2010; Sweden, U.S. to Follow*, SMARTPLANET (January 13, 2011), <http://www.smartplanet.com/blog/smart-takes/top-10-innovative-countries-denmark-leads-world-in-2010-sweden-us-follow/13487> (deeming the world’s ten most innovate countries to be Denmark, Sweden, the United States, Finland, Britain, Norway, Ireland, Singapore, Iceland, and Canada).

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before the emergence of their occidental counterparts.<sup>3</sup> Imperial China is also justly famed for its developments in chemistry, physics, ship design, metallurgy, and ceramics.<sup>4</sup> Such achievements rendered imperial China a far more technologically advanced place than either medieval or Renaissance Europe.<sup>5</sup> This preeminent status began to wane only during the Qing Dynasty, the last in the string of hereditary absolutist monarchies that together constituted imperial China.<sup>6</sup>

Accordingly, one might expect that contemporary China accords the products of creative enterprise due intellectual property (“IP”) protections in the same vein as the West, so as to “promote the Progress of Science and useful Arts.”<sup>7</sup> While China does possess a sophisticated intellectual property regime, it is an open question whether that regime serves sufficiently to protect the interests of foreign holders of intellectual property rights (“IPR”) who seek to enforce those rights in China.<sup>8</sup>

As remarkable as is imperial China’s durability, the PRC is equally remarkable for the rapidity with which it has become the world’s second largest economy, trailing only the United States.<sup>9</sup> The steady economic growth that China enjoyed over the course of the 1980s became “torrid” in the 2000s, when trade and foreign direct investment began to supplement the domestic demand that

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<sup>3</sup> Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C.J. INT’L L. & COM. REG. 1, 7–8 (2006) (“It is common knowledge that the Chinese invented a number of items prior to their ‘invention’ or use in the West. The famous four great inventions—papermaking, typography, the compass, and gunpowder—have profoundly impacted the world’s economy and human culture.”) (internal citations omitted).

<sup>4</sup> Miller, *supra* note 1, at 117.

<sup>5</sup> *Id.* (noting that “China’s technological achievements kept it far in advance of medieval and early Renaissance Europe”).

<sup>6</sup> *Id.* at 118–19.

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>8</sup> See MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA*, i (2009) (“China has the highest levels of copyright piracy and trademark counterfeiting in the world, even though it also provides the highest per capita volume of enforcement.”).

<sup>9</sup> See List of Countries by Gross Domestic Product, CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html> (last visited November 18, 2012).

had been fueling economic growth until then.<sup>10</sup> Previously, China's economic reforms and their attendant influence on the growth of its economy were perceived as relatively insignificant by the rest of the world.<sup>11</sup> By 2010, however, China had become the world's largest exporter.<sup>12</sup> Moreover, between 2003 and 2011, China's overall trade surplus grew from roughly \$25 billion to over \$150 billion, while its trade surplus with the United States grew during the same period from just over \$50 billion to roughly \$200 billion.<sup>13</sup>

Two important trends mark this breathtaking economic ascent. First, foreign direct investment increased substantially during this brief period as foreigners either invested in existing Chinese enterprises or embarked on undertakings of their own.<sup>14</sup> In 2006, for example, foreigners invested \$193 billion in 27,514 projects in China.<sup>15</sup> Second, this period also bore witness to the increasing sophistication of Chinese exports, which shifted in kind from apparel, textiles, footwear, and toys to electronics, telecommunications equipment, office machines, and appliances.<sup>16</sup> China, therefore, is a far cry from the "hermit . . . creeping out of its shell" that it was dubbed as recently as one generation ago.<sup>17</sup> Instead, China and the rest of the world are inextricably intertwined, a reality that especially affects foreign holders of intellectual property rights who do business in China.

This Note seeks to resolve a paradox that currently exists in the field of Chinese intellectual property law. On the one hand, the Chinese enforcement regime—and its shortcomings in the eyes of

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<sup>10</sup> EDWARD S. STEINFELD, PLAYING OUR GAME: WHY CHINA'S RISE DOESN'T THREATEN THE WEST 71 (2010).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Aaron Back, *China's Trade Surplus Shrank in '11*, WALL ST. J., Jan. 11, 2012, <http://online.wsj.com/article/SB10001424052970204124204577151632896924706.html>. While China's overall trade surplus shrank in 2011, its surplus with the United States grew; Back attributes such growth to the United States benefiting "less than some countries from China's appetite for raw materials." *Id.*

<sup>14</sup> STEINFELD, *supra* note 10, at 72.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 71.

foreigners—is a topic that garners substantial attention at the uppermost levels of the United States government and private sector. On the other hand, relatively few foreigners actually make use of China's system, and some commentators decry what they allege to be a mischaracterization of China's intellectual property regime as flawed, recommending instead that foreign right holders make greater use of China's enforcement mechanisms. Are China's apologists justified in portraying its intellectual property institutions in a positive light? Or, are foreign critics accurate in disparaging China's intellectual property regime?

Part I analyzes the causes for these apparently incompatible perspectives by tracing the development of intellectual property protections in China from their earliest appearance. In particular, Part I moves from a general historical overview of intellectual property in China to a survey of the current legal and bureaucratic institutions that constitute its intellectual property regime. In addition, Part I submits empirical data that attest to the notably small proportion of intellectual property civil lawsuits in China involving foreign parties.

Part II presents the conflict that this Note seeks to resolve. In particular, Part II lays out the views of those apologists who hold that China's legal institutions are equipped to provide just resolutions of intellectual property disputes. Part II also presents the perspective of critics in the United States government and private sector, both of which generally perceive the Chinese intellectual property regime in a negative light.

Part III concludes that the problems plaguing China's intellectual property regime render the apologist perspective misleading. Specifically, Part III acknowledges the commendable aspects of that regime, but contends that it would be misguided for foreign right holders who attempt to vindicate their rights in China to expect enforcement to proceed efficiently and reliably. In addition, Part III links historical phenomena present during the imperial period of Chinese history to the current approach that Chinese officials have taken in administering China's intellectual property regime. Finally, Part III concludes with recommendations for steps that foreign victims of infringement can take so as to improve their ability to enforce their rights in China.

I. LOOKING BACKWARD TO UNDERSTAND THE PRESENT: A  
HISTORICAL OVERVIEW OF INTELLECTUAL PROPERTY IN CHINA AND  
THE STATE OF THE CURRENT REGIME

A. *The History of Intellectual Property Law in China*

1. Cultural Underpinnings: Local Custom, Confucianism, and  
Buddhism

The received wisdom among both Chinese and Western scholars is that intellectual property—specifically, copyright—first emerged shortly after the development of printing.<sup>18</sup> Scholarly works on copyright have traditionally regarded Gutenberg’s invention of the printing press as the impetus for copyright protections in the West.<sup>19</sup> Similarly, Chinese historians link the emergence of copyright protections in China to the rise of printing there during the Tang Dynasty.<sup>20</sup> Nevertheless, as Harvard University professor William P. Alford contends in his seminal work on the history of Chinese intellectual property law, “neither a formal nor an informal counterpart to copyright or other major forms of intellectual property law” existed in imperial China.<sup>21</sup> Indeed, some hold that no concept of intellectual property ever developed organically in China, pointing out that one could be touted as a great historian during the imperial era for producing a work consisting of little more than verbatim quotations of other works.<sup>22</sup> Furthermore, the very word for “right” in the sense of a legal right, “quanli,” only entered the Chinese lexicon in the

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<sup>18</sup> See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 9 (1995).

<sup>19</sup> See ZHENG CHENGSI & MICHAEL PENDLETON, *COPYRIGHT LAW IN CHINA* 11 (1991).

<sup>20</sup> ALFORD, *supra* note 18, at 9. According to Professor Alford, the view that the advent of printing led to the emergence of copyright protection is rooted in the notion that “innovation spurs the need for well-defined private property rights, which in turn provide the incentive needed to foster further innovation.” *Id.* at 133 n.2.

<sup>21</sup> *Id.*

<sup>22</sup> Charles R. Stone, *What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property*, 92 MARQ. L. REV. 199, 200 (2008) (citing Robert André LaFleur, *Literary Borrowing and Historical Compilation in Medieval China*, in *PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD* 141, 141–44 (Lisa Buranen & Alice M. Roy eds., 1999)).

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nineteenth century after being coined by an Englishman.<sup>23</sup> While the view that intellectual property never truly existed in imperial China risks obscuring a complex historical landscape,<sup>24</sup> China's current intellectual property regime nevertheless came about in a cultural and legal context markedly different from that which enabled complementary institutions to emerge in the West.

The nature of the law in imperial China differed in two fundamental respects from that of the Western legal tradition. First, positive law, in contrast to its role in the West, was not the "defining focus of social order" in imperial China.<sup>25</sup> Second, the Chinese did not conceive of the law as cleaved into civil and criminal categories.<sup>26</sup> Instead, the central government of imperial China, then an "agrarian state self-consciously organized along the model of an extended family," relied on family and guild leaders and the heads of villages to enforce local customs.<sup>27</sup> Accordingly, matters that would have been resolved under the civil law in the West were instead handled by these local authority figures, while the positive law that did exist assumed a secondary status to custom.<sup>28</sup> Local authority figures were also responsible for tax collection and similar obligations, while representatives of the central government occasionally "went so far as to require the certification of guild chiefs" and to review the rules that they drafted.<sup>29</sup> Overall, this system amounted to a "controlled delegation of authority" by the state to local actors.<sup>30</sup> Such delegation, according to Professor Alford, afforded the central

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<sup>23</sup> William O. Hennessy, *Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257, 1269 (2009).

<sup>24</sup> See, e.g., Shi, *supra* note 3, at 46 (arguing that "China's IPR enforcement insufficiency is not a traditional cultural phenomenon reflected by Confucian ethics" but that, instead, "Confucian ethics act as a unique moral foundation for intellectual property protection").

<sup>25</sup> See ALFORD, *supra* note 18, at 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 10–11.

<sup>28</sup> *Id.* at 10. The positive law that did exist was essentially penal in nature and mainly addressed "the interactions of the state and individuals[.]" June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POL'Y INT'L BUS. 1185, 1203 (1996).

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.* at 11.

government the ability to regulate affairs at all levels of society by enabling it to overcome the hindrances that plagued imperial China for centuries, including disparate “dialects and customs, poor communications infrastructure, and persistent budgetary problems.”<sup>31</sup>

While it would be misleading to claim that its Confucian heritage endowed China with a total “lack of consciousness of intellectual property,”<sup>32</sup> Confucianism nevertheless profoundly shaped imperial Chinese society, especially in the realms of education and literature. As a consequence, such concepts as plagiarism and copyright developed differently there than they did in the West.<sup>33</sup> Confucianism itself defies easy categorization. It is, in essence, a “systematic code of interpersonal behavior” more akin to a “practical, political, and social doctrine” than to a “religion or quasi-religion.”<sup>34</sup> The system of education in imperial China was a thoroughly Confucian one. Confucianism itself became the official subject of study for those seeking careers in the imperial governmental bureaucracy sometime between 140 and 87 BCE,<sup>35</sup> and from roughly 1300 CE to the dawn of the twentieth century, young scholars preparing for the imperial civil service examination—the mechanism by which this bureaucracy was staffed—were expected to commit the entire Confucian canon to memory.<sup>36</sup> At its core, this path of study consisted exclusively in rote memorization<sup>37</sup>: after mastering an initial 2,000 Chinese characters, students embarked upon a roughly six-year-long process of memorizing a body of texts containing between 500,000

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<sup>31</sup> *Id.* As Alford relates, this loose delegation of authority enhanced the reach of the central government where, by the late Qing period, “no more than a single representative of the emperor . . . [existed] for every 200,000 subjects.” *Id.*

<sup>32</sup> Shi, *supra* note 3, at 3. See also Stone, *supra* note 22, at 204 (“[I]t is safe to say that China’s traditions and its attitude toward the written word are inextricably linked to an educational system that was profoundly influenced by the teachings of its most famous philosopher and first professional teacher, Confucius (551–476 B.C.).”).

<sup>33</sup> See Stone, *supra* note 22, at 200.

<sup>34</sup> Shi, *supra* note 3, at 5.

<sup>35</sup> See Marc H. Greenberg, *The Sly Rabbit and the Three C’s: China, Copyright, and Calligraphy*, 7 LOY. U. CHI. INT’L L. REV. 163, 173 (2010).

<sup>36</sup> Hennessy, *supra* note 23, at 1262.

<sup>37</sup> Stone, *supra* note 22, at 205.

and 600,000 characters<sup>38</sup> with the aim of scoring well enough on the imperial civil service examination to secure a position within the ranks of the governmental bureaucracy.<sup>39</sup> Confucianism and education thereby became closely intertwined—indeed, inseparable—in imperial China. Moreover, because every scholar-official had had the same Confucian education,<sup>40</sup> “elite Chinese literature does not identify the sources of its quotations, even if they are rare.”<sup>41</sup> Rather, the reader of such literature would have been presumed to be able to discern the source of the recycled material.<sup>42</sup> In contrast, a reader incapable of recognizing the source of a particular passage would have been presumed to be unable to understand the text at hand.<sup>43</sup> As a consequence of Confucianism’s influence on education and literature, verbatim copying was not considered to be an infringement of the rights of the original author.<sup>44</sup>

As Bangor University professor Wei Shi contends, however, it would be erroneous to conclude that Confucianism alone gave rise to a culture of plagiarism that persists to this day in the form of China’s lackluster enforcement of intellectual property rights.<sup>45</sup> Indeed, Confucianism has influenced nations such as South Korea and Japan to at least the same extent as China, yet both of those nations suffer from lower rates of intellectual property infringement than China.<sup>46</sup> Rather, Confucianism’s most enduring legacy in China appears to lie in its influence on the nature of interpersonal relations.<sup>47</sup> In contrast to the West, a Confucian

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<sup>38</sup> *Id.*

<sup>39</sup> Benjamin A. Elman, *Civil Service Examinations*, in *BERKSHIRE ENCYCLOPEDIA OF CHINA* 405–10 (2009); *see also* ALFORD, *supra* note 18, at 21–22.

<sup>40</sup> Stone, *supra* note 22, at 210.

<sup>41</sup> *Id.* at 209.

<sup>42</sup> *See id.* at 203.

<sup>43</sup> *See id.* at 210.

<sup>44</sup> *Id.* at 200.

<sup>45</sup> Shi, *supra* note 3, at 4.

<sup>46</sup> *Id.* at 44. Shi notes, however, that fundamental differences exist between China on the one hand and Japan and South Korea on the other, including “China’s unique socialist ideology, administrative decentralization, inadequate judiciary and huge but inefficient bureaucracy[.]” all of which “have made intellectual property enforcement [in China] rather difficult.” *Id.* at 45.

<sup>47</sup> *See id.* at 24–26.

society is comprised not of individual people but of relationships between people, that is, of their “interconnections and interdependencies.”<sup>48</sup> Ultimately, Confucianism aims to bring about a harmonious society by modeling human affairs on the “proper order . . . [governing] all things in the universe.”<sup>49</sup> Accordingly, such a society esteems communal over private property, and perceives the individual as important only insofar as he contributes to society as a whole.<sup>50</sup> For instance, the Confucian-influenced imperial Chinese *weltanschauung* regarded major technological advancements such as the development of medicine as “social enterprise[s] rather than as a succession of breakthroughs by individual geniuses.”<sup>51</sup> Professor Shi posits that this Confucian social framework—in contrast to mainstream opinion<sup>52</sup>—fostered innovation in China, presumably by acknowledging and encouraging individual contributions to society.<sup>53</sup> Accordingly, Professor Shi concludes that there is no connection between Confucianism and the rampant counterfeiting and piracy that has rendered intellectual property enforcement so difficult in contemporary China.<sup>54</sup> Whether or not this assessment is correct, Confucianism doubtless imbued imperial China with a conception of the individual and society in stark contrast to the belief in the primacy of individual rights that ultimately gained ascendancy in the West.<sup>55</sup>

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<sup>48</sup> *Id.* at 8 citing Hyung Kim, *FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY* 30–31 (1981).

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Id.* at 9 (quoting John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes toward Property Rights Invention and Discovery*, 20 U. PA. J. INT’L ECON. L. 735, 744 (1999)).

<sup>51</sup> Hennessy, *supra* note 23, at 1269 (citing Nathan Slivin, *Introduction* to 6 JOSEPH NEEDHAM, *SCIENCE AND CIVILIZATION IN CHINA*, pt. VI, at 1, 1 (Nathan Slivin ed. 2000)).

<sup>52</sup> See Shi, *supra* note 3, at 3–4 (“Under the dominating theory of this point of view [that traditional Chinese culture does not perceive copyright infringement to be wrong], Confucianism is a cultural predisposition leading to a lack of consciousness of intellectual property . . . likely to have a continuing influence on attitudes to[ward] IP protection.”).

<sup>53</sup> See *id.* at 9.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 24 (noting that “[p]rivate property rights are among the fundamental concepts upon which many Western states are built and intellectual property rights were born of a predominantly Western concept of private property rights and benefits”).

The Confucian philosophical framework that underpinned imperial Chinese society provided for a rigidly hierarchical ordering of interpersonal relationships that necessarily encompassed the professional classes. Officially, four such classes inhabited imperial China: scholar-officials, farmers, artisans, and merchants, in descending order of status.<sup>56</sup> Naturally, those who had succeeded in assimilating the vast Confucian corpus and in attaining a position within the ranks of officialdom occupied the uppermost stratum, while those whose livelihood was the commercial activity so disdained by Confucianism<sup>57</sup> inhabited society's lowest rung.

Both the scholarly class as well as members of the lowlier artisan and merchant classes engaged in creative activity that would have endowed them with modern intellectual property rights. In particular, merchants guarded trade secrets pertaining to papermaking and silk weaving, while the elite Confucian literati propagated "the conduits of cultural continuity": poetry, calligraphy, representational painting, and official dynastic histories.<sup>58</sup> Spanning the lower three rungs of society, artisans produced ceramics and music, wrote songs, composed dramas, engaged in storytelling, and mastered architecture.<sup>59</sup> Of course, formal intellectual property protections for such creative material did not yet exist in China. Rather, this Confucian-based ordering of the professional classes is notable for its inherent hostility to the creation of such protections. Confucianism's rigid, vertical allocation of authority bore upon every member of traditional Chinese society. By the sixteenth century, "[i]t was all 'top down'" in imperial China, with ultimate power vesting in the Emperor.<sup>60</sup> Such an environment, where the literati transmit rather than create and all of society defers to the established order, hardly

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<sup>56</sup> See Hennessy, *supra* note 23, at 1271.

<sup>57</sup> See Lazar, *supra* note 28, at 1201 (asserting that Confucianism holds that "individuals should sacrifice personal profits in order to benefit the group").

<sup>58</sup> Hennessy, *supra* note 23, at 1271–72.

<sup>59</sup> *Id.* at 1272.

<sup>60</sup> *Id.* at 1275.

amounts to fertile ground for the codification of individual rights in the exclusive use of one's original creations.<sup>61</sup>

In addition to its influence on education, literature, and society, Confucianism also left its mark on the law. The traditional Confucian view that positive law should be relegated to a status secondary to that of custom has not entirely disappeared;<sup>62</sup> even today, many Chinese feel that the law should be employed "only as a last resort."<sup>63</sup> Instead, Confucianism asserts that morality and ritual should guide human conduct.<sup>64</sup> As a corollary of its emphasis on instilling morality in its subjects,<sup>65</sup> Confucianism holds that "a formal legal system serves only to make people litigious and self-interested."<sup>66</sup> Indeed, in a truly Confucian society, litigation is unnecessary.<sup>67</sup> In its place, morality and ritual as promulgated by the central government and assimilated by the populace serves as the foundation of social order.<sup>68</sup> The members of a Confucian society "learn to adjust their views and demands to accommodate other people's needs and desires, to avoid confrontation and conflict, and to preserve harmony."<sup>69</sup> At bottom, individual desires must cede to group harmony.<sup>70</sup> Regardless of whether specific aspects of China's current intellectual property regime can be accounted for with reference to Confucianism, the school of thought influenced nearly every facet of imperial Chinese society, and for that reason alone merits discussion in any survey of Chinese legal history.

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<sup>61</sup> *Id.* at 1275–76.

<sup>62</sup> *See* ALFORD, *supra* note 18, at 10.

<sup>63</sup> Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 971 (2006).

<sup>64</sup> Greenberg, *supra* note 35, at 173.

<sup>65</sup> *Id.* at 174.

<sup>66</sup> Lazar, *supra* note 28, at 1201.

<sup>67</sup> *See* Yu, *supra* note 63, at 970.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Lazar, *supra* note 28, at 1201.

In addition to Confucianism, and often neglected by scholarly treatments of Chinese intellectual property law,<sup>71</sup> Buddhism exerted an equally powerful influence on imperial China's literary development and, consequently, on its conception of intellectual property. Buddhism was "inseparable from the earliest book copying, production, and printing in China."<sup>72</sup> By the seventh century CE, the publication and reproduction of sacred Buddhist texts outpaced that of Confucian literary works by a multiple in the thousands,<sup>73</sup> and by the time commercial printing had emerged in China during the tenth century, "nearly half a million copies of Buddhist books and pictures are known to have been printed in the eastern part of China in one small area alone over a period of less than half a century."<sup>74</sup> Significantly, Buddhism emphasizes that in copying and circulating its sacred texts, one can receive the blessings of the Buddha himself.<sup>75</sup> Other tenets of Buddhism include the religion's encouragement of the renunciation of earthly possessions and its teaching that the material world itself is merely "a dream from which we must awaken sooner or later."<sup>76</sup> These aspects of Buddhism are obviously antagonistic to property rights, as they exist in the West.<sup>77</sup> Moreover, Buddhist ideas would have gained currency in imperial China through the wide dissemination of Buddhist texts over the course of many centuries. Perhaps because of Buddhism's close connection to the emergence of the printed word in China, centuries separated the initial dissemination of Buddhist texts and the first claims by authors of an enforceable right to their printed works.<sup>78</sup> Such a centuries-long gap is all the

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<sup>71</sup> See Stone, *supra* note 22, at 225 (noting that "law review articles about intellectual property in China usually discuss Confucianism as if it were the only school of thought that existed in imperial China").

<sup>72</sup> *Id.* at 228.

<sup>73</sup> *Id.* at 227.

<sup>74</sup> *Id.* at 228 (quoting Tsien Tsuen-Hsui, *Paper and Printing*, in 5 *SCIENCE AND CIVILISATION IN CHINA* 1, 378 (Joseph Needham ed., 1985) (internal quotation marks omitted)).

<sup>75</sup> See *id.*

<sup>76</sup> *Id.* at 228–29 (quoting John Kieschnick, *THE IMPACT OF BUDDHISM ON CHINESE MATERIAL CULTURE* 2–3 (2003) (internal quotation mark omitted)).

<sup>77</sup> See *id.*

<sup>78</sup> *Id.* at 230.

less surprising when Buddhism and Confucianism are considered together in their influence on Chinese literary development.

## 2. Fits and Starts: The Nascence of Chinese Intellectual Property Protections and the Emergence of a Coherent Regime

In the West, the concept of intellectual property developed as a means of enabling authors and inventors to prevent the state from expropriating their original works.<sup>79</sup> Underpinning this concept is the belief that society benefits from providing formal incentives for original works, which disseminate among the greater population upon their creation.<sup>80</sup> No analogous concept ever took root in imperial China. Rather, the desire to maintain imperial power motivated “all known examples of efforts by the [imperial Chinese] state to provide protection for what we now term intellectual property,” a desire ultimately bound up with Confucian notions of maintaining an ordered, harmonious society.<sup>81</sup> Professor Alford characterizes the Confucian political culture of imperial China as the primary reason for the failure of the emergence there of a Western-style intellectual property regime<sup>82</sup>: because Confucianism conceived of Chinese society as an extended family with the ruler as its head, the ruler had the obligation as the population’s fiduciary to determine “which knowledge warranted dissemination and which ought to be circumscribed in the best interests of the commonwealth.”<sup>83</sup>

Certain isolated initiatives resembling intellectual property protections, however, did emerge during the imperial era. Such efforts included an edict promulgated in 835 CE banning the unauthorized reproduction of certain materials used for prognostication,<sup>84</sup> the issuance in 1009 CE of an order mandating

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<sup>79</sup> See ALFORD, *supra* note 18, at 18.

<sup>80</sup> See *id.*

<sup>81</sup> *Id.* at 17; see also Lazar, *supra* note 28, at 1201 (noting that “[t]he traditional Chinese legal system was shaped by the concept of social order propounded in Confucian philosophy”).

<sup>82</sup> *Id.* at 19.

<sup>83</sup> *Id.* at 23.

<sup>84</sup> *Id.* at 13.

the prepublication review of printed works so as to prevent the unauthorized reproduction of other works,<sup>85</sup> restrictions on the use of symbols associated with the ruling dynasty and officialdom,<sup>86</sup> and attempts to maintain the secrecy of medicinal production processes.<sup>87</sup> Professor Alford contends, however, that all such examples of proto-intellectual property protections were born of the very same force responsible for the lack of a viable intellectual property regime in imperial China: the Confucian governmental framework dedicated to controlling the dissemination of ideas so as to uphold social harmony “by maintaining commercial order and reducing instances of deception of the populace.”<sup>88</sup>

Similar motivations held sway in the West prior to the Industrial Revolution, however, including the disincentivizing of the publication of heterodox materials and the state’s desire to enhance its power, each of which served as the impetus for early copyright and patent protections, respectively.<sup>89</sup> Nevertheless, it was during the seventeenth and eighteenth centuries that the focus of intellectual property shifted in the West from the state to the individual,<sup>90</sup> a shift entirely in accord with the intellectual transformation wrought by the Enlightenment.<sup>91</sup> It should come as

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 15.

<sup>87</sup> *Id.* at 16.

<sup>88</sup> *Id.* at 17; see also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT’L L. & POL. 135, 140 (1997) (arguing that “both explicit imperial policies about the dissemination of knowledge and broader social attitudes about the power of the past and the nature of creativity militated against the development of the notion of individual ownership of expressions of ideas” in imperial China).

<sup>89</sup> *Id.* at 18.

<sup>90</sup> *Id.*

<sup>91</sup> See Daniel Gervais, *Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role of Geographical Indications*, 15 ILSA J. INT’L & COMP. L. 551, 554 (2009) (“The conflation of the Enlightenment’s focus on individual authorship, inventorship, and . . . Lockean tradition . . . on the one hand, and the belief that industrial progress through the protection . . . of innovation was essential, on the other hand, were the pillars on which modern intellectual property rules were built.”); Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. ST. L. REV. 137, 144–45 (2005) (“Intellectual property rights as means of rewarding individual effort are very much a child of the Enlightenment and 18th century European culture.”).

no surprise, then, that a concept such as intellectual property—so firmly rooted in the notion of securing individual rights from state incursion—failed to come about of its own accord in a society still governed by precisely the opposite impulses.<sup>92</sup>

It is equally unsurprising that the impetus for the formal recognition of intellectual property rights in China came from abroad. China's initial forays into the realm of formal intellectual property protections amounted essentially to "meeting the demands or expectations of foreign powers with which China traded and from which China sought investment."<sup>93</sup> After China's harrowing defeat at the hands of the British in the Opium War, which lasted from 1839 to 1842, Western commercial interests capitalized on the ensuing power vacuum to extract diplomatic concessions from the imperial Chinese government.<sup>94</sup> Consequently, foreign investment in China increased over the course of the nineteenth century such that, by the turn of the twentieth century, Chinese entities began to make unauthorized use of foreign trademarks and trade names so as to benefit from their domestic popularity.<sup>95</sup> Protection of trademarks was, accordingly, the focus of treaties brokered just after the dawn of the twentieth century between China, on the one hand, and Britain, Japan, and the United States, on the other.<sup>96</sup> Disputes between China and these foreign powers, however, resulted in the protections afforded by the treaties remaining unavailable until 1923, "and then more in name than fact."<sup>97</sup> The same results obtained for patent and copyright, leading Britain, the United States, and other foreign commercial powers operating in China to enact bilateral treaties as a means of protecting their intellectual property rights from Chinese

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<sup>92</sup> See Miller, *supra* note 1, at 107 ("In Chinese history it is difficult to discern the occurrence of any ideas along the lines of what came to be known in the West as inalienable individual personal rights, such as life, liberty, and the pursuit of happiness."). For a varying perspective, see Peter K. Yu, *Four Common Misconceptions About Copyright Policy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127, 131–43.

<sup>93</sup> Natalie P. Stoianoff, *The Influence of the WTO over China's Intellectual Property Regime*, 34 SYDNEY L. REV. 65, 66 (2012).

<sup>94</sup> See ALFORD, *supra* note 18, at 32.

<sup>95</sup> *Id.* at 34.

<sup>96</sup> *Id.* at 36–37.

<sup>97</sup> *Id.* at 41.

infringement.<sup>98</sup> China did enact copyright, patent, and trademark legislation in 1910, 1912, and 1923, respectively, although these laws were largely ineffective at curbing piracy.<sup>99</sup>

Imperial China itself ceased to exist in 1911 with the collapse of the Qing dynasty, and neither the following tumultuous two-decade period nor the subsequent Guomindang government brought about the establishment of a viable intellectual property regime.<sup>100</sup> The waning years of the Qing were fraught with corruption, popular resentment of the ruling dynasty, and “the corrosive effects of China’s semicolonial status.”<sup>101</sup> Furthermore, the foreign treaty signatories whose collective commercial presence in China had resulted in the inauguration of intellectual property protections there failed to convey to the Chinese government how intellectual property protections could benefit China.<sup>102</sup> The sociopolitical context in China following the collapse of the Qing, therefore, was hardly ripe for lasting legal reform. After assuming power in 1928, the Guomindang government attempted to establish a lasting legal framework, including measures designed to protect intellectual property rights.<sup>103</sup> Examples of such legislation include the Copyright Law of 1928,<sup>104</sup> the Trademark Law of 1930,<sup>105</sup> and the Measures to Encourage Industrial Arts of 1932.<sup>106</sup> Professor Alford posits two reasons for the ultimate failure of the Guomindang’s efforts to establish a viable intellectual property regime: first, external forces plagued the government, including the Manchurian invasion of 1931, the campaign to suppress the Communists, Japanese aggression, and the eventual Chinese civil war; second, the laws that were passed took for granted a legal structure and

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<sup>98</sup> *Id.* at 41–42.

<sup>99</sup> See Patricia E. Campbell & Michael Pecht, *The Emperor’s New Clothes: Intellectual Property Protections in China*, 7 J. BUS. & TECH. L. 69, 72 (2012).

<sup>100</sup> See ALFORD, *supra* note 18, at 48–55.

<sup>101</sup> *Id.* at 48.

<sup>102</sup> *Id.* at 49.

<sup>103</sup> *Id.* at 50.

<sup>104</sup> *Id.*; see also Frank Lin, *Piracy in China: Identifying the Problem and Implementing Solutions*, 14-WTR CURRENTS: INT’L TRADE L.J. 83, 85 (2005).

<sup>105</sup> See ALFORD, *supra* note 18, at 51.

<sup>106</sup> *Id.* at 52.

consciousness non-existent in early twentieth-century China.<sup>107</sup> Indeed, such laws were drafted on the false assumption that their audience possessed a certain degree of familiarity with foreign legal traditions; in reality, most Chinese were unfamiliar not only with the concept of intellectual property but also with “the very idea of vindicating rights through active involvement in a formal legal process meant to be adversarial in nature.”<sup>108</sup>

The PRC came into existence on October 1, 1949, and initially adopted a Marxist-influenced Soviet model to guide the implementation of intellectual property law.<sup>109</sup> Professor Natalie Stoianoff of the University of Technology, Sydney, posits that the intellectual property policy of the PRC can be divided into two stages: the Maoist era and the Open Door Policy era, with a “stark contrast in ideologies” distinguishing the two periods from each other.<sup>110</sup> The Maoist era, roughly corresponding to the period spanning the founding of the PRC to the end of the Cultural Revolution,<sup>111</sup> witnessed the synthesis of Confucian and Communist morality as a means of simultaneously “scorning commercial profit” and outwardly embracing the “development of science and technology.”<sup>112</sup> As Professor Alford notes, such a fusion was possible because both Marxism and Confucianism perceived original creations as products not of their individual creators but of the societies to which their creators belonged.<sup>113</sup> Accordingly, neither philosophy articulates a compelling reason to invest original works with ownership interests.<sup>114</sup> Pursuant to this governing philosophy, the PRC in 1963 issued the Regulations on Awards for Inventions, which provided that the state maintained ultimate ownership of inventions.<sup>115</sup> Moreover, copyright

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<sup>107</sup> *Id.* at 53.

<sup>108</sup> *Id.* at 54.

<sup>109</sup> *Id.* at 56–57.

<sup>110</sup> Stoianoff, *supra* note 93, at 68.

<sup>111</sup> *Id.* at 69.

<sup>112</sup> *Id.* at 68 (citing Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 *Nw. J. INT’L L. & BUS.* 15, 56–59 (1993) (internal quotation marks omitted)).

<sup>113</sup> See ALFORD, *supra* note 18, at 57.

<sup>114</sup> *Id.*

<sup>115</sup> See Stoianoff, *supra* note 93, at 68.

protections during the Maoist era were entirely eliminated.<sup>116</sup> Furthermore, the Regulations Governing the Control of Trademarks, promulgated in 1963, lacked any reference whatsoever to “rights” or “exclusive use.”<sup>117</sup> Needless to say, little in the way of legal reforms resulted from the Cultural Revolution—a period perhaps best characterized by the maxim, “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?”<sup>118</sup>

In contrast to the Maoist era, the Open Door Policy era, which commenced after the Cultural Revolution,<sup>119</sup> witnessed China’s adoption of “the [W]estern tradition of acknowledging individual exclusionary ownership rights over intellectual property and, indeed, other forms of property.”<sup>120</sup> Professor Stoianoff asserts that legal developments in China have converged with those of Europe and that China has, since 1978, attempted in earnest to comply with international expectations.<sup>121</sup> Indeed, China enacted formal trademark, patent, and copyright legislation—all of which is still in effect—in 1982,<sup>122</sup> 1984,<sup>123</sup> and 1990,<sup>124</sup> respectively. Additionally, China joined the World Intellectual Property Organization in 1980,<sup>125</sup> and acceded to the Paris Convention in 1984<sup>126</sup> and to the Berne and Universal Copyright Conventions in 1992.<sup>127</sup> Finally, China acceded to the World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) in 1999,<sup>128</sup> and, upon harmonizing its intellectual property legislation with TRIPS, joined

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<sup>116</sup> *Id.* at 69.

<sup>117</sup> ALFORD, *supra* note 18, at 63 (internal quotation marks omitted).

<sup>118</sup> *Id.* at 65 (internal citation and quotation marks omitted).

<sup>119</sup> *Id.*; *see also* Stoianoff, *supra* note 93, at 68–69.

<sup>120</sup> Stoianoff, *supra* note 93, at 68.

<sup>121</sup> *Id.* at 69.

<sup>122</sup> *See* Campbell, *supra* note 99, at 75.

<sup>123</sup> *Id.* at 85.

<sup>124</sup> *Id.* at 102.

<sup>125</sup> *See* Stoianoff, *supra* note 93, at 70.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 72.

<sup>128</sup> *Id.*

the World Trade Organization (“WTO”) in 2001.<sup>129</sup> Collectively, these legal developments, in accordance with Professor Stoianoff’s view, appear to indicate the willing embrace by China of precisely the sort of legal framework in which intellectual property protections exist in the West. Professor Alford proffered a more guarded assessment in 1993, however, arguing that China’s attempt to “have it ‘both ways’” in simultaneously providing for intellectual property rights in legislation while failing to enforce such rights “has resulted in having it neither way.”<sup>130</sup>

*B. The Regime As It Currently Exists: Avenues of Enforcement Available to Right Holders*

1. Customs

At present, China possesses an intellectual property regime that affords right holders several avenues of enforcement. Beginning—literally—at the periphery, the Chinese Customs Administration (“Customs”) has exclusive jurisdiction over the protection of intellectual property rights at China’s borders.<sup>131</sup> Customs serves two primary functions: it prevents counterfeit goods produced in China from being exported and it prevents counterfeit goods produced abroad from entering China’s borders.<sup>132</sup> Right holders can make use of Customs in two ways. They can submit a request to Customs to detain a particular shipment of infringing goods, although Customs will not act unless the right holder provides the requisite documentation and pays an obligatory bond.<sup>133</sup> Alternatively, Customs officials may act *ex officio* to protect goods that have already been entered into its database; in such circumstances, Customs officials may contact the right holder and give him the option of filing a request for the goods to be

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<sup>129</sup> *Id.* at 72–73.

<sup>130</sup> ALFORD, *supra* note 18, at 94.

<sup>131</sup> See DIMITROV, *supra* note 8, at 72. Dimitrov’s recent study provides an exceedingly thorough analysis of China’s entire intellectual property apparatus. Furthermore, much of Dimitrov’s information was gleaned from personal interviews of anonymous Chinese government officials and, accordingly, is not readily available to the public in other sources. For those reasons, Dimitrov’s study serves as the basis for this section.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 78.

detained.<sup>134</sup> Writing in 2008, Dartmouth University professor Martin K. Dimitrov predicted that the quality of enforcement provided by Chinese Customs was on the upswing primarily as a result of its centralization in 1998, but that in and of itself such enforcement was insufficiently deterrent.<sup>135</sup>

## 2. The Chinese Judiciary

Right holders can also seek redress in Chinese courts. China has a five-tiered court system: the Supreme People's Court, thirty-one provincial high people's courts, 346 intermediate people's courts, 3,135 county-level people's courts, and 11,000 township- and town-level people's tribunals together constitute the Chinese judicial hierarchy.<sup>136</sup> While Professor Dimitrov highlights increasing litigation, a higher degree of legal professionalism, and greater judicial independence as three positive trends, he also points to several weaknesses plaguing China's judiciary.<sup>137</sup> First, he cites as "technical" obstacles to improvement the need for newer and clearer laws and regulations to be made immediately available to the public; reform in select areas of the law; more lawyers and judges, especially in rural areas; and incentives to diminish judicial corruption.<sup>138</sup> Second, the Chinese Communist Party ("the Party"), in his estimation, hinders judicial independence by ensuring that judges "toe the party line on politically sensitive issues."<sup>139</sup> Finally, Professor Dimitrov maintains that the Party precludes the implementation of the rule of law by maintaining a parallel system of justice, the Discipline and Inspection Commission system, which "puts party members above the law."<sup>140</sup>

On a more positive note, however, China is perhaps the only country in the world to have established specialized intellectual

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 83–84.

<sup>136</sup> *Id.* at 97–98. These figures are accurate as of 2001.

<sup>137</sup> *Id.* at 100–01.

<sup>138</sup> *Id.* at 100.

<sup>139</sup> *Id.* at 100–01.

<sup>140</sup> *Id.* at 101.

property tribunals that hear civil cases in the first instance.<sup>141</sup> Such specialized tribunals are located at ordinary courts but presided over by judges with specialized training.<sup>142</sup> According to Professor Dimitrov, “rich localities with high levels of inventive activity have higher rates of litigation[,]” suggesting that areas such as Zhejiang, Tianjin, Guangdong, Shanghai, and Beijing—the five Chinese provinces with intellectual property tribunals that handled more than ten cases in 2004—may be better equipped to resolve complex lawsuits than courts in other parts of the country.<sup>143</sup> As a consequence of the establishment of the specialized tribunals, parties in intellectual property cases enjoy what Professor Dimitrov deems “the highest quality of judicial review that is currently available in China.”<sup>144</sup> In addition, most first-instance intellectual property cases involve open court hearings, which, coupled with published decisions by the tribunals, enhance the transparency of this sector of the Chinese judiciary.<sup>145</sup> Finally, a relatively high rate of appeal of first-instance cases may demonstrate that the intellectual property tribunals are fairer and more trusted than other Chinese courts.<sup>146</sup>

### 3. Administrative Enforcement of Patents

At the core of China’s intellectual property regime is a complex, highly fragmented administrative bureaucracy with enforcement responsibilities. At the outset, it is important to note that the various agencies comprising this bureaucracy play a far greater role in enforcing intellectual property rights in China than do other institutions; indeed, administrative enforcement cases outnumber other types of cases by a factor of one hundred.<sup>147</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 104–05.

<sup>144</sup> *Id.* at 106.

<sup>145</sup> *Id.* at 106–07.

<sup>146</sup> *Id.* at 107. See also Mark Cohen, *Crossing the River by Feeling the IP Stones: How China’s Civil Procedure System Benefits from Reforms Made in IP Civil Litigation*, CHINA IPR (Nov. 8, 2012), <http://chinaipr.com> (surveying China’s recently-passed revised Civil Procedure Law, which contains provisions that may enhance judicial transparency).

<sup>147</sup> DIMITROV, *supra* note 8, at 115.

While the State Intellectual Property Office (“SIPO”) was intended to serve as an intellectual property super-bureaucracy that would oversee discrete patent, copyright, and trademark sub-bureaucracies, that has not come to pass.<sup>148</sup> Instead, SIPO, which was modeled on the United States Patent and Trademark Office, is essentially indistinguishable from the China Patent Bureau—officially, a sub-bureau within SIPO—and amounts to little more than China’s de facto patent agency.<sup>149</sup>

China provides three types of patents: invention patents, which protect new products or processes and are awarded for twenty years; utility model patents, which protect simpler inventions, require only a formal examination for novelty, and are awarded for twenty years; and design patents, which protect unique shapes and forms, and are awarded for ten years.<sup>150</sup> SIPO has three primary responsibilities: patent examination, reexamination, and invalidation; resolving patent infringement disputes; and providing enforcement in cases of patent counterfeiting and passing off.<sup>151</sup> The first two avenues of enforcement generally proceed in an efficient manner, a positive development that Professor Dimitrov attributes to SIPO’s sharing of enforcement jurisdiction in these two areas with the courts, which provide right holders with another means of patent protection and incentivize SIPO officials to resolve disputes satisfactorily in the first instance rather than risk being subjected to subsequent judicial review.<sup>152</sup> The third avenue of enforcement does not share its jurisdiction with the courts; instead, local officials typically investigate patent counterfeiting and passing off themselves. This results in what Professor Dimitrov describes as an unpredictable pattern of enforcement.<sup>153</sup> As Fordham University School of Law Visiting Professor Mark Cohen recounts, recent legislative trends may serve as cause for

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<sup>148</sup> See ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 108 (2005).

<sup>149</sup> *Id.* at 111.

<sup>150</sup> DIMITROV, *supra* note 8, at 250.

<sup>151</sup> *Id.* at 255.

<sup>152</sup> *Id.* at 255–56.

<sup>153</sup> *Id.* at 260.

concern about the future state of China's patent enforcement.<sup>154</sup> Specifically, SIPO published for comment draft amendments to the Chinese Patent Law on August 10, 2012<sup>155</sup> even though "the ink [was] hardly dry" on 2008 amendments to the same law.<sup>156</sup> Professor Cohen contends that this development arose out of the senior leadership's frustration with the pace of innovation in China and the leadership's desire to increase the potential for Chinese patents to generate revenue.<sup>157</sup> The draft amendments contain a host of troubling proposals<sup>158</sup> that bolster the enforcement responsibilities of the comparatively inefficient administrative bureaucracy at the expense of the courts,<sup>159</sup> including the specialized intellectual property tribunals.<sup>160</sup> Furthermore, the drafting process was notable not only for SIPO's lack of consultation with foreign actors, but also for SIPO's reliance on information regarding patent enforcement from Hangzhou and Wenzhou, jurisdictions where foreigners "have suffered major losses . . . under questionable circumstances," and the corresponding failure of SIPO to seek similar information from Beijing, the locus of most foreign-related patent litigation.<sup>161</sup> Professor Cohen concludes that "the draft patent amendments could erode the [ten-plus] year understanding that China was

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<sup>154</sup> See Mark Cohen, *Why the Proposed Amendments to the Patent Law Really Matter ... And Maybe Not Just For Patents*, CHINA IPR (Sept. 6, 2012), <http://chinaipr.com>.

<sup>155</sup> *Joint Comments of the American Bar Association Section of Intellectual Property Law and Section of International Law on the Draft Amendments to the People's Republic of China Patent Law* 1 (2012), available at <http://chinaipr2.files.wordpress.com/2012/09/aba-comments-on-china-patent-law-revisions-finalcombo-7sep2012.pdf>.

<sup>156</sup> Cohen, *supra* note 154.

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> *Id.* (arguing that the amendments increase the authority of the administrative enforcement bureaucracy at the expense of the courts in two ways: "the LPO's [Local Patent Offices] [can now] adjudicate civil patent disputes," and "SIPO now proposes to give local patent offices added authority, thereby seeming to contradict the earlier goal of centralizing patent cases rather than a further devolution of authority to local LPO's").

<sup>160</sup> *Id.* (contending that the draft amendments relegate China "to its state of IP affairs before WTO accession, when local IP offices . . . had the authority to award damages in administrative cases. [Such] provisions were removed from China's IP laws . . . in response to domestic pressure to protect property rights . . . through greater reliance on the civil courts").

<sup>161</sup> *Id.*

evolving to a system that would primarily protect IP as a private property right through relying upon an increasingly expert civil judicial system.”<sup>162</sup>

#### 4. Administrative Enforcement of Copyright

According to Cornell University professor Andrew Mertha, China’s copyright enforcement bureaucracy is poorly managed<sup>163</sup> and has historically been ineffective due to insufficient personnel and funding in addition to its “embeddedness within another powerful bureaucracy that often pursued different priorities.”<sup>164</sup> Accordingly, the primary advocates of copyright protection in China are foreign right holders whose interests often conflict with those of powerful domestic groups, a tension that Professor Dimitrov deems responsible for the low quality of copyright enforcement.<sup>165</sup> China’s copyright bureaucracy is multifaceted, with many agencies possessing national-level enforcement jurisdiction, including the National Press and Publications Administration, the National Copyright Administration (“NCA”), and the Ministry of Culture.<sup>166</sup> Moreover, China’s copyright bureaucracy provides only one form of routine enforcement to right holders: “quasi-judicial enforcement,” which is conducted in-house by the NCA and results in written punishment decisions.<sup>167</sup>

Two trends characterize quasi-judicial enforcement of foreign copyrights: first, the volume of such enforcement is very low and rarely exceeds one percent of the NCA’s overall caseload; and second, there is a substantial degree of regional variation in the level of such enforcement, with richer, coastal provinces handling the overwhelming majority of cases.<sup>168</sup> Relatively clear enforcement mandates as well as the NCA’s publication of some of its administrative decisions constitute two positive trends in

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<sup>162</sup> *Id.*

<sup>163</sup> MERTHA, *supra* note 148, at 118.

<sup>164</sup> *Id.* at 119.

<sup>165</sup> DIMITROV, *supra* note 8, at 222.

<sup>166</sup> MERTHA, *supra* note 148, at 146–47. On page 146 of his study, Mertha provides a useful flow chart of China’s copyright enforcement bureaucracy.

<sup>167</sup> DIMITROV, *supra* note 8, at 236.

<sup>168</sup> *Id.* at 236–38.

copyright enforcement, yet the low rate of appeal of such decisions may demonstrate that the NCA discourages plaintiffs from making use of its appellate mechanisms.<sup>169</sup> Amendments to Chinese copyright law are currently undergoing review, and while copyright protections are slated to be extended to the areas of applied art and sports broadcasting, it remains to be seen whether this legislation will improve administrative copyright enforcement.<sup>170</sup>

### 5. Administrative Enforcement of Trademarks

At least six different administrative agencies possess trademark enforcement mandates,<sup>171</sup> including, at the national level, the State Administration for Industry and Commerce (“SAIC”) and the State Quality Technical Supervision and Quarantine Bureau.<sup>172</sup> While such an array of administrative enforcement options may appear to benefit victims of trademark infringement, this lack of centralization actually gives rise to two problems: multiple agencies working together may provide enforcement that is duplicative and uncoordinated, and an agency may “shirk” its enforcement responsibilities.<sup>173</sup> Such shirking can take two forms. An agency may flatly refuse to take on a particular case, or it can “shirk strategically” by taking on a case on the condition that the right holder provide a case-handling fee, which essentially amounts to a bribe.<sup>174</sup> Professor Dimitrov contends that shirking arises from the conflict of interest between the licensing and supervisory functions of a particular agency, a tension that “characterize[s] the work of every administrative agency with a trademark or copyright enforcement portfolio in China.”<sup>175</sup> Chinese bureaucracies grant many types of licenses to firms that they regulate, but pursuing a duly licensed firm that has engaged in

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<sup>169</sup> *Id.* at 241.

<sup>170</sup> See Mark Cohen, *Third Draft of the Copyright Law Amendments Undergoing Internal Review*, CHINA IPR (Oct. 14, 2012), <http://chinaipr.com>.

<sup>171</sup> See DIMITROV, *supra* note 8, at 185.

<sup>172</sup> MERTHA, *supra* note 148, at 191. On this page of his study, Mertha provides a highly useful flow chart of China’s trademark enforcement bureaucracy.

<sup>173</sup> DIMITROV, *supra* note 8, at 186.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

counterfeiting could result in driving such a firm out of business, thereby harming a local community's economy and depriving the agency of licensing fees.<sup>176</sup> Accordingly, Professor Dimitrov posits that agencies are ultimately more sympathetic towards counterfeiters than to foreign right holders, because "right holders may be here today and gone tomorrow" while counterfeiting is a reliable, long-term source of income for many local economies.<sup>177</sup> Indeed, Professor Mertha reckoned that a single physical market for counterfeit goods—the "Kunming Xichang electronics and audiovisuals market"—generated nearly \$900,000 in one year in licensing and other fees, a sum that amounts to roughly seventy times the yearly budget of a particular enforcement agency's investigative team.<sup>178</sup> In addition to duplicative enforcement and shirking, right holders are confronted with the problem that each enforcement agency treats a counterfeiting case differently, thereby enhancing the unpredictability of an enforcement environment that is already difficult to navigate.<sup>179</sup> Finally, it bears mentioning that in 2005 the number of cases handled by the SAIC was greater by a multiple of nearly thirty than that handled by the courts, which, despite the relative costliness of litigation, may ultimately provide right holders with a more favorable outcome.<sup>180</sup>

## 6. Criminal Enforcement of Infringement

Finally, China provides for the criminal enforcement of intellectual property rights in three ways: right holders can initiate the private prosecution of an infringer, the police can accept a case transferred to them by an administrative agency, or the police can initiate a prosecution themselves.<sup>181</sup> While nearly all such prosecutions lead to convictions, only one-tenth of one percent of the intellectual property cases handled by Chinese administrative bureaucracies in 2004 were criminal in nature.<sup>182</sup> This result is

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> MERTHA, *supra* note 148, at 185–86.

<sup>179</sup> DIMITROV, *supra* note 8, at 188.

<sup>180</sup> *Id.* at 189.

<sup>181</sup> *Id.* at 146–47.

<sup>182</sup> *Id.* at 146.

attributable to the labyrinthine process by which criminal prosecutions proceed: an administrative agency must decide to transfer a case to the police, who themselves must decide to transfer the case to the Procuratorate,<sup>183</sup> which has the authority to arrest the infringer and introduce the case in court, where the case may or may not be accepted.<sup>184</sup> Professor Dimitrov reasons that the volume of criminal enforcement is so low primarily because of unwillingness at each step of this procedural pipeline to move cases forward.<sup>185</sup> Nevertheless, there is a high degree of regional variation in the volume of criminal enforcement of intellectual property rights; predictably, developed coastal cities take seriously their enforcement responsibilities, while criminal prosecutions occur less frequently in those communities where counterfeiting is the local government's primary source of income.<sup>186</sup> Conviction will almost certainly result, however, in the event that a case of infringement does it make it to court, a trend that may well reflect a result-oriented system designed to "generate convictions, not volume."<sup>187</sup>

### C. Empirical Data on Foreign Intellectual Property Litigants in China

Foreigners may have strong opinions about the effectiveness of China's intellectual property regime,<sup>188</sup> but relatively few of them actually make use of it. Indeed, more intellectual property-related civil litigation occurs in China than in any other country in the world,<sup>189</sup> yet the presence of foreign litigants there is quantitatively

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<sup>183</sup> See Gregory S. Kolton, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 441 n.61 (1996) (describing the function of the Procuratorate); see also *id.* at 424–30.

<sup>184</sup> DIMITROV, *supra* note 8, at 146. Dimitrov describes the Procuratorate as the law enforcement organ whose "chief responsibility [in intellectual property cases] is the criminal indictment of . . . suspects." *Id.* at 158.

<sup>185</sup> *Id.* at 148. A recently promulgated opinion by the State Council, however, directly addresses this problem. See *infra*, note 268.

<sup>186</sup> See DIMITROV, *supra* note 8, at 157–58.

<sup>187</sup> *Id.* at 159.

<sup>188</sup> See *infra* Part II.B.

<sup>189</sup> Hope Shimabuku & Mark Cohen, *China's Current Intellectual Property Plan, Policies & Practices*, 15 SMU SCI. & TECH. L. REV. 17, 31 (2011).

negligible. In 2009, for instance, Chinese courts adjudicated 30,509 first-instance civil intellectual property cases, of which 1,361—or roughly 4.5%—involved foreign litigants.<sup>190</sup> In 2010, Chinese courts decided 41,718 such cases, 1369 of which involved foreign litigants, a figure amounting to roughly 3.2%.<sup>191</sup> In 2011, this figure had dropped to 1,321, a mere 2.3% of the 58,201 total first-instance civil intellectual property cases that Chinese courts decided that year.<sup>192</sup> As these figures demonstrate, foreigners “would not even account for a rounding error in Chinese civil IPR litigation.”<sup>193</sup> Moreover, even though the absolute number of civil intellectual property cases entertained by Chinese courts has grown substantially in each of the last three years, the proportion of foreign litigants involved in such cases has remained stagnant.

Viewing intellectual property litigation within the context of civil litigation in general reveals just how few foreigners occupy a position on the Chinese civil docket. In 2011, Chinese courts entertained a staggering 7,169,083 civil cases, yet only 36,230—or 0.5%—of these cases involved foreign litigants.<sup>194</sup> In addition, intellectual property cases *in toto* comprised less than one percent of China's civil docket in 2011.<sup>195</sup> As mentioned earlier,<sup>196</sup> Chinese courts heard around 58,000 civil intellectual property cases in 2011, roughly 1,300 of which—or 2.3%—involved foreign litigants.<sup>197</sup> These data lead to two notable findings. First, foreign litigants who sought to vindicate their intellectual property rights in China collectively amounted to less than 0.02% of the 2011 Chinese civil docket, an infinitesimal proportion.<sup>198</sup> Second,

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<sup>190</sup> Sup. People's Ct., People's Republic of China, WHITE PAPER OF INTELLECTUAL PROPERTY PROTECTION BY CHINESE COURTS IN 2009 42 (2010).

<sup>191</sup> Sup. People's Ct., People's Republic of China, WHITE PAPER OF INTELLECTUAL PROPERTY PROTECTION BY CHINESE COURTS IN 2010 3 (2011), *available at* <http://www.cpahkld.com/UploadFiles/20110509082512655.pdf>.

<sup>192</sup> Sup. People's Ct., People's Republic of China, WHITE PAPER OF INTELLECTUAL PROPERTY PROTECTION BY CHINESE COURTS IN 2011 31 (2012).

<sup>193</sup> Shimabuku and Cohen, *supra* note 189, at 32.

<sup>194</sup> Mark Cohen, *Foreign IP Litigation in China: How Important Is It?*, CHINA IPR (Oct. 18, 2012), <http://chinaipr.com>.

<sup>195</sup> *See infra* note 245.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *See* Cohen, *supra* note 194.

of the roughly 36,000 civil cases involving foreigners that Chinese courts heard in 2011, only around 1,300—or roughly 3.6%—involved intellectual property rights.<sup>199</sup> What rights, then, were the other roughly 34,000 foreign litigants seeking to enforce in Chinese civil courts? As Cohen relates, foreigners in 2011 were involved in 8,286 maritime cases, 4,727 contract cases, 4,450 ownership cases, and 1,727 cases involving the recognition or execution of foreign court judgments.<sup>200</sup> In sum, foreigners make scant use of Chinese courts in general, and comparatively fewer foreigners make use of Chinese courts to vindicate their intellectual property rights.

## II. THE PARADOX OF ENFORCEMENT: CONTRADICTORY CHARACTERIZATIONS OF CHINA'S INTELLECTUAL PROPERTY REGIME

### A. *The Apologists' Perspective*

Some commentators have expressed the view that China's intellectual property regime is—or soon will be—capable of providing for the efficient resolution of disputes arising out of infringement. In a recent article, Drake University professor Peter Yu relates that neither the United States government nor American holders of intellectual property rights are satisfied with China's intellectual property regime.<sup>201</sup> Nevertheless, Professor Yu is optimistic about the imminent future of intellectual property enforcement in China. In particular, he claims not only that China's regime has improved,<sup>202</sup> but also that China sits poised to cross over from the “less promising” to the “more promising” side of what he deems the “intellectual property divide.”<sup>203</sup> Somewhat forebodingly, he cautions that the United States may be in for a “rude awakening” should the strengthening of its intellectual

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<sup>199</sup> See *id.*; *infra* note 245.

<sup>200</sup> Cohen, *supra* note 194.

<sup>201</sup> Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 529 (2012).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 532.

property regime render China “an intellectual property power against which the United States may not be interested in competing.”<sup>204</sup> Specifically, Professor Yu predicts that the rule of law will take hold in China to a deeper extent than at present, and that China’s legal system will accordingly meet with substantially more use.<sup>205</sup> Consequently, “litigation-related disruption”<sup>206</sup> to the business activities of foreigners will render it “very costly for foreign rights holders or new local firms to enter the market.”<sup>207</sup> Moreover, Professor Yu posits that China will become increasingly innovative as a result of improvements to its intellectual property regime and, consequently, that the United States will lose the competitive advantage that it has “traditionally enjoyed as a result of its much higher intellectual property standards.”<sup>208</sup> Overall, Professor Yu presents a vision of China’s intellectual property regime as on the verge of becoming so robust that it may even adversely affect the interests of foreign right holders by leaving them afloat in a sea of costly litigation. Notwithstanding the ambivalence of this prediction, Professor Yu’s article implies that China soon will be a place where the holders of intellectual property rights can expect them to be enforced.<sup>209</sup>

Southern Methodist University professor Xuan-Thao Nguyen adopts an even less guarded, more laudatory stance than Professor Yu regarding the current state of intellectual property protections and enforcement in China.<sup>210</sup> Professor Nguyen seeks to present “a startling new picture of China that directly contradicts the dominant negative view of China’s approach to intellectual property rights.”<sup>211</sup> Ultimately, she argues that China is “very protective” of intellectual property rights, a conclusion that she grounds primarily in the recent surge in intellectual property

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<sup>204</sup> *Id.* at 543.

<sup>205</sup> *Id.* at 546.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 547.

<sup>208</sup> *Id.* at 550–51.

<sup>209</sup> *See id.* at 580 (“The oft-repeated story about China as a major pirating nation is too simple and too outdated.”).

<sup>210</sup> Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China’s Intellectual Property Regime*, 55 ST. LOUIS U. L.J. 773 (2011).

<sup>211</sup> *Id.* at 773.

litigation in China, which has overwhelmingly involved exclusively Chinese parties.<sup>212</sup> Specifically, Professor Nguyen contends that the willingness of the Chinese to employ judicial remedies to resolve intellectual property disputes demonstrates that “Chinese businesses and individuals have learned in a very short time to recognize and embrace the fruit of their intellectual endeavors.”<sup>213</sup> In addition to acknowledging the newfound desire on the part of Chinese right holders to seek redress in court, Professor Nguyen marshals select cases to support her claim that the Chinese judiciary itself recognizes both the existence of intellectual property rights as well as when infringement of those rights results in loss to right holders.<sup>214</sup> Professor Nguyen also expresses bewilderment at the dearth of foreign litigants, a trend that she characterizes as “contradictory to the persistent outcry against Chinese piracy and the abuse of intellectual property rights belonging to foreign owners.”<sup>215</sup> Accordingly, she submits that the glaring dearth of foreign litigants is perhaps attributable to the long-standing perception of China as a place hostile to intellectual property rights.<sup>216</sup>

The favorable views of China’s intellectual property regime presented above are, perhaps unsurprisingly, shared by those who oversee that regime. In particular, Tian Lipu, the commissioner of SIPO,<sup>217</sup> recently lambasted what he deemed the distortion of China’s intellectual property regime by Western media.<sup>218</sup> Tian

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<sup>212</sup> *Id.* at 774–75.

<sup>213</sup> *Id.* at 797–98.

<sup>214</sup> *Id.* at 801.

<sup>215</sup> *Id.* at 810.

<sup>216</sup> *Id.*

<sup>217</sup> *Tian Lipu, Commissioner of the State Intellectual Property Office*, [http://english.gov.cn/2006-02/10/content\\_185207.htm](http://english.gov.cn/2006-02/10/content_185207.htm) (last visited Nov. 23, 2012).

<sup>218</sup> See Ben Blanchard, *China Slams “Distorted” View of Copyright Piracy Problem*, REUTERS, Nov., 11, 2012, available at <http://www.reuters.com/article/2012/11/11/us-china-congress-piracy-idUSBRE8AA04620121111>; see also Tian Lipu, *China Is Serious About Intellectual Property*, WALL ST. J., Dec. 15, 2010, <http://online.wsj.com/article/SB10001424052748703727804576017992675772926.html> (conceding that “intellectual-property infringement is still relatively serious in some regions and with some products[,]” but contending that “[c]omplaints about China’s protection of intellectual property are often exaggerated” and that “intellectual-property enforcement [i]s no longer the problem of the U.S., nor . . . a problem of China—it [i]s now a global problem”).

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acknowledged the existence of intellectual property infringement as a legitimate problem that continues to plague China.<sup>219</sup> Nevertheless, Tian decried the failure of Western media to recognize important facts about China's intellectual property regime.<sup>220</sup> Specifically, Tian highlighted China's status as "the world's largest payer for [i.e., buyer of] patent rights . . . trademark rights . . . royalties, [and as] one of the largest [buyers of] . . . real software."<sup>221</sup> He emphasized that the software used by China's government officials, banks, insurance companies, and businesses is not pirated.<sup>222</sup> Furthermore, Tian contended that if foreign companies such as Apple, Inc., were so fearful that their intellectual property rights would be infringed in China, then such companies would not have chosen China as their preferred base of production.<sup>223</sup> Referring to Apple in particular, Tian remarked that most of its products are made in China, whereupon those products are exported to foreign markets where their value increases.<sup>224</sup> Tian concluded that companies such as Apple choose to take advantage of China's comparatively favorable manufacturing environment precisely because those companies trust China's intellectual property regime to protect their rights.<sup>225</sup>

### *B. The Critics' Perspective*

Despite the positive portrayal of China's intellectual property regime by some, the general perception in the United States is that it leaves much to be desired. Indeed, "[f]or all their sparring," wrote Richard D'Aveni in the pages of *The Washington Post* on the eve of the 2012 United States Presidential election, "President Obama and [challenger] Mitt Romney agree on this: China lurks as

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<sup>219</sup> Blanchard, *supra* note 218. ("Speaking honestly, there is a market. People use and buy pirated goods," Tian told reporters on the sidelines of a landmark Communist Party congress.)

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* (internal quotation marks omitted).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* ("This could only happen because China's intellectual property rights environment sets foreign investors at ease allowing them to come to China to manufacture.").

a threat to U.S. businesses.”<sup>226</sup> As D’Aveni pointed out, the United States Trade Representative (“USTR”) named China, for the eighth year, to its priority watch list in 2012.<sup>227</sup> The USTR disseminates such determinations in its annual Special 301 Report, a review of the worldwide state of intellectual property rights protection and enforcement.<sup>228</sup> While the 2012 Special 301 Report commends China for its establishment of a State Council-level leadership structure to oversee enforcement,<sup>229</sup> recognizes the Chinese leadership’s commitment to enhancing political accountability,<sup>230</sup> and speaks positively of China’s promulgation of a draft Judicial Interpretation intended to clarify legal standards pertaining to inducement of infringement,<sup>231</sup> the condemnatory far outweighs the laudatory in the report’s overall assessment. Preliminarily, the report not only notes that a “wide spectrum” of American right holders report serious obstacles to enforcement “of *all* forms of IPR in China,” but also expresses concern at the troubling direction that China’s intellectual property policies have taken recently.<sup>232</sup>

The report lists three policies in particular that, in the view of the USTR, compound existing obstacles to satisfactory enforcement.<sup>233</sup> First, the report decries “China’s efforts to link eligibility for government preferences to the national origin” of the intellectual property rights in a particular product.<sup>234</sup> Second, the report notes that Chinese government agencies “are inappropriately using market access and investment approvals as a means to compel foreign firms to license or sell their IPR to domestic

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<sup>226</sup> Richard D’Aveni, *How U.S. Business Can Win Against China*, WASH. POST, Oct. 13, 2012, [http://www.washingtonpost.com/business/how-us-business-can-win-against-china/2012/10/12/7d773e80-0f3b-11e2-bd1a-b868e65d57eb\\_story.html](http://www.washingtonpost.com/business/how-us-business-can-win-against-china/2012/10/12/7d773e80-0f3b-11e2-bd1a-b868e65d57eb_story.html).

<sup>227</sup> *Id.*

<sup>228</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 SPECIAL 301 REPORT 4 (2012), *available at* [http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report\\_0.pdf](http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf).

<sup>229</sup> *Id.* at 9.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 27.

<sup>232</sup> *Id.* at 26 (emphasis added).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Chinese entities.”<sup>235</sup> Third, the report expresses concern that sales of “IP-intensive goods and services remain disproportionately low when compared to sales in similar markets that provide stronger enforcements for IPR protection . . . .”<sup>236</sup> In addition, the report laments a host of trends that contributes to what it deems a generally lackluster enforcement environment: trademark counterfeiting, copyright piracy, physical and online marketplaces for counterfeit goods, the manufacture of counterfeit pharmaceuticals, the lack of means to protect pharmaceutical test data from unfair use, and the export of counterfeit goods.<sup>237</sup>

The report also refers to an “alarming increase” in cases involving trade secret theft, as well as the failure by China to impose sufficient deterrent penalties on infringers.<sup>238</sup> Finally, the report highlights the concern of knowledge-based industries that certain indigenous innovation policies that the Chinese government pursues serve to “coerce the transfer of IPR from foreign rights holders to domestic entities.”<sup>239</sup> In the estimation of the USTR, China is home to one of the bleakest enforcement environments of any country in the world.

The private sector in the United States holds a similarly dispirited view of China’s intellectual property regime. The International Intellectual Property Alliance (“IIPA”), a private sector coalition of trade associations representing American copyright-based industries, submits an annual report to the USTR and to other United States government agencies in advance of the USTR’s publication of its Special 301 Report.<sup>240</sup> In its 2012 report, the IIPA notes the persistence of high levels of copyright piracy in China, which ranges from the piracy of music, films, television shows, books and journals to the use and pre-installation on electronic devices of unlicensed software and “physical

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 27.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Description of the IIPA*, INT’L INTELLECTUAL PROP. ALLIANCE, <http://www.iipa.com/aboutiipa.html> (last visited Apr. 13, 2013).

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piracy.”<sup>241</sup> In addition, the report asserts that the continued existence of barriers to creative content, some of which violate China’s international WTO obligations, has resulted in the Chinese market for American copyright-based companies remaining largely closed.<sup>242</sup> The report also contends that China’s legal institutions are insufficiently protective of intellectual property rights. Specifically, the report claims that thresholds for criminal liability are simply “too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement,” and further notes that such thresholds are not consistently followed by Chinese authorities.<sup>243</sup> Moreover, the report criticizes procedural hurdles such as, *inter alia*, notarization requirements for documents that discriminate between Chinese and foreign right holders.<sup>244</sup>

The results of two surveys released in 2012 further reveal the extent to which foreigners who conduct business in China harbor negative opinions of China’s intellectual property regime. The first survey was conducted by the American Chamber of Commerce in the People’s Republic of China (“AmCham”), a non-profit organization that represents American companies doing business in China, the membership of which comprises more than 3,500 individuals from over 1,000 companies.<sup>245</sup> According to the AmCham survey, sixty-six percent of 152 respondents felt that China’s enforcement of intellectual property rights either remained at the same level or deteriorated over the course of 2011, a figure that is especially striking in light of the Chinese government’s nine-month-long special campaign that year intended to combat infringement.<sup>246</sup> Furthermore, only eight percent of 154 respondents who had initiated an administrative action in response

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<sup>241</sup> INT’L INTELLECTUAL PROP. ALLIANCE, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 29 (2012), *available at* <http://www.iipa.com/rbc/2012/2012SPEC301CHINA.PDF>.

<sup>242</sup> *See id.*

<sup>243</sup> *Id.* at 42.

<sup>244</sup> *Id.* at 43.

<sup>245</sup> *Welcome to AmCham China*, AMCHAM CHINA, <http://www.amchamchina.org/article/10> (last visited Apr. 13, 2013).

<sup>246</sup> AM. CHAMBER OF COMMERCE IN CHINA, 2012 CHINA BUSINESS CLIMATE SURVEY REPORT 19 (2012), *available at* <http://web.resource.amchamchina.org/cmsfile/2012/03/26/c46fc22667c5eeb231748808a9244027.pdf>.

to the infringement of their intellectual property rights were “very satisfied” with the level of cooperation from the relevant Chinese officials; in contrast, fifty-three percent were “somewhat satisfied” while the remaining thirty-nine percent were either “somewhat dissatisfied” or “very dissatisfied.”<sup>247</sup> The opinions of the 131 respondents who litigated infringement of their intellectual property rights were slightly better, with nine percent claiming to have been “very satisfied” with the level of cooperation from the requisite Chinese officials, while fifty-four percent were “somewhat satisfied” and thirty-eight percent either “somewhat dissatisfied” or “very dissatisfied.”<sup>248</sup>

In addition to the AmCham survey, the US-China Business Council (“UCBC”), a private, nonpartisan, nonprofit organization of roughly 240 American companies that do business in China,<sup>249</sup> conducted the China Business Environment Business Survey, which revealed opinions similar to those elicited by AmCham’s survey.<sup>250</sup> Ninety-five percent of the UCBC’s respondents were either “somewhat concerned” or “very concerned” about China’s level of intellectual property enforcement, while nearly half of the respondents felt that such enforcement had either “remained unchanged,” “somewhat deteriorated,” or “greatly deteriorated” over the course of the previous year.<sup>251</sup> Tellingly, seventy-two percent of respondents claimed that the level of intellectual property enforcement in China affected their business activities undertaken there.<sup>252</sup> In particular, such enforcement—more precisely, the lack thereof—affected these respondents in the following ways: forty percent claimed that they limited the number of products they co-manufacture or license in China; another forty percent claimed that they curbed their research and development activities in China; thirty-six percent claimed that they limited the

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<sup>247</sup> *Id.* at 21.

<sup>248</sup> *Id.*

<sup>249</sup> *An Introduction to the US-China Business Council*, US-CHINA BUSINESS COUNCIL, <https://www.uschina.org/member.html> (last visited Apr. 13, 2013).

<sup>250</sup> US-CHINA BUS. COUNCIL, USCBC 2012 CHINA BUSINESS ENVIRONMENT BUSINESS SURVEY (2012), available at <https://www.uschina.org/info/members-survey/2012/environment-results.html>.

<sup>251</sup> *Id.* at 11–12.

<sup>252</sup> *Id.*

number of products they manufacture in China; and twenty-two percent claimed that they limited the volume of products they sell in China.<sup>253</sup> In sum, critics in the United States government and private sector present a vision of China's intellectual property regime that contrasts starkly to the apologists' generally positive portrayal.

### III. THESIS, ANTITHESIS, AND SYNTHESIS: DRAWING CONCLUSIONS ABOUT CHINA'S INTELLECTUAL PROPERTY REGIME

#### A. *Vindication for the Critics: The Apologist Characterization of China's Intellectual Property Regime Is Misleading*

As any survey of the history of intellectual property in China would reveal, China's modern enforcement regime is remarkable above all else for how quickly it has come into being.<sup>254</sup> To its credit, China continues to take certain efforts to improve that regime. In its Promotion Plan for the Implementation of the National Intellectual Property Strategy in 2012, SIPO reaffirms its commitment to bolstering enforcement, including bringing about a culture wherein "knowledge is respected, innovation is advocated, credibility is kept[,] and law is observed[.]"<sup>255</sup> Moreover, recently enacted legislation includes revisions to draft versions of amendments to China's copyright law<sup>256</sup> and revised civil procedure law, which makes additional remedies available to litigants in intellectual property cases.<sup>257</sup> While these developments may appear to vindicate the views of apologists for China's intellectual property regime, other findings demonstrate that such a view is ultimately misguided. In particular, the highly fragmented nature of China's administrative intellectual property

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<sup>253</sup> *Id.*

<sup>254</sup> See discussion *supra* Part I.A.2.

<sup>255</sup> STATE INTELLECTUAL PROP. OFFICE OF CHINA, PROMOTION PLAN FOR THE IMPLEMENTATION OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY IN 2012 (2012), available at [http://english.sipo.gov.cn/laws/developing/201204/t20120410\\_667158.html](http://english.sipo.gov.cn/laws/developing/201204/t20120410_667158.html).

<sup>256</sup> See Mark Cohen, *Third Draft of the Copyright Law Amendments Undergoing Internal Review*, CHINA IPR (Oct. 14, 2012), <http://chinaipr.com/2012/10/14/third-draft-of-the-copyright-law-amdendments-undergoing-internal-review/>.

<sup>257</sup> Cohen, *supra* note 146.

bureaucracy,<sup>258</sup> which plays a far more significant role in enforcement than the judiciary,<sup>259</sup> militates against a generally positive characterization of China's enforcement regime. SIPO's recently published draft amendments to China's patent law provide for the transfer of enforcement jurisdiction from the judiciary to the administrative bureaucracy,<sup>260</sup> a change that will serve only to retard the efficiency of patent enforcement. Moreover, the quasi-judicial enforcement of copyright infringement—the only means of administrative enforcement routinely available to copyright holders<sup>261</sup>—occurs at a negligibly low rate and almost entirely in the relatively rich, coastal provinces,<sup>262</sup> the economies of which do not depend upon infringement.<sup>263</sup> Such enforcement, therefore, can hardly be characterized as an avenue that foreign victims of copyright infringement should expect to work in their favor. Furthermore, the conflict of interest between the licensing and enforcement functions of agencies charged with redressing trademark infringement, and the attendant phenomenon of “shirking,”<sup>264</sup> is a particularly bleak aspect of China's intellectual property regime that appears likely to recede only when counterfeiting ceases to be a lucrative endeavor.

China's administrative enforcement bureaucracy is not the only flawed sector of its intellectual property regime. Notwithstanding the relative efficiency of the specialized intellectual property tribunals,<sup>265</sup> the Chinese judiciary suffers from a host of problems of its own. Courts in rural areas are understaffed, judicial corruption persists, and the overbearing influence of the Chinese Communist Party serves to hinder the independence of judges.<sup>266</sup> Moreover, criminal prosecutions of infringers are hampered by bureaucratic inefficiencies,<sup>267</sup> and while a recently promulgated

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<sup>258</sup> See discussion *supra* Part I.A.2.

<sup>259</sup> See discussion *supra* note 147.

<sup>260</sup> See discussion *supra* note 154.

<sup>261</sup> See discussion *supra* note 167.

<sup>262</sup> See discussion *supra* note 168.

<sup>263</sup> See discussion *supra* note 186.

<sup>264</sup> See discussion *supra* notes 173–75.

<sup>265</sup> See discussion *supra* notes 144–47.

<sup>266</sup> See discussion *supra* notes 139–40.

<sup>267</sup> See discussion *supra* notes 182–85.

opinion of the State Council on enhancing the coordination of administrative and criminal enforcement is a promising development, it remains to be seen whether the opinion's recommendations will be implemented.<sup>268</sup> Overall, China's intellectual property regime continues to suffer from too many problems to sustain the viewpoints of its apologists.

*B. The Long Shadow of the Past: Historical Phenomena Account for Shortcomings Plaguing China's Intellectual Property Regime*

Shortcomings plaguing China's intellectual property regime may be attributable to certain historical forces present in imperial China that continue to influence the country today. Imperial China was a notably inventive society,<sup>269</sup> yet the concept of an enforceable ownership interest in one's original creation is a distinctively Western phenomenon.<sup>270</sup> It is unsurprising, however, that intellectual property as a legal doctrine failed to emerge of its own accord in imperial China. The Confucian ethos that underpinned imperial Chinese civilization emphasized deference to state and society at the expense of the exaltation and formal recognition of individual desires.<sup>271</sup> Moreover, Buddhism and Confucianism gave rise to a literary and educational culture at odds with the notion of affording a particular individual a limited monopoly in his original creation.<sup>272</sup>

These historical phenomena manifest themselves today in the manner by which the Chinese government has undertaken to

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<sup>268</sup> See Mark Cohen, *New State Council Opinion on Improving Administrative/Criminal IPR Enforcement Coordination*, CHINA IPR (Oct. 12, 2012) <http://chinaipr.com/2012/10/12/new-state-council-opinion-on-improving-administrativecriminal-ipr-enforcement-coordination>. According to a conversation that the author had with Professor Cohen, the State Council Opinion *itself* remains to be seen; rather, all that has been made available to the public are isolated descriptions of its provisions in the press, and, as of December 2012, the Opinion is still considered to be a "state secret." Conversation with Professor Mark Cohen, Fordham University School of Law, in New York, New York (Dec. 3, 2012).

<sup>269</sup> See discussion *supra* Introduction.

<sup>270</sup> See discussion *supra* note 91.

<sup>271</sup> See discussion *supra* Part I.A.1.

<sup>272</sup> See *id.*

administer China's intellectual property regime. Ultimately, the Chinese state has acted primarily to preserve its own interests regardless of whether the state's interests coincide with those of individual right holders, an approach that mirrors the Confucian emphasis of state over individual prerogatives.<sup>273</sup> The circumstances surrounding the publication of draft amendments to China's patent law buttress this view,<sup>274</sup> as do aspects of the recently promulgated revised trademark law, which Professor Cohen deems to be only the latest among a "crop of revised IP laws in China . . . [that] are primarily being drafted to accommodate and anticipate China's own needs, and not in response to international pressure."<sup>275</sup> Furthermore, trends in trade secret litigation buttress the conception of the Chinese state as preoccupied with advancing its own interests, perhaps even at right holders' expense.<sup>276</sup> Trade secret litigation is less likely to succeed than any other form in intellectual property litigation in China, a trend Professor Cohen suggests may be attributable to "industrial policy motivations for trade secret theft" that emphasize "acquiring information to satisfy national or local industrial plans or targets, particularly for state owned or state subsidized companies."<sup>277</sup> Administrative and criminal enforcement trends also lend credence to this conception of the Chinese state's motivations. Agency shirking of enforcement mandates<sup>278</sup> and a relatively low volume of criminal prosecutions of infringers<sup>279</sup> are associated with local economies dependent on infringement, suggesting that organs of the state carry out their enforcement responsibilities in a manner designed advance the government's interest in generating revenue at the expense of right holders' interest in stamping out

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<sup>273</sup> *See id.*

<sup>274</sup> *See discussion supra*, notes 154–62.

<sup>275</sup> Mark Cohen, *The Brave New World of Chinese IP Litigation—Trademarks*, CHINA IPR (Nov. 13, 2012), <http://chinaipr.com/2012/11/13/the-brave-new-world-of-chinese-ip-legislation-trademarks/>.

<sup>276</sup> *See* Mark Cohen, *What the Data Says About Trade Secret Litigation in China*, CHINA IPR (Oct. 31, 2012), <http://chinaipr.com/2012/10/31/what-the-data-says-about-trade-secret-litigation-in-china/>.

<sup>277</sup> *Id.*

<sup>278</sup> *See discussion supra* note 177.

<sup>279</sup> *See discussion supra* note 186.

infringement. That the overwhelming majority of quasi-judicial administrative copyright enforcement occurs in rich, coastal provinces adds additional weight to this view.<sup>280</sup> In sum, historical trends present during the imperial period of China's history continue to impact the Chinese state's approach to administering its intellectual property regime and account for some of that regime's significant shortcomings.

*C. What Can Be Done: How Foreign Right Holders Can Attempt to Improve Their Position Within China's Intellectual Property Regime*

Despite its manifold shortcomings, there are aspects of China's intellectual property regime that have proven to be relatively effective. The specialized intellectual property tribunals constitute the regime's brightest spot,<sup>281</sup> and it is unfortunate that the Chinese government appears inclined to rob the judiciary of authority while bolstering that of the administrative bureaucracy, at least in the realm of patent enforcement.<sup>282</sup> In light of this apparent trend, it is all the more unfortunate that the level of foreign litigation in China is so anemic and that the proportion of foreign litigants on China's civil docket has shrunk over the past few years.<sup>283</sup> Rather than shy away from vindicating their rights in court, foreign right holders should seek to make greater use of China's judiciary, especially its specialized intellectual property tribunals. That SIPO failed to consult any foreigners in the composition of its draft amendments to patent law reveals that the Chinese state is not inclined to seek out foreign viewpoints as to how best to improve its enforcement regime,<sup>284</sup> a conclusion that is bolstered by the history of intellectual property protections in China.<sup>285</sup>

As a counterweight to this lack of engagement by Chinese officials, foreign right holders should make greater use of the Chinese judiciary as a means of enforcing their rights and calling

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<sup>280</sup> See discussion *supra* note 168.

<sup>281</sup> See discussion *supra* notes 144–47.

<sup>282</sup> See discussion *supra* notes 154–62.

<sup>283</sup> See discussion *supra* Part II.C.

<sup>284</sup> See discussion *supra* notes 154–62.

<sup>285</sup> See discussion *supra* Part I.A.1; I.A.2.

attention to infringement. Indeed, as Professor Dimitrov contends, those foreigners who do make use of China's intellectual property tribunals are afforded the highest quality of judicial review that the country has to offer,<sup>286</sup> and the remainder of the judiciary is not entirely devoid of positive attributes.<sup>287</sup> In addition to making greater use of civil litigation, foreign right holders might attempt to vindicate their rights through initiating private criminal prosecutions of infringers, especially in the developed coastal cities where such enforcement is taken relatively seriously.<sup>288</sup> Even though the criminal prosecution process is highly cumbersome, recent reforms appear to be geared towards making it more efficient,<sup>289</sup> and cases that ultimately do reach trial almost always result in convictions.<sup>290</sup>

#### CONCLUSION

While imperial China was a notably inventive place, formal intellectual property protections analogous to those in the West failed to emerge there of their own accord. The deep influence of Confucianism on imperial Chinese society brought about a culture that subordinated individual desires to group harmony and perceived original creations as products not of individual people but of the society to which they belonged. Moreover, Confucianism's influence on education and literature rendered verbatim copying not merely an accepted practice but a fundamental aspect of scholarship. Buddhism's close connection to the emergence of printing in China also served to delay by centuries the first claims by authors of ownership interests in their works. Accordingly, the impetus for China's modern intellectual property regime came from abroad. After China's defeat in the Opium War, foreign investment in China increased dramatically and Western commercial interests began to press China for the legal recognition of their intellectual property rights. An effective

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<sup>286</sup> See discussion *supra* note 144.

<sup>287</sup> See discussion *supra* note 137.

<sup>288</sup> See discussion *supra* note 186.

<sup>289</sup> See discussion *supra* note 268.

<sup>290</sup> See discussion *supra* note 187.

enforcement regime, however, eluded China until the birth of the PRC. Since the late 1970s, the PRC has taken efforts to integrate China's intellectual property regime with international institutions. China acceded to TRIPS in 1999 and joined the WTO in 2001. In tandem with these legal developments, China's economy has rapidly become the world's second largest, a fact attributable largely to foreign direct investment.

China's economic rise especially affects foreign holders of intellectual property rights. Commentators, however, differ starkly in their assessments of the ability of China's intellectual property institutions to combat infringement. On the one hand, China's apologists claim that such institutions are—or imminently will be—sufficient to provide for the just and efficient resolution of disputes arising out of infringement. On the other hand, China's critics, particularly those in the United States, contend that China's intellectual property regime fails to deter and remedy infringement. Ultimately, the views of China's apologists are misleading. China's specialized intellectual property tribunals have proven to be relatively effective, but insufficient resources, judicial corruption, and the inability of judges to act independent of the Chinese Communist Party hinder the effectiveness of China's judiciary. China's fragmented administrative enforcement bureaucracy, which handles the overwhelming majority of disputes arising out of infringement, suffers from a host of problems that work to the detriment of right holders. Criminal enforcement almost always results in convictions, yet procedural inefficiencies render such convictions frustratingly difficult to achieve. These shortcomings may be attributed to certain historical phenomena. Specifically, the Chinese state, in administering China's intellectual property regime, has adopted an approach that comports with Confucianism's elevation of state prerogatives at the expense of individual interests. Trends in patent law reform, trade secret litigation, and trademark enforcement bolster this conception of the Chinese state's motivations.

Foreign right holders, therefore, cannot reasonably expect China's intellectual property regime to serve their interest in combating infringement. Consequently, foreign victims of infringement should seek to reverse the trend of anemic foreign

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litigation in China and employ China's courts, especially the intellectual property tribunals, to vindicate their rights. Indeed, the Chinese government appears disinclined to take foreign perspectives under consideration in drafting new intellectual property legislation, a trend that may render the courts the only venue where foreign right holders can air their grievances. Finally, foreign right holders might also attempt to initiate private criminal prosecutions against infringers, although this avenue of enforcement is less likely to deliver favorable results.