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**RIDING THE TIGER:**  
A COMPARISON OF INTELLECTUAL PROPERTY RIGHTS IN THE UNITED STATES  
AND THE PEOPLE'S REPUBLIC OF CHINA

Jennifer A. Crane \*

**Introduction**

“Doing business in China can unsettle seasoned lawyers,” warns Hong Kong commercial attorney Kim Newby.<sup>1</sup> Nowhere else is this statement more immediate than in the realm of intellectual property law. The People’s Republic of China, hereinafter referred to as China, offers a tempting yet mysterious market for many businesses and investors of the Western hemisphere. China, home to 1.3 billion people,<sup>2</sup> operates under a communist system and is a world leader in advancing technology while retaining much of its traditional culture. To Western nations, China’s legal, economic, and cultural functioning remains a nearly inaccessible enigma. Yet Western economies increasingly participate in the global market. Tremendous international pressure and the proverbial “dangling carrot” of untapped foreign markets enticed China to acquiesce and join trade agreements with the United States and Europe. Equitable tariff provisions aside, the most prominent terms of these agreements center on securing and enforcing intellectual property rights. China’s modern intellectual property system exists not to satisfy a domestic demand for such rights, but to reflect the country’s concessions to Western pressures in trade negotiations. Rather than create a system that reconciles Chinese culture and jurisprudence with the various trade agreements, the national government in Beijing simply adopted very Western-inspired intellectual property rights definitions and institutions. This adopted system, by design or error, lacks the support in Chinese provincial governments necessary to produce truly adequate intellectual property rights enforcement.

The Beijing government began creating its Western-inspired intellectual property rights system in the 1980s, yet today many U.S. businesses still remain apprehensive to transfer technology to China. Critics openly question the effectiveness of actual enforcement procedures. Now, over twenty years later, U.S. intellectual property attorneys caution that if U.S. businesses export “proprietary technology [to China] that can be misappropriated, expect it to be misappropriated.”<sup>3</sup> Joseph Massey, a U.S. Trade Representative, echoed the same concern in 2006, stating that “U.S. firms say that the biggest problems they face in China today are much the same as the complaints they

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<sup>1</sup> Kim Newby, *Doing Business in China: How the State of 1.3 Billion Can Tap the Nation of 1.3 Billion*, 19 ME. B.J. 238, 242 (2004).

<sup>2</sup> CIA – The World FACTBOOK (2007), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#People/> (last visited April 28, 2008).

<sup>3</sup> Veronica Weinstein and Dennis Fernandez, *Recent Developments in China’s Intellectual Property Laws*, 3 J. INT’L L. 227, 228 (2004).

raised in 1986, namely inadequate protection or enforcement of [intellectual property rights].”<sup>4</sup> This ineffective enforcement caused some critics to argue that “China’s current system of intellectual property protection is more of a wish list for foreign investors than a realistic and effective system of enforceable rules.”<sup>5</sup> Such sentiment is so oft “repeated . . . and expressed at any context where enforcement of [intellectual property rights] is discussed that it has become a cliché.”<sup>6</sup>

When intellectual property rights develop organically, it reflects the needs and understandings of a nation’s citizenry. A society must produce two prerequisite understandings for intellectual property laws to develop: first, there must be “a clear understanding that the invention or idea could indeed be a product of the human intellect rather than a random gift of the gods,” and second, a society must recognize “the value of the intellect in intangible form could also have commercial value.”<sup>7</sup> While the ancient Greeks and Romans acknowledged the former, it was not until the advent of craft guilds of the Middle Ages that societies developed “proprietary attitudes towards [technical] knowledge.”<sup>8</sup> China’s history also suggests an ancient basis in certain limited types of intellectual property rights, namely trademarks.<sup>9</sup> Western intellectual property protection grew from a nation’s specific desire to protect its citizens’ creative works and to encourage further innovation.<sup>10</sup> At English common law, and the U.S. jurisprudence that subsequently borrowed heavily from it, intellectual property rights encouraged creative production through economic incentive.<sup>11</sup> And, as evidenced by the progression of the U.S. system, the effective enforcement of intellectual property rights cannot occur until both the population and the government value these rights. Modern copyright, patent, and trademark law developed in Western societies as various economic and political factors created a demand for intangible property rights in creative expression, innovation, and customer goodwill.

For China, however, the situation is reversed. No internal stimuli prompted the creation of an intellectual property system. Rather, China accelerated the modernization

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<sup>4</sup> Joseph A. Massey, *The Emperor is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986-2006*, 7 CHI. J. INT’L L. 231, 231 (2006).

<sup>5</sup> Zhang Naigen, *Chinese Intellectual Property Regime and the WTO*, 6 J. OF CHINESE & COMP. L. 189, 190 (2003).

<sup>6</sup> Assafa Endeshaw, *Intellectual Property Enforcement in Asia: A Reality Check*, 13 INT’L J. L. & INFO. TECH. 378, 384 (Autumn 2005).

<sup>7</sup> Edward C. Walterscheid, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 39 (William S. Hein & Co., 2002).

<sup>8</sup> *Id.* at 40.

<sup>9</sup> These marks denoted specific manufacturers from various regions as a means of advertising and guarantee of quality. There is some evidence that trademarks existed as early as 2698 B.C. when pottery making was discovered. See Ke Shao, *Look at My Sign! Trademarks in China from Antiquity to the Early Modern Times*, 87 J. PAT. & TRADEMARK OFF. SOC’Y 654, 654 (2005). Trademarks became consistently present in the Tang Dynasty, from 618–906 A.D. See Graham J. Chynoweth, *Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen its Copyright Laws*, 2003 DUKE L. & TECH. REV. 3, \*7 (2003).

<sup>10</sup> Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 IDEA 607, 611 (2003).

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

of its intellectual property laws to conform to the contemporaneous international standards<sup>12</sup> and created “an elaborate United States-inspired intellectual property legal regime without the political and social foundations” to effect adequate enforcement.<sup>13</sup> China’s motivation for implementing intellectual property laws was to gain favorable trading partnerships with Western countries through various international agreements.<sup>14</sup> The Beijing government’s formal enactment of treaty requirements allows the government to create a system of plausible deniability; China can reap the benefits of the agreements while handing enforcement responsibilities to provincial governments hostile to intellectual property rights. This system provides protection for domestic infringers and an alibi for the government in Beijing.

Chinese culture, isolated from Western societies for much of its development, remains at odds with monopolistic and exclusionary property rights for innovations, instead maintaining that knowledge is to be shared. It is abundantly clear why most of the Chinese population see little use for protection of intellectual property rights; the sixty year-old communist regime that denies property rights and subjugates the individual for the sake of the community combined with the cultural disdain for proprietary knowledge creates an environment hostile to intangible property rights in creative expressions and innovations.

Despite differences in the impetus to develop intellectual property protections, similarities exist between the early U.S. system and current Chinese system. While externally stimulated, the evolution of China’s intellectual property laws mimics the U.S. system’s early progression, from nearly powerless to moderately adequate. In its infancy, the United States maintained policies that encouraged piracy of invention and expression to bolster its own economy. The United States became an impartial defender of intellectual property rights only *after* it became an economic powerhouse when international protection was in its best interest. Regardless of the motivation, as the United States and China’s progress plainly demonstrates, nations cease to be pirates and become protectors only after the protection of intellectual property rights becomes paramount to a national economy.

This paper will explore the development of the United States’ intellectual property rights system and China’s underlying cultural resistance, furthered by the current communist regime, to the granting and protecting of intellectual property rights. Next, I shall seek to investigate the international pressures that influenced China’s present intellectual property rights system as well as the operation of current Chinese intellectual property rights protection. Finally, this effort will compare the functioning of early American intellectual property protection with the modern Chinese system to provide insight as to *if* and *when* China will effectively enforce intellectual property rights domestically.

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

<sup>13</sup> Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 IND. J. GLOBAL LEGAL STUD. 449, 450 (2001).

<sup>14</sup> *Id.*

## **I. A Historical and Political Analysis of Intellectual Property in the United States**

The intellectual property system of the United States was not created in a vacuum. The drafters of the U.S. Constitution were well aware of English common law and borrowed heavily from its understanding of limited monopolies and exclusive rights for innovations and creative expressions. English common law developed from the English application of ancient jurisprudential doctrines. An understanding of the United States' system of intellectual property rights protection requires first an exploration of the development copyright, patent and trademark protection in Europe and at English common law. The United States intellectual property regime evolved from the very basic and limited English system as the country's and citizens' needs required greater sophistication and international equality.

### *A. Influences on United States Intellectual Property Rights*

Throughout the Middle Ages (1250-1450 A.D.), human knowledge was considered communal.<sup>15</sup> Quotation marks appearing in the limited written works at the time signaled wise passages; these grammatical marks were not yet used to alert readers to words that were not the author's own.<sup>16</sup> Initially, quotations were considered "proverbs in the public domain" and the only control available to an author was through the actual, physical copy in his possession—once the manuscript or book left his clutch, "others were free to copy it."<sup>17</sup> According to legend, the first European recognition of a literary property right occurred in 567 A.D. in Ireland, when the ecclesiast Columba copied the psalter written by his teacher Finnian.<sup>18</sup> This intellectual theft led to a violent battle prior to the provincial king hearing Finnian's case. The king ruled in Finnian's favor with the verdict "to every cow her calf."<sup>19</sup> With this pithy phrase, the king acknowledged that the author possessed some ownership interest.<sup>20</sup> While Finnian's king recognized authors' intellectual property rights, the English legal system remained less sophisticated and would take centuries before formally recognizing literary property rights—even longer to acknowledge that authors possessed them.

The idea of exclusive control over human creative expressions developed from the English Crown's desire to restrain unwanted writings. After the creation of the Church of England, the King of England was not only the political authority, but the religious one as well. As publishing technology advanced, the Crown, the English government and the

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<sup>15</sup> Jackson, *supra* note 10, at 612.

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

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

<sup>18</sup> Richard Wincor & Irving Madell, COPYRIGHT, PATENTS AND TRADEMARKS: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL PROPERTY 23 (Oceana Publications, Inc. 1980).

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

<sup>20</sup> This theft of intellectual property, however, was apparently not recognized, or at least forgiven/ignored, by the Catholic Church, as Columba was canonized and is one of the three patron saints of Ireland.

Church of England floundered trying to control dissenting or blasphemous publications.<sup>21</sup> The King began issuing Letters of Patent (“Printing Patents”), or open letters affixed with his royal seal, to publishers, granting them exclusive rights to print certain works.<sup>22</sup> In 1557 the Star Chamber, the high equity court, issued a Charter to the Stationer’s Company. This document granted “[a] guild of publishers various powers intended to be exerted against seditious and heretical books,”<sup>23</sup> on the condition that the publishers agree to “royal censorship, supervision, regulation and licensing of books.”<sup>24</sup> The power of the publishers’ guild continued to grow, each publisher retaining exclusive rights to publish and reprint works in their catalogue. From these Letters of Patent and the Charter developed the common law understanding of exclusive rights over written expressions. Noticeably absent from this scheme was concern for authors’ rights.

In 1710, the English Parliament legislated on copyright protection, enacting the Statute of Anne. For the first time, the statute gave authors of new works henceforth the exclusive right to produce their works.<sup>25</sup> Authors had control over their writings for a fourteen-year period, with the option to renew for fourteen more.<sup>26</sup> In 1769, the English legal system handed down a seminal decision in *Millar v. Taylor*, holding that authors had real common law property rights in their works.<sup>27</sup> At the end of the eighteenth century, “quotation marks [began] to signify the ‘property’ of the original author” as ideas about property ownership and knowledge evolved.<sup>28</sup>

A number of factors encouraged this evolution of legal protections—utilitarian and economic considerations to encourage works for the benefit of the whole community and moral considerations, epitomized by John Locke’s theory of property.<sup>29</sup> In his theory of property, found in *Treatise on Government*, Locke maintained that property rights are created when man mixes his labor with nature. Absent from Locke’s discussion of property rights is any explicit reference to copyright, however his philosophy can be expanded to include such rights; since “authors invest their labor in their work,” and therefore should “have a moral right to control the expression they create.”<sup>30</sup> By granting exclusive control to authors, authors are motivated to produce creative works in order to reap the subsequent rewards. By limiting the time period of this control, the new knowledge benefits the entire community.

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

<sup>22</sup> *Id.*

<sup>23</sup> Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY No. 5, 5 (2000).

<sup>24</sup> Walterscheid, *supra* note 7, at 61.

<sup>25</sup> Hamilton, *supra* note 23, at 7.

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

<sup>27</sup> *Id.* at 66.

<sup>28</sup> Jackson, *supra* note 10, at 612.

<sup>29</sup> *Id.* at 613–15.

<sup>30</sup> *Id.* at 615.

The idea of a state-granted right to inventors over their creations originated in Venice, Italy, during the fifteenth century and spread rapidly throughout Europe.<sup>31</sup> Around the same time, England's King Henry VI gave the Flemish glassmaker John of Utyman a Letter of Patent granting him a twenty-year monopoly on his glass-making process after Utyman's installation of windows at Eton College.<sup>32</sup> Nevertheless, the English common law continued to refrain from granting vested ownership rights for inventions because of the resistance to condone monopolies. The English Crown would, from time to time, grant Letters of Patent, giving the inventor a "limited-term monopoly privilege to engage in a new trade or craft" but there was no jurisprudential basis for it.<sup>33</sup> It was from this privilege that the American founders extrapolated intellectual property rights for an inventor. A true English patent practice, as understood in modernity, did not develop prior to the 1800s.<sup>34</sup>

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The first trademarks appeared in the West to distinguish products and manufacturers when commerce grew from intra-village trading to multi-regional and national exchange.<sup>39</sup> These marks developed as early as Greek and Roman times.<sup>40</sup> The first intellectual property rights arguably developed from the distinguishing marks on products that derived value from customer goodwill. One of the first English forays into intellectual property positive law had roots in the need for distinctive marks for consumer confidence.<sup>41</sup> An 1266 A.D. statute mandated "every baker shall have a mark of his own for each sort of bread in order that would-be customers should know what kind of bread

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<sup>31</sup> Walterscheid, *supra* note 7, at 45.

<sup>32</sup> Pat Choate, *HOT PROPERTY: THE STEALING OF IDEAS IN AN AGE OF GLOBALIZATION* 26 (Knopf 2005).

<sup>33</sup> Walterscheid, *supra* note 7, at 14.

<sup>34</sup> *Id.* at 13–14.

<sup>35</sup> Walterscheid, *supra* note 7, at 45.

<sup>36</sup> Choate, *supra* note 32, at 26.

<sup>37</sup> Walterscheid, *supra* note 7, at 14.

<sup>38</sup> *Id.* at 13–14.

<sup>39</sup> Shao, *supra* note 9, at 655.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 670.

they were being offered” as a means to distinguish the quality of the product.<sup>42</sup> While trademarks are now included under the intellectual property rights umbrella, until the late 1800s they were considered to be the subject of commercial regulations law and as such, no ownership property rights were recognized.

The framers of the Constitution, familiar with the limited patent, copyright, and trademark privilege system of England, altered the English practice to better reflect the new nation’s pioneering spirit. The English common law gave the framers a solid foundation, but the framers were intent on creating an inventive and unique political structure. The development of the U.S. intellectual property rights system reflected the English common law as well as the innovative attitude and economic needs of the new country.

*B. America: “The Pirate”*

Stemming from an English common law background of authors’ copyright and Letters of Patent privileges, the U.S. Constitution included a provision for the promotion of the “Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>43</sup> The Intellectual Property Clause, as it is now known, was presented at the 1785 Constitutional Convention in Philadelphia shortly before it adjourned and was unanimously approved, astonishingly, with little to no debate.<sup>44</sup> This lack of discussion carried through the ratification process. Scholar Marci Hamilton suggests that from this “scant debate” and the literal text, “the Framers believed the progress of knowledge was in the national interest,” and they were willing to suppress copying and imitation for limited periods so that technology and expression “would progress and the community would benefit.”<sup>45</sup>

Interesting to note, this enumerated power of the U.S. Congress to “Promote the Sciences and useful Arts” is contained in the only clause that also articulates a specific mode of effecting that power.<sup>46</sup> As well, the Clause contains limits to this power, namely that the right be granted for a “limited” time, “exclusively” to the author or inventor, and that the innovation must advance “Science and the useful Arts.”<sup>47</sup> So ingrained in the American psyche is this desire to encourage a broad range of innovation through capital benefit, the U.S. Supreme Court has never felt compelled to “render an opinion as to the meaning of either ‘science’ or ‘useful arts’ as used.”<sup>48</sup> The accepted definition of “Science,” as understood in the eighteenth century by the framers, is generally “knowledge” or “learning” while the “useful Arts” means simply “helpful or valuable trades.”<sup>49</sup> The framers included the Intellectual Property Clause not only to ensure

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

<sup>43</sup> U.S. CONST. Art. 1. § 8, cl. 8.

<sup>44</sup> Walterscheid, *supra* note 7, at 2.

<sup>45</sup> Hamilton, *supra* note 23, at 12.

<sup>46</sup> Walterscheid, *supra* note 7, at 11.

<sup>47</sup> Hamilton, *supra* note 23, at 9.

<sup>48</sup> Walterscheid, *supra* note 7, at 133.

<sup>49</sup> *Id.* at 125–26.

limitation of the incentive-monopolies for invention and creativity, but also to encourage innovation in all aspects of knowledge and industry.

The framers of the U.S. Constitution drew just as heavily from the English common law practice of granting Letters of Patent and copyright protections as from the English repugnance for monopolies when establishing the Intellectual Property Clause. In English practice, Letters of Patents and copyrights were considered privileges from the Crown rather than a right springing from and vested in a creative work.<sup>50</sup> The English practice exempted holders of Letters of Patents and copyrights from the prohibition of monopolies and did not encourage innovation so much as merging of power for the artisans or publishers in the Crown's favor. The U.S. Constitution's Intellectual Property Clause functions to separate monopolist forces, "correspondingly weakening them to the benefit of the people."<sup>51</sup> The existence of the Intellectual Property Clause indicates the importance of intellectual property rights to the framers, who were uncertain if the U.S. Congress would have the power to recognize property rights of inventors and authors without an explicit grant of authority. In order to restrict monopolies and incentivize innovation and creative expression, they not only stated the specific power but the mode in which it was to be effected.

Yet the United States was not always the beacon of intellectual property law honesty that it presents itself as today. The early history of American intellectual property abounds with tales of piracy, theft, imitation, and deceit. In his first State of the Union address, George Washington spoke of his concerns about the future of the U.S. economy and called on Congress to create legislation not only to encourage domestic innovation, but also for "the introduction of new inventions from abroad."<sup>52</sup> During Thomas Jefferson's presidency, then Secretary of State Alexander Hamilton put together a report outlining a plan to become Europe's economic rival.<sup>53</sup> Hamilton wanted to impose stiff tariffs on imported European goods and to use the "tariff wall" protection to foster a robust domestic patent system.<sup>54</sup> Key to Hamilton's plan was the immigration of skilled foreign workers to the young nation. He effectively sent forth the message to immigrants to "bring your nation's industrial secrets to America."<sup>55</sup>

The early U.S. copyright laws and policies actually encouraged piracy of foreign literary works. Domestic copyright protection was greatly valued by the United States, as evidenced by twelve of the thirteen original colonies enacting their own copyright legislation before adopting the federal Constitution.<sup>56</sup> While the Copyright Act of 1790 prohibited copying works by U.S. authors, it supported the piracy of foreign works by not recognizing foreign copyrights and prohibiting non-citizens from registering a U.S. copyright. As the United States attempted to create its own artistic culture, Americans

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<sup>50</sup> *Id.* at 93.

<sup>51</sup> Hamilton, *supra* note 23, at 4.

<sup>52</sup> Choate, *supra* note 32, at 27.

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

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

<sup>55</sup> *Id.* at 26.

<sup>56</sup> Wincor & Madell, *supra* note 18, at 7.

“wanted foreign copyrighted works on the cheap.”<sup>57</sup> At one point, Charles Dickens’ novel *A Christmas Carol* sold in Great Britain for the equivalent of \$2.50, while a copy could be purchased in the United States for about \$0.06.<sup>58</sup> The piracy of foreign copyrights continued in the United States until 1891 when the U.S. Congress passed legislation allowing copyright relations with other countries.<sup>59</sup> However, U.S. protection of English-language literary works only extended to works manufactured domestically until 1986 when the amendment to the copyright act lapsed.<sup>60</sup>

U.S. patent legislation chronologically coincided with copyright legislation. The laws enacting the early patent protections enabled infringement of domestic and international inventions alike. The first Patent Act in the United States was enacted in 1790.<sup>61</sup> The original Patent Act required inventors to submit petitions directly to the Secretary of State, Thomas Jefferson.<sup>62</sup> The Secretary of State, together with the Secretary of War and the Attorney General, reviewed all patent petitions, but the number of petitions quickly became burdensome.<sup>63</sup> In three years (1790-1793), 57 U.S. patents were granted, 114 petitions were still pending, and dozens of petitions were denied.<sup>64</sup> The Patent Act of 1793 attempted to correct the system by doing away with a review of each petition.<sup>65</sup> Rather, an inventor simply needed to register his invention with the U.S. Department of State.<sup>66</sup> As could be expected, this led to multiple patenting of the same invention.<sup>67</sup> Some of this duplication was innocent when separate inventors unknowingly registered the same inventions. Other times, this duplication was far more fraudulent.<sup>68</sup> Each patent petition was a matter of public record. A person could view the record at the Department of State’s record room, steal whatever idea he thought profitable, and register it again as his own.<sup>69</sup> Another loophole of the 1793 Act lay in the fact that only American citizens were eligible for a U.S. patent, enabling an American businessman to “bring a foreign innovation to the United States and commercialize the idea, all with total legal immunity” and even government support.<sup>70</sup> The U.S. Congress amended the Act in 1800 to allow foreign citizens who resided in the United States for two years to petition for a patent; in 1832, the Act was revised to enable foreigner citizens who lived in the United States for twelve months and who swore an oath of intention for U.S. citizenship to

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<sup>57</sup> Choate, *supra* note 32, at 41.

<sup>58</sup> *Id.* at 42.

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

<sup>60</sup> 17 U.S.C § 601 (a), *stating* “Prior to July 1, 1986, and except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.”

<sup>61</sup> Law of April 10, 1790, ch. 7, 1 Stat. 109–112, *repealed by* Patent Act of 1793, ch. 11, 1 Stat. 318–323.

<sup>62</sup> Choate, *supra* note 32, at 26–27.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Law of February 21, 1793, ch. 11, 1 Stat. 318–323.

<sup>66</sup> Choate, *supra* note 32, at 26–27.

<sup>67</sup> *Id.* at 29

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

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

<sup>70</sup> *Id.*

petition.<sup>71</sup> The substance of the Patent Act remained authoritative until 1836 and enabled American entrepreneurs to steal some of Europe's most profitable trade secrets and technologies, becoming "by national policy and legislative act, the world's premier legal sanctuary for industrial pirates."<sup>72</sup>

One famous example of this piracy involves the U.S. citizen Francis Cabot Lowell. In 1810, Lowell set out to steal the Cartwright loom—an invention that allowed England to become the world leader in textiles. So vital was this technology that England "forbade the export of the machinery, the making or selling of drawings of the equipment and the emigration of the skilled workers."<sup>73</sup> Lowell visited England under the guise of traveling for health reasons—the cold damp air could somehow aid his constitution. Those he met were taken with the Harvard graduate's charm and credentials. Eager to show off their innovative devices, which they guarded jealously from each other, British textile producers gave Lowell guided and detailed tours of their factories. Unbeknownst to his hosts, Lowell possessed an almost photographic memory and recorded everything he saw and heard each night in his journals. Despite the fact his belongings were futilely searched twice before he departed for home, Lowell smuggled the plans for the Cartwright loom out of England and recreated them in his own factory. Lowell created the Boston Manufacturing Company with his stolen technology and encouraged politicians to increase import tariffs, thus successfully pushing England's cloth out of the American market.<sup>74</sup> Lowell's story is by no means unique. Not until the U.S. economy achieved a certain robustness and U.S. citizens sought recognition of their intellectual property rights abroad did the United States truly install effective protection of international intellectual property.

The U.S. system of intellectual property rights requires intellectual property owners to maintain watch over their own rights. Copyrights and patents may be granted, and trademarks and trade secrets recognized, but in order for intellectual property to have any value in the United States, individuals and businesses must police the related industry and use the U.S. legal system to enforce their rights. America employs a structure that relies on an individual safeguarding his rights through litigation. The grants of exclusive rights for intellectual property are, therefore, worthless unless an owner remains vigilant in the policing of potential infringers. Adequate protection is only possible with a responsive judicial system and investigative and protective rights-holders.

## **II. An Historical and Political Analysis of Intellectual Property in the People's Republic of China**

It is easy to possess a mistaken impression that the culture and politics of China, both in antiquity and modernity, predisposes Chinese society to lack *any* recognition of intellectual property. However, like the early evolution of English common law

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<sup>71</sup> *Id.* at 26.

<sup>72</sup> *Id.* at 30.

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

<sup>74</sup> *Id.* at 32.

trademarks, a Chinese system developed to mark and distinguish products made by individual producers. Archaic trademark laws demonstrate that Chinese culture is not entirely adverse to intellectual property. However, the social, philosophical and governmental beliefs of China were adverse to the concepts of copyright and patent.

Trademarks were used in ancient China. Ke Shao, a scholar at the Queen Mary Intellectual Property Research Institute at the University of London, found that from the seventh century A.D. in China, the “[u]ses of trademarks [were] said to be regulated by laws, which both guaranteed the quality control and boosted the consciousness of rights” of manufacturers.<sup>75</sup> As technology advanced and travel and trading became easier in the sixteenth century, consumers began using marks on products to discriminate between goods and value attached to the unique marks.<sup>76</sup> Evidence exists of a pharmacy that was required to change its name as it shared a Chinese character (letter) with the new emperor.<sup>77</sup> Upon the emperor’s death, the pharmacy reverted back to its original name suggesting that “there must have something of great value behind trademark,” most likely “[t]he individual goodwill that directly relates to customers and market.”<sup>78</sup> Early trademark laws carried severe punishments: an administrative law of the Tang bureaucracy, from 618-907 A.D., mandated that “false and confused products will be confiscated” while the Tang penal code declared “anyone who falsely makes and sells disqualified utensils, appliances, silk and cloths will be flogged sixty strokes.”<sup>79</sup>

Copyright and patent laws, however, never developed in Chinese antiquity. The main impediment to Chinese copyright laws comes from a history of strong paternalistic government and Confucianism and Taoism influences. The traditional Chinese ideals of proper self-interest, *Li*, and personal relationships, *Guanxi*, may “trump... natural rights” and an understanding of personal property.<sup>80</sup> In Chinese culture, the complementary concepts of *Li* and *Fa* play into the Chinese understanding of personal rights. *Li* predisposes individuals to “be submerged in the collective” and *Fa* enables the state to control the individual. The Chinese term for ‘rights’, *Quanli*, holds itself at odds with the concept of intellectual property. *Quan* means “to weigh or balance” while *Li* connotes proper self-interest within the community.<sup>81</sup> In fact, the whole concept of *Li*, if properly followed, “should lead one away from activity that promotes dissension and toward social harmony.”<sup>82</sup> Therefore, the etymology of *Quanli* “literally implies a weighing or balancing of interests”<sup>83</sup> and ultimately “leave[s] the Chinese people predisposed against the concept of intellectual property rights.”<sup>84</sup> *Li* and *Quanli* prefer a reliance on customary interaction and a reticence to apply positive law.

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<sup>75</sup> Shao, *supra* note 9, at 660.

<sup>76</sup> *Id.* at 666.

<sup>77</sup> *Id.* at 669.

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

<sup>79</sup> *Id.* at 673.

<sup>80</sup> Palmer, *supra* note 13, at 472.

<sup>81</sup> *Id.*

<sup>82</sup> Chynoweth, *supra* note 9, at \*7.

<sup>83</sup> Palmer, *supra* note 13, at 472.

<sup>84</sup> Chynoweth, *supra* note 9, at \*7.

The cultural importance of the interpersonal relationship in China is also of significance. *Guanxi* is a Chinese idea of “social connections” and “complex networking of relationships... based on mutual obligation, reciprocity, goodwill and personal affection.”<sup>85</sup> The fostering and development of stable, useful personal relationships, and not individual rights, is paramount to the Chinese cultural and political structure. *Guanxi* tempers the rule of law. Confucian philosophy teaches “the rule of law becomes necessary only when individuals wish to act outside their assigned roles.”<sup>86</sup> Therefore, if *Guanxi* functions properly, there is no need for laws. An equally influential philosophy, Taoism, holds a similar contempt for positive law, for only when a person has “lost the Way, [of] ‘integrity, humaneness, righteousness and etiquette’ does disorder develop” which necessitates the development of law.<sup>87</sup>

In addition to Chinese philosophy and elevation of the community over the individual, the cultural understanding of the role of information and knowledge in China hinders the development of a legal intellectual property rights system. While the history of trademarks demonstrates that a value is placed on who *made* a product, there is little appreciation for who *invented* it. The Chinese culture does not view the “imitation or copying of works of other people...as illegitimate, or even questionable.”<sup>88</sup> The intangible innovation has no real economic value as “the Chinese traditionally feel they should only pay for the tangible goods,” and as such should be shared to improve the community’s knowledge.<sup>89</sup>

The Confucian and Taoist philosophic and cultural influences of *Li*, *Fa*, *Quanli*, and *Guanxi* culminate and are exhibited in the Chinese Communist Constitution’s Supremacy Clause. Article 51 of the Chinese Constitution states “the exercise by citizens...of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective.”<sup>90</sup> This government mandate combined with the explicit veneration of the community to the cultural subjugation of the individual and the reliance on custom rather than law makes it apparent why acceptance of intellectual property rights becomes a seemingly impossible feat.

After a long, isolated and imperial history, China emerged on the international stage in the nineteenth century. Throughout World War I and World War II, China was in a state of turmoil, filled with internal revolutions and unrest as the country struggled to create a modern identity for itself. During one uprising by the Communist Party in China, Mao Tse Tung gained leadership and took control of China after the Long March and the

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<sup>85</sup> Nathan Greene, *Enforceability of the People’s Republic of China’s Trade Secret Impact on Technology Transfer in the PRC and Preparing for Successful Licensing*, 44 IDEA 437, 461 (2004).

<sup>86</sup> *Id.* at 460.

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

<sup>88</sup> Endeshaw, *supra* note 6, at 385.

<sup>89</sup> Matthew L. Goldberg, *The Viability of Stimulating Technology-Oriented Entrepreneurial Activity in China, Taiwan, Japan and South Korea: How Regulations and Culture Encourage the Creation, Development, and Exploitation of Intellectual Property*, 1 INT’L LAW & MGMT. REVIEW 1 (2006).

<sup>90</sup> Greene, *supra* note 85, at 449.

Second Sino-Japanese War in 1949. In 1966, Mao began the official campaign known as the Cultural Revolution to re-educate the Chinese people and incorporate communism into all aspects of their lives. Today, the Communist Party controls China, though the government has moved to a decentralized, provincial structure.

The Communist Party in China does not consider a socialist legal and political system as an end itself, but rather as a “basis for the government’s efforts at political and economic reforms.”<sup>91</sup> The post-Mao government created a unique and “precarious interdependency between legal culture and political legitimacy” as the central government in Beijing delegated more authority and control to the various provinces.<sup>92</sup> The Communist government relies on the believed and respected political philosophy adhered to by the Chinese people to enforce its laws. With a loosened national grip, the Communist party relies on the continued conviction and subsequent action of the population for its sustained power.

This decentralized government creates problems for international treaty enforcement. The structure has led to local officials gaining expansive and often unchecked powers, aptly employing a Chinese adage, “the mountains [are] high and the emperor in Beijing [is] far away.”<sup>93</sup> The Beijing government effectively has little control over the provincial powers, while the Communist party and local interest still appear to dominate local politics and policy. While this arrangement remains frustrating to Western businesses and politicians who would like a responsible and accountable body for entering international agreements, China is able to let the Beijing government formally assent to trade treaties, while enabling provinces to independently proceed with more locally motivated agendas on intellectual property protection.

During the Cultural Revolution, the Communist Party of China undermined the judiciary and therefore, the ability to effectively enforce intellectual property laws. The Party villainized judges as “enemies” of the new order and forced them into the countryside to be “reeducated,” severely reducing the number of courts available.<sup>94</sup> In the 1980s, the Beijing government recognized the skeleton legal system was grossly inadequate and has since restored courts and judges during the past twenty years.<sup>95</sup> Nevertheless, while the judges’ ranks expand, they still do not possess “the competence or respect...to carry the type of clout they need to effectively enforce judgments.”<sup>96</sup> The reeducation of former judges and reordering of the judicial system demonstrated the Communist Party’s power, effectively creating puppet judges. The current judiciary, “as with all significant organs of the Chinese government, is still subject to the supervision of the Chinese Communist Party.”<sup>97</sup> Even if judges wished to enforce international treaty

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<sup>91</sup> Palmer, *supra* note 13, at 451.

<sup>92</sup> *Id.*

<sup>93</sup> Massey, *supra* note 4, at 235.

<sup>94</sup> Greene, *supra* note 85, at 448.

<sup>95</sup> *Id.* at 448.

<sup>96</sup> *Id.* at 452.

<sup>97</sup> Eu Jin Chua, *The Laws of the People’s Republic of China: An Introduction for International Investors*, 7 CHI. J. INT’L L. 133, 138 (2006).

provisions, pressure from the Party or local businessmen might make enforcing and/or even rendering such enforcement impossible.

The Chinese interdependency between political culture and legal legitimacy is most obvious in the example of provincial courts. As these courts rely on the local Communist-controlled government for resources and judicial appointments, judges are beholden to local politicians. The Adjudication Committee of the Communist Party in a province may “direct a particular ‘verdict’” if sensitive or significant political matters are in dispute.<sup>98</sup> The local officials of the Communist Party effectively use the provincial courts as a vehicle to effectuate their own agendas. In the absence of democratic or public feedback-sensitive organizations, local Chinese governments “wager[] [their] legitimacy on the success of [their] economic and legal reforms” which require a compliant judiciary.<sup>99</sup>

China created a federal judiciary with various appellate branches to accommodate the decentralized government. Each province has various Basic People’s Courts, an Intermediate People’s Court and a Higher People’s Court. The highest Chinese court is the national Supreme People’s Court. Three-judge panels announce their decisions by way of written brief, which have been criticized as lacking “analysis or legal reasoning.”<sup>100</sup>

Due to international pressure to create an independent judiciary, the Beijing government implemented its first five-year plan in 1999. The goals of the 1999 plan included improving judiciary education, increasing the number of judges, enforcing anti-corruption regulations, adopting a more adversarial system in court proceedings, and improving the efficiency of the courts.<sup>101</sup> The second five-year plan, enacted in 2004 and still ongoing, stresses the need to make the courts financially independent, establish a case-law precedent system and coordinate a consistent understanding of the laws throughout China’s provinces.<sup>102</sup> While these formal acquiescences serve to placate international fears, it remains unclear if the Beijing government has the ability or even the desire to effect these improvements. The extremely decentralized government may enable Beijing to formally agree to one thing, while the provincial governments continue to act in contrary and self-interested ways.

### III. International Pressures and Agreements

When China emerged from isolation in the nineteenth century, international forces rushed to create spheres of influence on the heavily populated nation. The United States, upon seeing other European and Asian nations struggling to gain exclusive footholds on

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<sup>98</sup> Greene, *supra* at note 85, at 450–51.

<sup>99</sup> Palmer, *supra* note 13, at 452.

<sup>100</sup> Chua, *supra* note 97, at 151. As China is a civil law system, prior cases have no binding effect; however, due to an increase in foreign litigants, some provincial judges are writing their decisions with more legal analysis to provide better guidance for legal practitioners. *Id.* at 136.

<sup>101</sup> *Id.* at 137.

<sup>102</sup> *Id.* at 138.

Chinese soil, negotiated the famous Open Door Policy in 1900.<sup>103</sup> To retain the integrity of China as a nation, the Open Door Policy mandated free use of certain seaports and a respect for each nation's claimed territory. During World War II, the United States sent aid to China to fight Japan. When the Communist Party gained control in 1949 and established the People's Republic of China, the United States refused to recognize the newly constituted nation, instead continuing relations with the democratic Republic of China (Taiwan) as the legitimate government of China. Not until 1970 did the United States attempt to reconnect with China. In 1972, President Richard Nixon visited China and the two nations released the Shanghai Communiqué, expressing both countries' desire to establish normal trade relations. Since then, the United States has exerted influence by means of trade pressures to motivate the Chinese government to give weight to the rule of law. The United States imposed economic sanctions in reaction to incidents such as those in Tiananmen Square in 1989 and repressed other trade programs and incentives to persuade China to comply with international intellectual property agreements.<sup>104</sup>

Under pressure from the United States and other nations, China agreed to most major international intellectual property treaties in the 1980s and 1990s. China's intellectual property rights system was enacted solely to comply with various treaty provisions—most of the Chinese intellectual property definitions and institutions imitate both the U.S. and European systems.

China's attempted inclusion and eventual accession into the WTO is the driving force behind much of its intellectual property legislation and enforcement during the 1990s. The WTO administers and enforces TRIPs along with other trade agreements and China must be in full compliance with its requirements by 2011 to remain a part of the organization. As China seeks to benefit economically from good standing in international trade relations, it has, at least superficially, attempted to implement the intellectual property standards required by the WTO.

#### **IV. The Modern Chinese Intellectual Property Rights System**

The Chinese government possesses a short and turbulent history with positive intellectual property law. After the Communist revolution in 1949, all former laws were eradicated and China remained without any sort of intellectual property protection until 1982.<sup>105</sup> The National People's Congress passed the 1982 Trademark Law followed by the 1985 Administrative Regulations on Technology-Introduction Contracts.<sup>106</sup> These regulations required inventors, businesses, and foreign investors to register contracts for technology transfers and associated intellectual property rights with the Chinese Ministry of Foreign Trade and Economic Cooperation, or relevant local authorities, for

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<sup>103</sup> Jerome Alan Cohen, *China and Intervention: Theory and Practice*. 121 U. Pa. L.R. 471, 480 (1973).

<sup>104</sup> U.S. DEP'T OF STATE, BACKGROUND NOTE: CHINA, <http://www.state.gov/r/pa/ei/bgn/18902.htm> (last visited April 30, 2008.)

<sup>105</sup> Naigen, *supra* note 5, at 189.

<sup>106</sup> Greene, *supra* note 85, at 456.

approval.<sup>107</sup> The government determined whether technology covered by technology or intellectual property rights transfer contracts was “suitable” for a project, was of an “advanced nature,”<sup>108</sup> and did not contradict Communist constitutional ideals.<sup>109</sup> Yet these contracts could not exceed ten years in length.<sup>110</sup> Through the 1980s in China, very few intellectual property rights existed; the existing trademark and patent laws were weak and routinely flaunted, and no copyright protection existed whatsoever.<sup>111</sup> When international pressure surrounding global trade issues came to the forefront, China began in earnest to enact new intellectual property legislation.

Understanding China’s new intellectual property rights system requires a cursory look at its 1999 Uniform Contract Laws (UCL) and their cultural foundation. The Beijing government enacted the UCL to comply with WTO requirements; the aims of the UCL included retreating from a state-planned economy by supporting economic and political behavior to encourage a market-based system.<sup>112</sup> The UCL attempted to relax some of the rigid contract formalities and remove discrepancies in the former code.<sup>113</sup> With legislation in place to support a more Western and capitalist understanding of business, the Beijing government began a move to provide regulations for intellectual property rights.

In 1992 and again in 2000 to 2001, China enacted rounds of amendments to intellectual property rights laws with the passage of new copyright, patent, and trademark laws.<sup>114</sup> Between fifty and sixty percent of the laws pertaining to intellectual property rights were updated.<sup>115</sup> The 1992 revisions of the Patent Law brought China into further compliance with TRIPs. The 2000 to 2001 legislation fully protected rights outlined in the TRIPs agreement, including: a patentee’s rights for offering his invention for sale, new judicial reviews for invention patents, the protection of utility models and industrial designs, more efficient procedures for production and sale injunctions and further restrictions on the government’s compulsory license capabilities.<sup>116</sup> While these new regulations are still not fully consistent with all international conventions agreed to by the Beijing government, China is still currently within the time period to make full adjustments.

### *A. Copyrights*

The protection of copyright remains the intellectual property right in China with the most dichotomies between the law and its enforcement. Thus far, the copyright

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

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

<sup>109</sup> THE CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA, XIAN FA arts. 5–7 (1982) (P.R.C.).

<sup>110</sup> Greene, *supra* note 85, at 456.

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

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Naigen, *supra* note 5, at 193.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 200.

legislation enacted by the Beijing government has “produced more bark than bite.”<sup>117</sup> The current national law protects “literary works, oral works, musical, operatic, dramatic and acrobatic works, fine art, architectural works, photographic works, cinematographic works . . . engineering drawings, design drawings, graphic works [and] computer software,” among other creative compositions.<sup>118</sup> Copyright holders possess the right to restrict the “copying, publishing, exploiting, [or] broadcasting [of] a work,” and works are protected for fifty years from publication or production.<sup>119</sup> As per the TRIPs agreement, formal registration of copyright is not required to obtain rights per se, but it is necessary to initiate litigious disputes.<sup>120</sup> Local provincial copyright officials handle domestic copyright registration while the State Copyright Bureau coordinates foreign registrations.<sup>121</sup> It is unclear what protection exists for unpublished works.

The enforcement of copyrights in China remains inadequate by international standards; a lack of structure to the enforcement system and seemingly no deterrent to pirate-entrepreneurs fuels infringement activities. Currently, the enforcement of copyrights is divided among five national administrative and government agencies that guide provincial efforts.<sup>122</sup> This system has been described as “arbitrary and non-transparent” with relatively low penalties.<sup>123</sup> Liable copyright infringers may only be required to pay damages up to proven lost profits, infringers’ gains, or reasonable royalties (or ¥500,000 [around \$65,000] if these are not easily assessed).<sup>124</sup> No provisions exist in the law for punitive damages for willful infringement or criminal charges.<sup>125</sup> For the few infringers actually found liable, this system provides little deterrence to pirates who are sheltered by the overlapping bureaucracy of China’s enforcement mechanism.

### B. Patents

The current Chinese patent law appropriates many patent regulations and definitions from the U.S. system, leaving little consideration for China’s own unique communal culture and creating a patent system rife with internal struggles. The Chinese patent laws require that an invention, to be patentable, must be “novel, inventive and of practical applicability.”<sup>126</sup> The Chinese requirement bears similarity to the U.S. requirements of usefulness, novelty, and non-obviousness.<sup>127</sup> China restricts the meaning of “novel” slightly as compared to the U.S. definition; the Chinese use of the word “means that no identical invention or utility model has been disclosed in China or

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<sup>117</sup> Chynoweth, *supra* note 9, at \*11.

<sup>118</sup> Chua, *supra* note 97, at 152.

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

<sup>120</sup> *Id.*

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

<sup>122</sup> Weinstein & Fernandez, *supra* note 3, at 234. The agencies are: Administration of Industry and Commerce, State Intellectual Property Office, State Quality & Technical Supervision Bureau, Public Security Bureau, General Administration of Customs. *Id.*

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

<sup>124</sup> *Id.* at 230.

<sup>125</sup> *Id.*

<sup>126</sup> Chua, *supra* note 97, at 151.

<sup>127</sup> 35 U.S.C. § 154 (2004).

anywhere in the world, or made known to the public in the country before filing.”<sup>128</sup> The U.S. definition of novelty only precludes patentability if the invention was known, used, sold, or described in the U.S. or “patented or described in a printed publication in...a foreign country” prior to the patentee’s application.<sup>129</sup> China will also not grant a patent for any invention that the examiners deem “against social morality, detrimental to the public interest or contrary to the laws of the State.”<sup>130</sup> A compulsory license allowing government use may also be obtained in cases of national emergency,<sup>131</sup> or in “‘extraordinary’ state of affairs” or “‘when the public interest so requires.’”<sup>132</sup> The wording of the national patent law is such that any patent *could* be infringed at the will of the government; yet it is important to note that while China has this power, it has yet to command a compulsory license.<sup>133</sup> In contrast to the United States, but in accord with Europe and most other countries, China follows a “first to file” system, granting a patent to the first person to apply regardless of actual inventorship.<sup>134</sup> Patents must be filed with the State Intellectual Property Office, and the rights granted in a patent are negative rights, allowing a patentee to exclude others so that no one else “may make, use or sell the patented product, or use the patented process or use or sell the product of that process without the patentee’s permission.”<sup>135</sup> A patentee can also “prevent unauthorized imports” of a patented invention into China.<sup>136</sup> The requirements of patentability in modern Chinese patent law seem to be wholly imported from the TRIPs agreement, while the restrictions on patentability stem from Communist apprehension of an entirely free market.

Patent infringement suits may be adjudicated in two ways in China—a patentee can choose to take an infringement case to the People’s Courts or can go through an administrative process.<sup>137</sup> Businesses and individuals can seek injunctions and preventative preservation measures as well as damages through the Chinese judicial system.<sup>138</sup> Calculations of compensation for infringement must be made “according to the profits made by the infringer or the losses suffered,” which may include the litigation and enforcement costs for stopping the infringement.<sup>139</sup> As in copyrights, discretionary damages may not exceed ¥ 500,000, or about \$65,000.<sup>140</sup> Article 57 of China’s Patent

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<sup>128</sup> Chua, *supra* note 97, at 151.

<sup>129</sup> 35 U.S.C. §§ 102(a), (b) (stating a person shall be entitled to a patent unless, “the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or; the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States...”).

<sup>130</sup> Goldberg, *supra* note 89, at 6.

<sup>131</sup> Chua, *supra* note 97, at 152.

<sup>132</sup> Goldberg, *supra* note 89, at 6.

<sup>133</sup> *Id.* at 7; Chua, *supra* note 97, at 152.

<sup>134</sup> *Id.* at 151.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 152.

<sup>137</sup> *Id.* at 153.

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

<sup>139</sup> *Id.* at 154.

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

Law, as per TRIPs requirements, shifts the burden of proof to a defendant to prove that infringement did not occur or that there was innocent ignorance of any infringement.<sup>141</sup> The People's Court, however, still requires substantial evidence to adequately plead a complaint. Damages commanded by the Courts "tend to be very low"<sup>142</sup> as well as "vague and unimposing."<sup>143</sup> Businesses may also resolve their cases before the China International Economic and Trade Arbitration Commission (CIETAC), but this avenue of resolution precludes any judicial action.<sup>144</sup>

### *C. Trademarks*

Given the limited but pervasive history of trademarks in China, trademark protection is a smaller pill for the Beijing government and Chinese people to swallow. Entities must now register their trademarks with the State Administration of Industry and Commerce (SAIC) on a "first to file" basis, with registration protecting the mark for ten years and subsequent renewals available for additional ten-year periods.<sup>145</sup> As in the U.S. system, registered marks may be canceled for a variety reasons, including abandonment if the mark has not been used for three consecutive years, fraudulent registration, or "non-distinctive[ness]."<sup>146, 147</sup> In compliance with the TRIPs agreement, the 2001 Chinese Trademark Law grants a judicial review of the SAIC's decision to reject a trademark application or cancellation of a registered mark as well as the confiscation of goods or fines for infringement of a mark.<sup>148</sup> The Chinese people more readily accept trademark laws because of a culturally-recognized value determination. The national and provincial governments more readily protect these intellectual property rights, as demonstrated by the expansion of Chinese trademark legislation and public litigation of disputes. In fact, the Beijing government seems more willing to give protection to domestic unregistered trademarks and trade dress than registered foreign marks under the Anti-Unfair Competition Law.<sup>149</sup>

Foreign marks not registered in China actually receive some limited protection. Through various enactments since 2001, the Beijing government provides a system to protect "well-known" marks.<sup>150</sup> The four requirements of the "well-known" trademark

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<sup>141</sup> Weinstein & Fernandez, *supra* note 3, at 228–29.

<sup>142</sup> Chua, *supra* note 97, at 154.

<sup>143</sup> Goldberg, *supra* note 89, at 10.

<sup>144</sup> Chinese Law recognizes an innocent infringer defense if the infringer can prove ignorance of any infringement of patents or trademarks, and reveals the source of the products may not be liable for damages. Chua, *supra* note 97, at 151–52.

<sup>145</sup> *Id.* at 150.

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

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Chua, *supra* note 97, at 152.

<sup>150</sup> Naigen, *supra* note 5 at 198–99. This regime consists of the 2001 Trademark Law, articles 13 and 14, The Regulation for Implementation of Trademark Law (September 2002), article 5, the Supreme People's Court's Interpretation on Application of Laws for the Trail of Civil Dispute Cases of Trademark (October 2002), Article 22, and the Provision of Identification and Protection for Well-known Trademark (June 2003). *Id.* at 198.

protection regime are: (1) a “competent authority” to identify the mark;<sup>151</sup> (2) a specific procedure of identification;<sup>152</sup> (3) explicit standards of identification; and (4) the actual protection of the mark.<sup>153</sup> The standards used to balance a “well-known” trademark’s protection rights against a registered mark’s rights consist of a balancing of the extent of the public’s knowledge of the “well-known” mark, the length of the “well-known” mark’s use, the extent and geography of the “well-known” mark’s publicity, the protection record of the “well-known” mark, and any other relevant factors.<sup>154</sup>

As China employs the “first to file” rule, the “well-known” mark protection enables foreign businesses to safeguard their trademarks registered elsewhere from bootleggers and squatters. As of 2001, the CIETAC has issued eight rulings on “well-known” marks on the issue of Internet domain name registration rights.<sup>155</sup> The CIETAC ruled in favor of five foreign businesses, including IKEA, Proctor & Gamble, and DuPont, allowing these companies to reclaim domain names such as *ikea.com.cn* and *dupont.com.cn* based on the “spirit of the Paris Convention and Article 2 of the Anti-Unfair Competition Laws.”<sup>156</sup> However, this “spirit” is not universally adhered to in China. In 2003, Geely, China’s largest domestic car manufacturer used Toyota’s logo without permission on its Meiri sedan model and in its promotion materials.<sup>157</sup> The provincial Chinese court ruled that the logo, which Toyota used worldwide, “is not recognized in China as a ‘distinctive brand.’”<sup>158</sup> Not only did Toyota lose its case, it also paid court costs for the suit.<sup>159</sup> While China has made strides to comply with international standards of trademark protection, such instances demonstrate that further progress is required to allay foreign investors’ fears of rampant infringements.

#### *D. Trade Secrets*

Chinese culture holds a long tradition of passing down expertise and industrial and commercial secrets within a family to continue a family business; the culture is more accepting of granting legal protection to the intellectual property right of trade secrets. The SAIC defines a trade secret as any technological or business information that “falls outside the public domain and that can render economic benefits to the owner of undisclosed information, ‘and for which the party that has rights therein has adopted measures to maintain its confidentiality.’”<sup>160</sup> Acquiring trade secrets is not a criminal offense despite the criminal penalty “for obtaining private property by unlawful means.”<sup>161</sup> This distinction indicates that the Chinese government does not view a trade

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<sup>151</sup> The local people’s court is regarded as the competent authority.

<sup>152</sup> The SAIC attempts to identify conflicting well-known marks during the registration process.

<sup>153</sup> Naigen, *supra* note 5, at 198–99.

<sup>154</sup> *Id.*

<sup>155</sup> Weinstein & Fernandez, *supra* note 3, at 229–30.

<sup>156</sup> *Id.*

<sup>157</sup> Choate, *supra* note 32, at 180.

<sup>158</sup> *Id.*

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

<sup>160</sup> Greene, *supra* note 85, at 443.

<sup>161</sup> *Id.* at 446.

secret as property. However, any misappropriating party may be ordered to “desist from the illegal act” and be fined between \$1,200 and \$25,000.<sup>162</sup> Of all the intellectual property rights, the Beijing government appears to most readily embrace trade secrets, being “fiercely protective of their own secrets” as they too “are aware of the lack of [intellectual property rights] enforcement.”<sup>163</sup> The Chinese culture embraces trade secret as the preferred method of keeping information and innovations confidential. The strength of the modern trade secret protection comes from this cultural attitude and the recognition that positive intellectual property rights are ineffective.

The requisite intellectual property laws are now in place for China to enforce sufficiently rigorous intellectual property rights protection at an international standard following the well-tread provisions of the Berne and Paris Conventions and the TRIPs agreement. Since the Beijing government has formally assented to the requirements of intellectual property treaties and the standards of the WTO to effect the country’s stature in the global marketplace, the biggest obstacle to true protection is now in the enforcement of the positive law.

### V. Current Chinese Enforcement and Cultural Change

The weakest link in the modern Chinese intellectual property rights system remains the enforcement of the country’s new laws and their adjudication by provincial authorities. Historically, Chinese culture views litigation as a “failure of community and a reflection of disharmony”; judicial resolution is not favored among the Chinese business community.<sup>164</sup> Even when cases are brought to judicial or bureaucratic authorities for resolution, judges and officials may not remain as independent and unbiased as the international community might hope. It is the “attitudes of the particular players” and partiality of provincial judges to local interests which are integral to the effectiveness of intellectual property rights enforcement.<sup>165</sup> One judge went so far as to openly state on the record, “Chinese intellectual property laws exist to protect Chinese intellectual property” from the rest of the world.<sup>166</sup> With attitudes such as this dominating the provincial judiciaries, the current Chinese intellectual property rights system continues to frustrate foreign interests.

Preferential treatment given to Chinese interests is evidenced throughout new intellectual property rights legislation. The Chinese laws, in fact, identify and categorize an entity by its ownership—whether it is a “wholly foreign-owned entity,” a joint venture, or a company owned entirely by Chinese (a “domestic entity”).<sup>167</sup> Each classification of entity is subject to “specific requirements related to formation and operation.”<sup>168</sup> In

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<sup>162</sup> *Id.* at 444.

<sup>163</sup> *Id.* at 463.

<sup>164</sup> Endeshaw, *supra* note 6, at 385.

<sup>165</sup> Weinstein & Fernandez, *supra* note 3, at 234.

<sup>166</sup> *Id.*

<sup>167</sup> Michael J. Meagher, & Lucia Lian, *Practice Tips: Chinese Law of Lao Wai: A Survey of Chinese Law for American Business Lawyers*. 51 B. B. J. 17 (2007).

<sup>168</sup> *Id.*

addition, Chinese entities themselves may be wholly or partially owned by the government and is “nearly inseparable from the state” as a result of China’s Company Law requirements, raising serious questions about a court’s ability to rule against such companies.<sup>169</sup> The existence of these categorizations, their formation requirements and strong government influence indicate differential and partial treatment given to various entities by judiciary and arbitration organizations. While China’s accession to the WTO and the TRIPs agreement removed some of the disparate treatment, the independent adjudication and enforcement of judicial decisions remain wanting.<sup>170</sup>

As previously noted, the Chinese courts’ and arbiters’ independence is often critiqued by scholars and foreign investors.<sup>171</sup> Conflicting decrees from various branches of the Beijing government lead many provincial officials to develop “a habit of ignoring government rules.”<sup>172</sup> In 1979, Beijing authorities increased local governments’ legislative and executive authority.<sup>173</sup> In the realm of intellectual property rights, the effect was to give control to officials who “almost always prioritized keeping illegitimate operations going” because of the benefit to the local economy.<sup>174</sup> While the publicized goal of this decentralization of government power was to “enhance local autonomy,” it also “worsened China’s ability to fight piracy.”<sup>175</sup> The impetus behind the blind eye local officials’ turn on infringing practices may not always be corruption and bribery. Infringing practices of Chinese businesses may be a valuable source of local revenue and employment, making local authorities “reluctant or even resistant to the enforcement” of intellectual property rights for fear of “antagonizing a local power structure” or impeding the community’s income.<sup>176</sup> In some instances, provincial officials and their local priorities result in differing inter-province interpretations of the national laws.<sup>177</sup> In poorer provinces, a higher demand for counterfeit or pirated items often exists, and the sale results in local prosperity and satisfaction of demand.<sup>178</sup> Provincial officials choose not to look beyond this net benefit, as strengthening the local economy is the “end-all goal.”<sup>179</sup> The decentralized government allows Beijing to commit the country to international treaties while lacking the power to enforce the provisions.

Provincial Chinese authorities, taking comfort in the knowledge that the Beijing government is “far away over the mountains,” employ many methods to deter foreign lawsuits and to provide domestic benefits from lax intellectual property rights enforcement.<sup>180</sup> The provincial courts may openly rule against foreign businesses (e.g. the

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<sup>169</sup> Greene, *supra* note 85, at 439.

<sup>170</sup> Meagher & Lian, *supra* note 167, at 17.

<sup>171</sup> Weinstein & Fernandez, *supra* note 3, at 234.

<sup>172</sup> Goldberg, *supra* note 89, at 14.

<sup>173</sup> Greene, *supra* note 86, at 440.

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

<sup>175</sup> *Id.* at 454.

<sup>176</sup> Weinstein & Fernandez, *supra* note 4, at 234.

<sup>177</sup> Newby, *supra* note 2, at 249.

<sup>178</sup> Greene, *supra* note 86, at 454.

<sup>179</sup> *Id.*

<sup>180</sup> Massey, *supra* note 5, at 232.

Toyota/Geely dispute and the loss of the distinctive Toyota trademark) or employ subtler tools of prejudice to discourage foreign lawsuits.<sup>181</sup> The current system mandates plaintiffs notify potential defendants warning that litigation is being considered. The Chinese judicial system requires gathering all evidence prior to filing a suit, so these letters effectively give infringers forewarning, enabling them to “hide or destroy the evidence.”<sup>182</sup> Since China’s intellectual property rights laws were not culled from a common law tradition but were imposed upon the country through a civil law system after a long history of isolation, the few provincial court decisions in foreign businesses’ favor (e.g., IKEA, Proctor & Gamble, and DuPont) have no precedential value.<sup>183</sup>

Foreign entrepreneurs hoping to preventatively protect their intellectual property or to stop infringers are often left in the dark about how to proceed. China operates a system of “internal, unpublished rules beneath the normal system of law” in which, frequently, “the secret system trumps the published one.”<sup>184</sup> These unpublished rules stem from the prevalent Communist Party’s influence in the politics, judicial, and business spheres and integrate the concepts of *Li*, *Fa*, *Quanli*, and *Guanxi*. This unwritten cultural and judicial system is not an intentional frustration of justice, but rather exemplifies the Chinese cultural tradition and national interests. Those Western businesses that have managed to work within this unwritten system recognize the cultural importance of *Guanxi* and expend the time and effort to build the requisite personal relationships that are revered far more than positive law.

China’s intellectual property rights system is not without hopeful signs to the international community, though improvements may prove to be superficial. Despite obvious issues with enforcement, China continues to make progress in its very young intellectual property law regime. Beginning in earnest in 1995 and 1996, China created a functioning intellectual property rights system, with the enforcement of these rights being a significant part of a nationwide anti-crime campaign.<sup>185</sup> Between 1994 and 1998, the Beijing government reported seizing 35 million illegal audio-visual products and 20 million smuggled VCDs (video formatted compact discs, similar to DVDs), while ending operations or leveraging fines against 74 pirated VCD assembly businesses.<sup>186</sup> In 2003, Chinese officials reported sending out 150,000 enforcement agents to crack down on counterfeit or infringing products.<sup>187</sup> These agents confiscated almost thirteen million pirated products and closed nearly 2,000 illegal businesses.<sup>188</sup> While China touts these statistics as improved enforcement, these numbers are miniscule when compared to China’s size. A dramatic increase in enforcement would be necessary to raise public awareness and to educate domestic businesses to intellectual property laws currently on the books in China.

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<sup>181</sup> Newby, *supra* note 2, at 242.

<sup>182</sup> Robert B. Barrett, Jr. *Bullish on China*. 2 THE PAT. LAW. 10, 12 (Winter 2005).

<sup>183</sup> Greene, *supra* note 86, at 443.

<sup>184</sup> Newby, *supra* note 1, at 239.

<sup>185</sup> Palmer, *supra* note 13, at 464.

<sup>186</sup> *Id.*

<sup>187</sup> Goldberg, *supra* note 89, at 10–11.

<sup>188</sup> *Id.*

While administrative and judicial processes remain largely shrouded in mystery to most foreign investors, some agencies are attempting to clarify the process. The Ministry of Trade and Economic Cooperation now publishes a legal gazette of trade rules and regulations.<sup>189</sup> While this publication does not adequately announce policy changes regarding existing regulations, it does indicate the Beijing government's willingness to address some of the international community's complaints. In cases involving foreign parties, Chinese provincial courts have also released detailed legal analyses of decisions to provide guidance, but not guarantees, for future litigation.<sup>190</sup>

### Conclusion

It may be that strict enforcement of intellectual property rights cannot be expected of an emerging economy, though China's economic development is certainly retarded by its traditional and communist opposition to personal property rights. The United States' internal demands for global intellectual property protection were created by international infringement on its citizens' inventions and works. Since China is late in joining the global marketplace, most of the major developed nations already maintain intellectual property rights systems that adequately recognize and protect Chinese nationals' intellectual property rights abroad. This recognition gives protection to Chinese business seeking to use their intellectual property rights outside the mainland, thereby eliminating the motivation to develop reciprocal domestic enforcement. In 2007, the United States filed action against China at the WTO, charging a lack of enforcement for piracy and infringement of properly Chinese registered copyrights.<sup>191</sup> Yet this sort of international suit will surely have little sway to prompt China to change its current enforcement procedures, as Chinese nationals are not set to lose their international intellectual property rights as a result of the complaint. The Beijing government's likely response will be a statement that it is attempting to restrict piracy and infringement together with an announcement of token enforcement statistics; again, the actual enforcement will be left to provincial governments which do little to protect foreign intellectual property rights.

China created an intellectual property rights regime to gain beneficial trade relations, mostly in response to the demands of the United States' and Europe's. Western countries sought protection of their own citizens' intellectual property rights and, with China's economy booming, demanded China enact legislation that recognized these rights, lest favorable trade relationships never materialize. The Chinese government saw the need to assent to the various intellectual property agreements and conventions and began to codify the provisions into Chinese Law beginning in the 1980s. But laws on the books do not guarantee enforcement. For laws to be properly so-called, they must bear the weight of authority and the fear of punishment; enforcement occurs only when either a powerful government forces its will through the threat of considerable punishment or

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<sup>189</sup> Palmer, *supra* note 13, at 465.

<sup>190</sup> Chua, *supra* note 97, at 136.

<sup>191</sup> Richard McGregor & Eoin Callan, *China Hits Out at US Complaints to WTO*, FINANCIAL TIMES, Apr. 10, 2007, <http://search.ft.com/ftArticle?ct=0&id=070411002781>

the citizens clamor for government imposition to protect their own interests. Intellectual property rights enforcement in China's adopted system is not a priority for the government or the people. China's businesses profit from piracy, with the infringing-products market satisfying the consumer demands of the Chinese people. No moral aversion to this piracy exists in China as individual property rights, tangible or not, have little recognition. Even if there was hesitancy to pirate and infringe on other's intellectual property because of individual ownership, the concept of *Li* would overcome this reticence—the individual should be subjugated to the good of the community.

China has little incentive to increase its intellectual property rights enforcement procedures unless international influences cause Chinese business interests and the population at large to desire further protection. The Beijing government currently gets to have its cake and eat it too: Beijing can formally codify the provisions of international treaties, thereby securing beneficial international trade relations, while the lack of enforcement of these provisions enables local goods producers to infringe and expand the Chinese economy. Until Chinese intellectual property laws reflect the mores and attitudes of the population, any written or literary work, patented invention, or trade or service mark, though formally protected, will not have any recognizable property value. There may be internationally-appropriated intellectual property law but there is no enforcement. Adequate enforcement of intellectual property laws in China will only occur when a shift occurs in cultural and political thinking. If and when individual ownership rights are embraced and the Chinese population recognizes a need for domestic intellectual property rights protection, then China will have the internal motivation to enforce recognized intellectual property rights. Until this internal motivation occurs, Chinese intellectual property laws will be highly ineffectual to the international community.

Through the rampant piracy and infringement still occur in China, there are indications that such the shift in motivation may be occurring. Domestic enterprises are beginning to recognize the value of intellectual property rights. Between 1985 and 1992, the 12,000 largest Chinese state-owned businesses each filed less than one patent application each year on average.<sup>192</sup> Initially, foreign companies filed most of the patent applications under China's new patent system. Increasingly, Chinese companies are not only filing for Chinese patents, but also utilizing the Chinese patent and trademark laws as a "legal means to resolve intellectual property disputes" instead of "simply infringing" upon others' rights.<sup>193</sup> With the upcoming 2008 Beijing Summer Olympic Games, the Beijing government issued "special Protection of Olympic Symbols regulation" to prevent losses from royalty revenues.<sup>194</sup> It is more likely than not that these new grants, judicial decisions, and enactments of positive law enforcement of intellectual property rights will be better received and enforced as now Chinese, not Western, interests are being protected. Steps toward better intellectual property rights protection may lead to a changed understanding of individual ownership rights among Chinese businesses and the Chinese population.

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<sup>192</sup> Palmer, *supra* note 13, at 458–59.

<sup>193</sup> Goldberg, *supra* note 89, at 10.

<sup>194</sup> Weinstein & Fernandez, *supra* note 3, at 234–35.

Critiques of the Chinese intellectual property laws abound as modern world governments and businesses desire instant gratification of their demands. It is obvious from the Beijing government's actions throughout the past twenty years that it wishes for China to competitively participate in the global marketplace and to at least partially shed its disconnected image. The question remains, at what cost? The Chinese intellectual property system is changing from one that "effectively subsidiz[ed] piracy and taxe[d] adherence to the law, to one which effectively subsidizes adherence to the law and taxes piracy."<sup>195</sup> The Communist regime's entry and participation in the capitalistic global market can be likened to "riding a tiger;" capitalism a glorious and powerful beast, but maintaining communist control or eventually dismounting may prove impossible.<sup>196</sup> The Beijing government's idea to decentralize its enforcement of intellectual property laws may have been a self-preservation tactic. At one time, domestic needs instigated the development of the U.S. intellectual property system and its integration into the international arena. The United States based its system of intellectual property rights on an economic incentive to innovate following democratic-republican ideals. China, on the other hand, is attempting to continue under a communist regime while joining a capitalist system. While the national government may reluctantly consent to various capitalistic requirements for the sake of progress, it allows the national Communist Party to influence provincial officials to maintain communist ideals and actions. As the international community endeavors for more effective intellectual property rights enforcement in China, it is important to note that the democratic republic of the United States, though idealistically opposed to the current Chinese regime, experienced the same selfish desires to strengthen its own economy during the formation of its intellectual property rights system. A country's desire to encourage its own economy can turn the government from a bootlegging pirate to an intellectual property protector.

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<sup>195</sup> Palmer, *supra* note 13, at 473–74.

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