

**From Words to Deeds: Explaining China's (Non)compliance with the Global
Intellectual Property Rights Regime since the Country's WTO Entry**

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d i s s e r t a t i o n t o t h e m

To my family

Abstract

What explains the persistent gap between China's de jure and de facto compliance with the intellectual property rights (IPR) norms, despite China's consistent legislative and enforcement efforts since the country's WTO accession in 2001? I argue that the degree of China's (non)compliance with IPR norms should be understood as a result of balancing two factors: the need for short-term economic gains by violating others' IPR, and the aspiration for long-term sustained growth by respecting IPR norms. Based on 17 months of field work in China from 2007 to 2008, I argue that Chinese IPR policy has emerged within the context of the legacy of planned economy and an immature market mechanism. In this environment, only a small handful of elite Chinese domestic private-sector companies are actively engaged in innovative activities -- most firms continue to rely on the input of natural resources and cheap labor to survive market competition. Although foreign business investors in China hold IPR as a vital component of their competitiveness, their business activities are interpreted as exploiting Chinese wealth by economic nationalists in the Chinese mass public. As such, under some circumstances the advocates of IPR norms -- those few cutting-edge Chinese companies along with foreign IPR holders -- are strong enough to persuade Chinese government officials to comply with the IPR norms and achieve the country's long-term economic development goals. However, under many other circumstances, Chinese local governments will protect IPR infringers and ignore IPR norms -- even though they possess the enforcement capacity -- because of the short term political interest in raising tax revenue and creating jobs.

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Chapter 1 : Introduction

Empirical Puzzle and Research Question: the Gap between de facto and de jure Compliance with IPR Norms in China

Chinese IPR Policy on Paper: De Jure Compliance

The primary question that guides my dissertation is: *what explains the gap between China's de jure and de facto compliance with the intellectual property rights (IPR) norms, despite China's consistent legislative and enforcement efforts since the country's WTO accession in 2001?* Over the last 30 years, China was transformed from a stagnant, inward-looking, centrally-planned economy into an animated, outward-looking, decentralized market economy. An important component of China's market reform was the establishment of a full-fledged IPR system. China not only established an IPR regime domestically, but also became actively involved in the international IPR regime during the past three decades.

Historically, the norm of intellectual property rights has been in existence nearly as long as human beings sought to protect their creative output. Over the past centuries, that notion became globalized with the worldwide spread of global capitalism in the 20th century (May and Sell 2006). As China adopted a market-oriented reform strategy and an open-door policy in 1978, the respect for knowledge and knowledge generators started to gain an increasingly prominent role in China's policy agenda. At the

same time, IPR came to be instituted as part of the new legal system, which is widely regarded as a cornerstone for a “socialist market economy”.¹

In 1978, a market-oriented reform and an open-door policy took shape gradually in China. With the start of economic modernization campaign, China’s market-driven efforts were set to realize the “four modernizations”, which included “the modernization of science and technology”.² After being despised as part of the “exploitative class” for decades, intellectuals were recognized by the country’s then top leader, Deng Xiaoping, as part of the “leading class” in China and science and technology as “No. 1 productive force”.³

Following Deng Xiaoping’s emphasis on scientific innovation, the younger generations of Chinese leadership further emphasized the vital role of intellectual property rights in China's modernization efforts and explicitly called for more effective protection of IPR, foreign and domestic alike. During the 1990s, IPR increasingly gained a significant place in the country’s official discourse to "merge into the mainstream track"

¹ A classic contribution on property rights and early capitalist development is North 1990 North, D. (1990). Institutions, Institutional Change and Economic Performance: Political Economy of Institutions and Decisions, Cambridge University Press. For a recent discussion on property rights and Chinese economic reform, see Oi 1999 Oi, J. and A. Walder, Eds. (1999). Property Rights and Economic Reform in China. Stanford, Stanford University Press, California., Also see Peerenboom 2002 Peerenboom, R. (2002). China's Long March toward Rule of Law Cambridge, UK, Cambridge University Press ;

² Deng Xiaoping: *Speech on the 1978 National Conference on Science*(邓小平在1978年全国科学大会上的讲话) from *Selected Works of Deng Xiaoping, Vol. 2*(邓小平文选第二卷)。The online version of this speech is available at the website of China's official Xinhua News Agency at http://news.xinhuanet.com/st/2006-01/07/content_4021953.htm, last accessed 04/05/2007;

³ Deng Xiaoping : *Science and Technology is the Most Important Productive Force*(邓小平: <科学技术是第一生产力>) from *Selective Works of Deng Xiaoping*(邓小平文选第三卷), Vol. 3. The online version of this article is available at the website of China's official Xinhua News Agency at http://news.xinhuanet.com/newscenter/2004-07/23/content_1635528.htm, last accessed 04/05/2007;;

(*jiegui*) of the internationally accepted standard of IPR protection. From then on, IPR protection became a salient issue in the working agenda of the Chinese legislature.⁴

Starting from the 1980s, China adopted the first series of IPR legislations. Since the early 1990s, the Chinese domestic IPR regime increasingly felt the impact from international influence a series of bilateral negotiations with the Western countries, particularly the U.S. (see Appendix A). China also joined a series of international IPR agreements, offering protection to domestic and foreign IPR, despite some domestic critiques as “selling out China’s national interests” (see Appendix B). The highlight of China’s participation in the international IPR regime was the country’s WTO entry in 2001. By joining the WTO, China formally acceded to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the foremost international treaty consisting of the contemporary international IPR regime. That move drove China to make further adjustments to meet the minimum standard of IPR protection set by the WTO, which marked the country’s complete adoption of international IPR norms.

Based on those legislative efforts, the Chinese government claims that “although there is still much room for improvement, China has accomplished a lot of fruitful work (in IPR protection). It has covered a long way that took decades or even centuries for the developed countries to cover and established a relatively comprehensive system of IPR protection in less than 20 years.”⁵

⁴ For speeches by China’s younger generations of leadership on intellectual property rights, see, for example, Jiang Zemin’s Report at the 15th National Congress of the Communist Party of China, available online at <http://www.fas.org/news/china/1997/970912-prc.htm>, last accessed July 30th, 2010; also see Hu Jintao’s report at 17th National Congress of the Chinese Communist Party, available online at <http://www.china.org.cn/english/congress/229611.htm>, last accessed July 30th, 2010;

⁵ State Information Office: *White Paper on New Progress in Chinese Intellectual Property Protection* (中国知识产权保护状况的新进展), April 21, 2005. Full text of the white paper is online at

De Facto Compliance with IPR Norm: The Real Problem

Despite the enduring legislative efforts and extensive participation in the international IPR regime, in China, as in many other developing countries, IPR infringement remains a salient problem. Piracy and counterfeiting are still rampant in many parts of China. The destructive effect of widespread IPR infringement has not only threatened the long time operation of local businesses in China, but also poisoned trade relationship between China and other countries, particularly the U.S. This sense of unease is compounded by the perception that one way China achieved the rapid economic growth is by copying Western technology and ignoring the international intellectual property rights (IPR) regime. The International Intellectual Property Alliance, a U.S. based IPR studies group, claimed that U.S. companies lost an average of 2.2 billion U.S. dollars due to copyright infringement alone and the rate of piracy on the Chinese market is as high as 90% on average. Foreign companies investing in China still blamed China for not implementing international IPR norms in practice although the country has signed the international IPR agreements on paper. For example, on March 22, 2011, the American Chamber of Commerce in China released its Business Climate Survey 2011. According to the survey, 70 percent of American businesses operating in China believe its IP system to be “totally ineffective” or “ineffective”. During the past decade since China’s WTO entry (2002 to present), respondents expressed an equivalent amount of

http://news.xinhuanet.com/zhengfu/2005-04/21/content_2858983.htm. In the remainder of dissertation, the text of Chinese documents is translated by the author unless otherwise noted.

discontent with the protection of IPR.⁶ It is necessary to bear in mind that the figures above come from business associations mainly composed of U.S. companies, not from the Chinese government due to the lack of transparency in the latter's operation, but those figures provides a sense that the infringement level is astounding high.

Even some Chinese scholars with government background do not deny the rampancy of IPR infringement in China. As is pointed out by a leading IPR scholar from Beijing University, "China's IPR work is not in a satisfactory situation: on one hand, we do not have enough respect on other countries' IPR; on the other hand, we do not have adequate protection for our country's domestic IPR."⁷ Chinese State Intellectual Property Office (SIPO)'s Eleventh 5-year plan report states that

"In recognizing the great achievement we have made, we have to consciously recognize that our IPR protection level does not meet the requirement of our country's economic and social development. Discrepancy still exists between our country's IPR protection and international development. Specifically, our IPR policy does not fit well with the concrete condition of our country ; IPR administrative branches remain disorganized and the level of efficiency of IPR administration needs to be improved. Leaders at different levels have not yet fully realized the importance of IPR protection. Our society's sympathy for IPR is still weak."⁸

Such voices were echoed in the speeches by Chinese top leaders. During his meeting with the General Secretary of World Intellectual Property Organization (WIPO) in 2002, former Chinese Premier Zhu Rongji admitted that "China attached great importance to IPR protection and have made some achievements in this regard in recent

⁶ American Chamber of Commerce in China (2011) Business Climate Survey. <http://www.amchamchina.org/upload/cmsfile/2011/03/22/efb2ab9d3806269fc343f640cb33baf9.pdf>, last accessed 06/05/2011;

⁷ Interview with Zheng Shengli(郑胜利) by *People's Daily*,(人民日报), 04-03-2008, P14; ,

⁸ State Intellectual Property Office (SIPO), 2006: *China's IPR Protection: Present and Future Development*, (中国知识产权保护: 现状与发展) (Translation by author.)

years, but there is still a lot of work to be done.”⁹ Several years later, Zhu Rongji’s successor, the incumbent Premier Wen Jiabao admitted on a domestic occasion that IPR protection “remains a difficult task in China”.¹⁰

Literature Review

Although the study of the origin and diffusion of the IPR norm in specific as an international economic norm has not become a central focus for political science scholars until recently, there is a vibrant debate in international relations (IR) and comparative politics about the spread of international economic norms in general. Specifically, this section will evaluate three dominant categories of theoretical attempts in IR and comparative politics literature to address the adoption and compliance of international economic norms: the external pressure argument, the bureaucratic politics argument, and the political culture argument. I argue that each of the existing explanations contains a grain of truth and provides a solid foundation for scholars’ academic exploration. However, each of those theories falls short at some stage of the analysis. Instead of rejecting the preceding explanations as wrong, I argue that they are incomplete in some important ways and my dissertation offers a more nuanced theory to explain the gap between China’s *de jure* and *de facto* compliance with the international IPR norms.

External Pressure Argument

Applying a realist perspective to the analysis of the IPR issue, the external pressure argument holds that, in power-oriented trade diplomacy, the cost of

⁹ *People’s Daily*, May 20th, 2002, Page 1;

¹⁰ Report about Wen Jiabao’s speech is available online at http://www.sipo.gov.cn/sipo/ztxx/sqdz/zylj/200710/t20071012_210099.htm, last accessed July 30th, 2010;

noncompliance with IPR norm is great; the global trade hegemon will impose punitive tariffs on countries considered serious violators. On the issue of IPR, the United States is the global hegemon in the world trade system and the largest producer of IPR-related products. Therefore, it has stronger bargaining power in IPR negotiations to press China onto the track it designs (Ryan 1995; Ryan 1998). Apart from bilateral pressure, multilateral pressure from international organizations such as WTO also pressed countries aspiring to join the WTO to revise its IPR legislations so as to meet the minimum standard of IPR protection as required by WTO membership (Shadlen, Schrank et al. 2005).

The external pressure argument certainly captures an important aspect of the making of Chinese IPR policy: the “push behind” role by the West, mainly the United States, to accelerate China’s IPR legislation. However, the external pressure argument is vulnerable to critiques on the following fronts: first, while the external pressure argument offers a convincing explanation to the *adoption* of the IPR norm, it has little to say about the *implementation* of the IPR norm. Indeed, while the Chinese government constitutes the major defense line at the negotiation table, external pressure can hardly reach the local government and societal actors behind the Chinese border. It is through those actors that formal IPR agreements are translated into real policy outcomes. Second, maybe more importantly, external pressure cannot explain why the Chinese government takes IPR protection measure under some circumstances even *without* foreign pressure. In that case, the pressure they face comes from within rather than without. Moreover, even if foreign pressure works under some circumstances, it cannot keep its presence all the time. On

many occasions, foreign pressure influences Chinese decision making in the form of newly emerging foreign policy actors and newly developed ideas, values, and orientations. Therefore, researchers cannot treat China as a unitary state; they must open the blackbox of the Chinese state to examine the operation of Chinese IPR policy on the domestic arena.

Bureaucratic Politics Argument

Scholarly attempts to open the black box of the Chinese state did yield significant progress in recent years. Most prominent among those works are Mertha (2005) and Dimitrov (2009). Instead of treating the Chinese communist bureaucracy as a monolithic setup, this strand of argument posits that China's IPR policy implementation is handicapped by administrative and legal decentralization, which creates barriers for the central disciplining of local officials and create opportunities for local protectionism and corruption.

Some findings of chapter 3 of my dissertation support the bureaucratic argument. My critique of this argument, however, is that it only offers us a partial explanation why IPR policy is so difficult to implement at the local level. First, like the external pressure argument, the role of societal actors is relegated to a trivial place in the analysis of bureaucratic politics argument. While the bureaucratic politics argument is right in arguing that politics at the local level determines the eventual policy outcome, it should go further to examine the local actors below the local bureaucratic institutions. Second, although part of the bureaucratic politics argument implicitly acknowledges the impact of societal actors, namely, the IPR infringers, it has not considered another important aspect

of societal actors, namely the IPR holders and the innovators. In fact, although under certain circumstances Chinese local government branches form a coalition with IPR infringers and offer them protection, it is possible for them to stand on the side of IPR holders if their local economy benefits from innovators.

Political Culture Argument

The third category of literature offers a culturalist explanation. As one of the pioneering studies of IPR policy in China, William Alford stresses the importance of historical and cultural contexts in which IPR laws operate (Alford 1995). Specifically, this argument attributes China's ineffective IPR enforcement to the legacy of Confucian culture, which holds that copying others' work as a necessary and justified means to disseminate knowledge. Moreover, for a long time Chinese society considers creativity as a collective benefit to the community. Having strong contempt for commercial activity, the agriculture-based Chinese society despised those who create for sheer profits. That culturalist argument finds support with other scholars such as Patrick Hu (Hu 1996) and Peter Yu (Yu 2002).

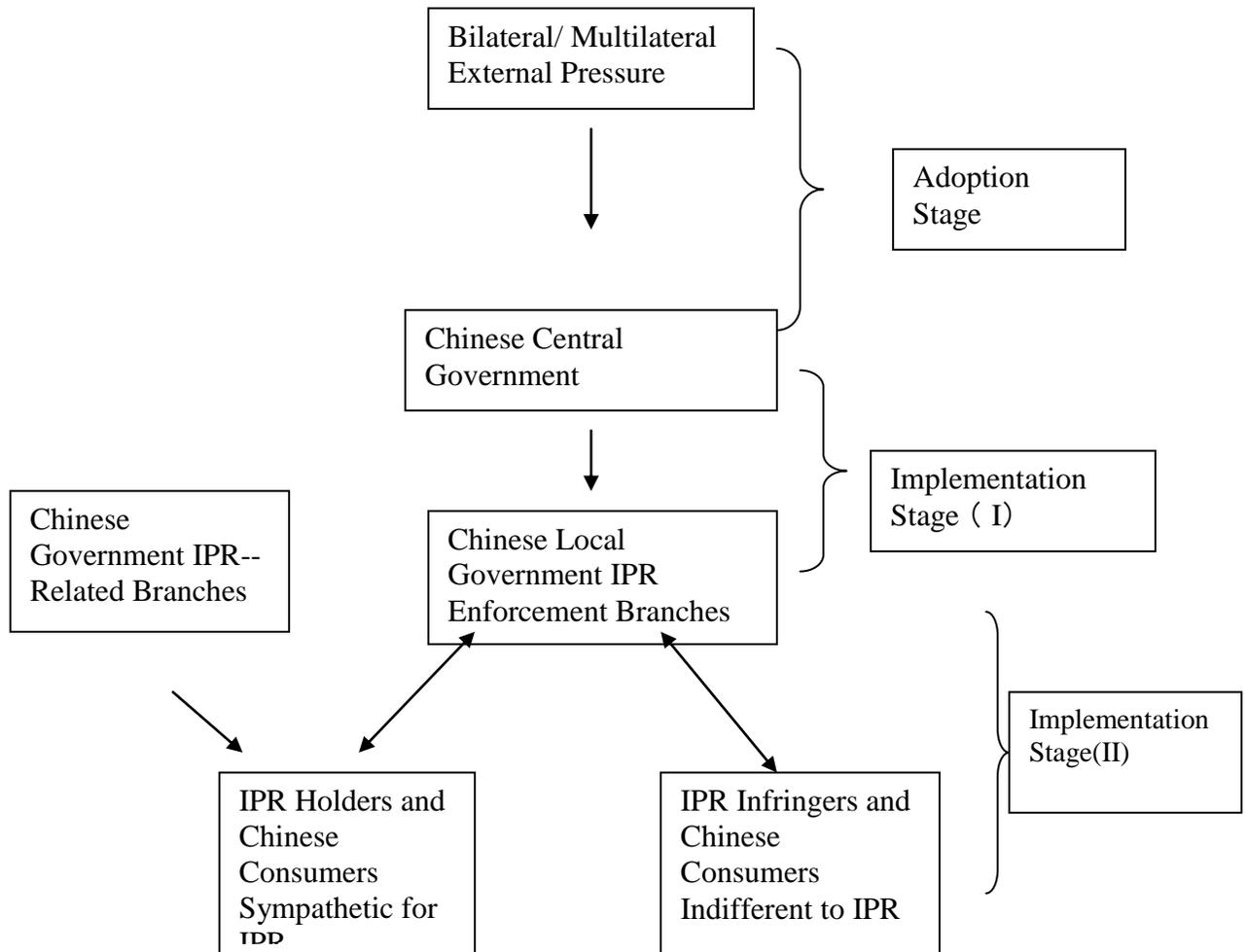
Despite the fact that historical and cultural legacies are very relevant for the formulation of Chinese IPR policy in contemporary era, merely relying on cultural explanations neglects the following significant facts: culture is a constantly changing factor and is inevitably affected by the political and economic environment from which it originates. Therefore, a simplistic understanding of culture cannot capture the complexity of culture as a multi-dimensional phenomenon. While both Chinese IPR holders and Chinese IPR infringers share the same cultural tradition, why do they differ in terms of

real IPR actions? If Confucianist cultural tradition in China works against IPR in a uniform way, why do some state and business actors have a strong inclination to protect IPR while many others do not? While the culturalist argument is right in bringing ideational factors into perspective, a more nuanced approach is necessary to analyze the interaction between different ideas held by different actors.

My Central Thesis: Bring the Societal Actors Back in

Built on the analyses of the previous strands of scholarship, my argument can be summarized as follows: after the adoption stage, Chinese IPR policy enters the implementation stage. (See table below)

Table 1.1: Different Stages of The Adoption and Implementation of IPR Norms in China



During the implementation stage, the degree of China's (non)compliance with IPR norms should be understood as a result of interaction between state and societal actors. Even in an authoritarian country such as China, societal actors do not passively follow the state. Instead, they impact and are impacted by the policy designed by the state. Chinese IPR policy has emerged within the context of the legacy of the planned economy and an immature market mechanism. In this environment, only a small handful of elite Chinese domestic private-sector companies are actively engaged in innovative activities -- most

firms continue to rely on the input of natural resources and cheap labor to survive market competition. Although foreign business investors in China hold IPR as a vital component of their competitiveness, their business activities meet suspicion or even hostility among the Chinese consumers. As such, under some circumstances the advocates of IPR norms - those few cutting-edge Chinese companies along with foreign IPR holders -- are strong enough to persuade Chinese government officials to comply with the IPR norms and achieve the country's long-term economic development goals. However, under many other circumstances, Chinese local governments will protect IPR infringers and ignore IPR norms -- even though they possess the enforcement capacity --because of the short term political interest in raising tax revenue and creating jobs. Due to the limited influence of IPR holders in China, the constituency for the IPR norms remains weak. Therefore, ignoring IPR norms prevails over respecting IPR norms.

Field Work, Methodology, and Case Selection

Data and Field Work

In order to test my thesis, I conducted 17 months of field work from May 2007 to October 2008 to collect necessary data. Due to the political sensitivity of the research topic under examination, reliable quantitative data on Chinese IPR policy published by official Chinese sources is very hard to get, if not completely unavailable. Therefore, I mostly adopted qualitative methods to collect and analyze necessary data for my dissertation. .

My field work sites included 7 provinces/municipalities in China: Anhui, Beijing, Jiangsu, Shanghai, Guangdong, Fujian, and Hong Kong. My field work consisted of three

major components: interviews, archival research, and participant observation.

Specifically, I conducted 123 in-depth interviews during my field work, including 99 formal interviews and 24 informal ones. The formal interviews were conducted with government officials ranging from three ministerial-level officials involved in the top Chinese IPR policy making circle all the way down to village level officials, IPR lawyers and judges, domestic and foreign business professionals, and IPR scholars associated with Chinese think tanks and major universities. Ranging from 30 minutes to 2 hours, my formal interviews happened mostly in the offices of my interviewees. Some of them were conducted on the dinner table, a place where many Chinese people discuss business matters. To break down my interviews by the interviewees' occupations, I conducted 26 interviews with IPR officials at different levels, 29 with domestic and foreign business professionals, 19 with IPR lawyers and judges, and 25 with IPR scholars.

While formal interviews are important sources of my information, informal interviews play an indispensable role in supplying necessary information. Unlike the formal interviews, I conducted informal interviews with sellers and buyers of counterfeit/pirated goods, most of whom occupy much lower social positions than the IPR professionals mentioned above. Unlike my formal interviews, the informal interviews happened on the street, in stores selling counterfeit and pirated goods, and in basement apartments rented by peasant workers. As a native of Anhui Province, I am able to conduct informal interviews in the local dialect. That proved to be an effective tool to shorten the distance between the interviewer and interviewees. Under those informal

circumstances I could get information that my interviewee would otherwise not speak out on formal occasions.

My field work did not isolate interviews from archival research and participant observation. Instead, they were often combined together for the purpose of making better sense of the data acquired. During my field work, I accumulated over 1,000 IPR- related journalistic reports, yearbook articles, leadership speeches, and Chinese government newsletters, some of which were for internal circulation only. Most of those documents were published between 1990 and 2008, with some of them published back in the 1980s or even the 1950s. Admittedly, the Chinese media is still controlled by the government, so a lot of the reports are filled with bureaucratic jargon. However, the information excavated from those jargons proved really valuable. At the end of many interviews, my interviewees helped me to “read between the lines” to cross-examine the archival documents that I collected. On the other hand, the archival data also helped me a great deal to verify the validity, or the lack thereof, of the information gathered from my interviews. That process of cross examination is very exhausting, time-consuming, and often frustrating, but it turned out to be an extremely rewarding learning experience.

In August 2007, I participated in several meetings between IPR enforcement officials and several patrons of counterfeiters in a town in Anhui province during the post raid period.¹¹ In July 2008, I participated in an anti-counterfeit raid conducted in Jiangsu Province. Those opportunities made me aware of the political and economic dynamics hindering the implementation of IPR policy at the local government level. Moreover, in fall 2007 I got the chance of sharing with several street peddlers a basement apartment in

¹¹ For further information about those meetings, see the beginning part of Chapter 3.

suburban Beijing. During the three weeks of living with them, I was able to observe the working of a significant portion of the underground pirated/counterfeit goods market: the buying and selling of pirated/counterfeit goods, the cat and mouse game between street peddlers and law enforcement officials, and part of the distribution network of pirated/counterfeit goods. As far as I know, the above access is unprecedented for Western-based researchers on Chinese IPR issues.

Case Selection:

Why China?

According to John Gerring, a case study is “an intensive study of a single unit for the purpose of understanding a larger class of (similar) units.” ((Gerring 2004) (P 342)¹² China is chosen as the subject of this study both because of its uniqueness and its generalizability.

What comes first is China’s uniqueness: with the world’s largest population and one of the world’s fastest growing economies, China gains more and more weight in the international political economy. The study of social and political phenomena in China, whose complexity is due a great deal to the country’s cultural, historical, and demographic diversity- is able to enrich our understanding of the social world. Here it is also important to note that, with some exceptions, the implementation of IPR laws in China remains very under-explored. To the best of my knowledge, my project is one of

¹² Also see Rueschmeyer 2003 Rueschemeyer, D. (2003). Can One or A Few Cases Yield Theoretical Gains? Comparative Historical Analysis in the Social Sciences. edited by James Mahoney and Dietrich Rueschmeyer, Cambridge University Press.

the first political science attempts to incorporate the elements of Chinese state, society, and foreign pressure to analyze China's IPR policy making and implementation.¹³

It is also important to note that China is similar to many developing and post-communist countries in the world. As a late comer to the world economy, China regards the widespread diffusion of IP as the most effective way to distribute knowledge that will eventually lead to economic development and power. As a post-socialist country, the traditional Chinese approach to IPR is just the opposite to the Western capitalist assumption that property rights are the very cornerstone of the establishment of a market economy. Therefore, the theoretical conclusion generated by the study of China's adoption and compliance with IPR will also lend insight into the study of political economy in other developing and post-communist countries, many of which are confronted with similar tasks in their political and economic development.

Why IPR?

Since the 1980s, there has already been fruitful scholarship on the making and implementation of public policy in China. (Lieberthal and Lampton eds, 1987 ; Lieberthal, 1992} However, Chinese IPR policy has not attracted scholarly attention until recently. In international relations literature, much scholarly attention is devoted to the study of *de jure* compliance. But the issue of *de facto* compliance remains the tricky part, hence the interesting part.

¹³ By far the only two book-length analyses of Intellectual Property Rights in China by political scientist is Mertha (2005): The Politics of Piracy, Ithaca: Cornell University Press and Dimitrov, M. K. (2009). Piracy and The State : The Politics of Intellectual Property Rights in China New York Cambridge University Press. However, I think that both works missed some substantial parts of the story. My project does not seek to overthrow or supplant the preceding analyses, but I seek to substantially add our understanding of the issue.

To reiterate Gerring's point, the study of IPR policy in China goes beyond the IPR field. So many forces are at play during the making and implementation of IPR policy in China, both because of the complex nature of Chinese political economy and because of the complex nature of the IPR norm itself. In that sense, IPR provides an excellent window to view such important themes in the study of international relations and comparative politics as the influence of international norms on domestic politics, central-local relationship, growth of civil society and its interaction with the authoritarian state in a transitional economy, and the establishment of rule of law in China- a country that does not have this kind of tradition historically.

Four decades ago, Chalmers Johnson emphasized that “ the main tasks of China scholarship in America should be to train more China-oriented political scientists and to think about how to explain political events in China.” (Johnson 1965)(P 271)¹⁴ During the past four decades, both China and the field of China studies underwent profound changes.¹⁵ While Johnson's view remains relevant, some scholars call for the maturation of China study from a “consumer field” whose analytical insights come from theories growing from the study of other countries to a “producer field” that is capable of generating original insights of interest (Perry 1999) . I do not aim to achieve this ambitious goal with my dissertation, but I certainly seek to construct a middle-level

¹⁴ As quoted in Liu and Dittmer 2006 Liu, G. and Lowell Dittmer (2006). Introduction: The Dynamics of Deep Reform. China's Deep Reform: Domestic Politics in Transition. L. Dittmer and. G. Liu, Rowman and Littlefield Publishers.;

¹⁵ For an excellent critical survey of the state of China studies in America, see Dittmer and Hurst, 2006 Dittmer, L. and W. Hurst (2006). Analysis in Limbo? Contemporary Chinese Politics amid the Maturation of Reform. Domestic Politics in Transition: China's Deep Reform. Liu. G and L. Dittmer, Rowman and Littlefield Publishers: 49-81., *ibid.*;

theory that can provide insightful analysis of the dynamics of China's market reform through the study of China's IPR policy.

Chapter Layout

With the introduction chapter in place, I will describe the decision-making process of IPR legislation at the level of Chinese central government in chapter 2. Chapter 3 moves on to discuss the implementation of those IPR legislations at the local level. Chapter 4, 5, and 6 respectively highlight how the interaction between the state and societal actors impact the implementation of Chinese IPR policy in the realms of patent, copyright, and trademark. I conclude the dissertation by situating my study in the broader context of the interaction between global political economy and China's domestic political and economic reform.

Chapter 2. Domestic Interests, Foreign Pressure, and the Political Economy of IPR Legislation in China (1949-present)

Introduction : The Life Experience of a Chinese Musician

In the early 1940s, a young composer named Luobin Wang traveled from his hometown Beijing to West China's Qinghai and Xinjiang and drew his inspiration from the folk songs of the local ethnic minority groups. During his stay in West China, he composed more than 700 love songs, many of which became the repertoire of leading Chinese singers. Since the 1950s, some of these songs have been translated into foreign languages and performed by Western singers such as Paul Robertson, Luciano Pavarotti, and Placido Domingo. However, for a long time Wang did not gain fame or monetary rewards commensurate with these outstanding artistic achievements. For more than 30 years since the 1950s, songs composed by Wang bore only the label of "Qinghai Folk Song", "Xinjiang Folk Song", or even "Collectively Composed" when they appeared on the playlist of concerts in China. Wang himself was imprisoned from 1963 to 1975 for his service in the Nationalist government toppled by the Chinese Communist Party in 1949.¹⁶

After Wang left prison in 1976, he started his journey to claim economic and moral rights to his musical works. According to his own recollection (Wang 1995), not everyone supported his efforts. In the early 1990s, the disagreement even culminated in a national level debate involving China's leading musicians and scholars.¹⁷ One year

¹⁶ Before 1949, Wang was jailed for 3 years by Nationalist Government for his suspected connection with the Chinese Communist Party. Altogether he served for more than 15 years in prison in his entire life. For more about his life story, see Wang Defen: *Condolences from Afar to Wang Luobin* from *People's Daily*, 03/15/ 1997, Page 7;

¹⁷ For views in support of Wang, see, for example, (Chen 1995) For views against Wang's effort, see, for example, Zhu 1995 (Zhu,1995);

before Wang's death in 1996, his copyright was eventually recognized by the Chinese copyright authorities.¹⁸

Wang's case is but an example of the fate of the Chinese copyright-holders, but it illustrates the difficulty of copyright protection in China during the past six decades. Wang's thought-provoking life story prompts political scientists to think about a set of deeper questions: why was it so difficult for the IPR norm, which has been accepted in many countries around the world and is now enshrined in contemporary Chinese legal arrangements, to be adopted in China before the Chinese market reform started in the late 1970s? Why did Chinese decision-making elites eventually decide to make further legal adjustments protecting intellectual products as private property anyway after such bitter disputes?

In this chapter I seek to answer these questions. The dependent variable of my analysis is the establishment of the Chinese IPR regime, with patent law, trademark law and copyright law as its core; the independent variable is the varying impacts of different socio-economic groups, domestic and foreign, during the different historical stages. Existing arguments focus on the influence of external pressure (Mertha 2005(a); Dimitrov 2004; Alford 1995), but I argue that it is the combination of the arrival of the Western notion of IPR and the development of a market mechanism that shaped the present IPR system in China. There had been incipient IPR awareness in China before foreign pressure was keenly felt. While foreign pressure sped the pace of Chinese IPR regime's merging into the international track since the 1990s, domestic resistance has

¹⁸ Even after Wang's death, there were still doubts over Wang's the copyright to the folk songs he composed. For more information, see Su Jichang, *Wang Luobin Sets A Model for National Solidarity*, from *Xinjiang Economic News*, Page 1, 05/08/1996;

never ceased to counteract the impact of foreign pressure. IPR legislation marks China's strategic compliance with international IPR norms. It constitutes but the first step to IPR protection. There is still a long way to move from strategic compliance to the complete internalization of IPR norms. This chapter demonstrates that even this first step was accomplished with much painstaking endeavor.

This chapter is structured as follows: the first section makes a brief introduction of the norm of intellectual property rights: How did IPR norm become global after originating from the domestic context of the Western countries? What is the inherent contradiction within the norm of intellectual property rights that arouse disputes between IPR holders and the public? The second section discusses four major periods of the evolution of Chinese IPR regime: the pre-reform era(1949-1966), the early reform era(1978-1990/1991), the pre-WTO era (1991-2001) and the post-WTO era(2001-present). I conclude this chapter by summarizing my argument and raising questions that will be addressed in my next chapter.

A Brief Introduction of the History of Global IPR Norm

Norms behind the IPR Tripod: patent, trademark, and copyright

In this dissertation, I use the traditional definition of "intellectual property", which includes patent, trademark, and copyright.¹⁹ As will be demonstrated later, while the IPR norm represents people's value for human creative works, the three different sub-

¹⁹ Under Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), there are some other forms of IPR such as (1) industrial design, which covers specific appearances of products; (2) geographical indicator, which distinguish local products from generic or other variants, and (3) trade secret. Traditionally, however, patent, trademark, and copyright are regarded as the main components of modern IPR. For more detailed discussion of this, see Gervais 1998 Gervais, D. (1998). The TRIPS Agreement: Drafting History and Analysis, 2nd Edition, Sweet and Maxwell.

categories of IPR represents people's value for human creative works in different issue areas.

Patent

A patent is a time-limited, exclusive right that is granted for an invention. As the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) states,

“Patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.”²⁰

Patent protection is usually related to technology-intensive innovation and provides inventors with the right of exclusion from the use, production, sales, or import of the product or technology in question. Once a patent expires, the invention enters the public domain. Arguments in favor of patent protection are often centered on the various incentives patents create for innovative activity.

Trademark

Trademark is a distinctive sign that indicates that a specific good or service is produced or provided by a specific person, group, or business. Usually, trademark is made up of one or more distinctive words, letters, numbers, drawings or pictures, emblems, or other graphic representations. According to TRIPS,

“Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark.”²¹

²⁰ TRIPS Section 5, Article 27

²¹ TRIPS Section 2, Article 15

Trademark protects the legal rights of its owner by conveying information about the character and reputation of the good or service to the consumers. Once reputation and goodwill have been established, the trademark itself may acquire commercial value.

Copyright

Copyright is traditionally the protection given to creators for their literary or artistic works. Under TRIPS, copyright protection shall extend to the “*expressions* and not to ideas, procedures, methods of operation or mathematical concepts as such.”²²

Computer software has also been included under copyright protection since software is increasingly regarded as a literary work.²³

Like patents, the goal of copyright protection is to instill incentives to create optimal level of literary works so as to provide social, cultural, and economic benefits to society. However, because the subject matter of copyright protection is mostly literary works, the theoretical underpinnings of modern copyright law involves not only economic factors but also social and cultural factors. As is argued by a legal scholar, modern copyright law does not only provide economic incentives for authors and publishers, but also “encourages creative expression on a wide array of political, social, and aesthetic issues. The activity of creating and communicating such expression and the expression itself constitute vital components of a democratic civil society.” (Netanel 1996)(P. 347)

Development of Intellectual Property Rights(IPR) as an Economic Norm: From National to International to Global

²² TRIPS, Article 9 (2)

²³ TRIPS, Article 10 (1)

IPR as an economic norm is embodied in a set of international treaties and conventions. The first time that IPR as an economic norm was embodied through legal form in the West was during the Renaissance period. In 1409, Venice conferred upon a Germanic technician a patent for new technology that was later applied to mineral processing. In 1474, Venice promulgated the first patent law in modern history, in which the ownership of knowledge was institutionalized through a legal form to explicitly promote innovation.²⁴

In the 19th century, the spread of international trade and the development of science and technology ushered in an international era of IPR protection. In 1883, the Paris Convention for the Protection of Industrial Property required signatory nations to provide national treatment for foreign innovations in the areas of patents, trademarks, industrial designs, appellations of origin, and utility models.²⁵ Three years later, the Berne Convention for the Protection of Literary and Artistic Works was signed to provide copyright protection to the literary and artistic works of the signatory parties.²⁶ Those two international treaties represented the beginning of protecting IPR at the international level, featured with both merely established non-discrimination agreements in the area of IPR and minimum standards of protection.(Richards 2004)

In 1893, the Paris and Berne Convention were merged into the United International Bureaux for the Protection of Intellectual Property (known by its French acronym BIRPI), located in Berne. In 1960, BIRPI moved to Geneva. In 1967, it became

²⁴ See May and Sell (2006)

²⁵ Full text of the Paris Convention is available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html;

²⁶ Full text of the Berne Convention is available at http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo001.html

the World Intellectual Property Organization (WIPO). (Ryan P. 1998) WIPO's mission was to help nations develop multilateral norms governing IPR, help nations develop national legislation, and facilitate the negotiation of international treaties.²⁷ However, WIPO possesses no dispute resolution organ to settle IPR disputes between different countries and enforce minimum standard of IPR protection.²⁸

In 1995, the end of the Uruguay Round negotiation resulted in the establishment of the World Trade Organization (WTO). An important component of the new international trade arrangements was the establishment of a global regime for IPR governance: the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).²⁹ Unlike the preceding conventions, the basic function of the TRIPS agreement was to establish and enforce minimum international standards for IPR protection. There were some other significant changes to a number of aspects of the previous international IPR agreements. Specifically, TRIPS gives the governance regime teeth by applying the WTO's dispute settlement mechanism to any international disputes regarding the undertakings within TRIPS. As part of the multilateral agreements that led to the establishment of the WTO, TRIPS also links IPR to the wider issues of international trade at the WTO. Moreover, TRIPS ushered in a global IPR regime that reached deep into the domestic regulatory environment of states.³⁰

Two Legs of IPR's Legal Body

²⁷ Convention to Establish WIPO, available online at <http://www.wipo.int/treaties/en/convention/>;

²⁸ For more information, see http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html

²⁹ Full text of the TRIPS is available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

³⁰ Sell, 2003; May and Sell, 2006;

The legalization of the IPR norms was meant to protect intellectual creation as a private property. Laws governing IPR attempt to regulate the relationship between state, business (including the IPR holder as well as the infringer), and the public that consume IPR products. Specifically, a full-fledged IPR law has to address the following questions: what kind of intellectual output shall be protected as IPR? What is the boundary between the privatization of intellectual output and fair use of IPR by the general public? What constitutes infringement of IPR? Who is responsible for protecting IPR from possible infringement? How should legal remedies be made in case of IPR infringement?

However, the object of an IPR norm, the output of human creativity, is extremely fluid compared to other types of private property such as land, real estate, or monetary income. While the core aspect of legal construction of IPR norm is the balance between private rewards for intellectual production and public benefits, the practice of IPR laws is perpetually torn between the issue of rewarding intellectual creativity on one hand and promoting general social welfare on the other hand (May 2000). In practice it is never an easy task to balance those two goals.

The contemporary IPR regime has two legs: one is to protect IPR and the other is to prevent the abuse of IPR as a weapon against potential competitors. Without two equally strong legs, the IPR legal construct cannot stand steadily.³¹ In fact, an enormous legal literature points towards the delicate but important relationship between these two legs of the IPR regime.³²

³¹ Fang Linlin, *Duan Ruichun on IPR Protection*, from *Science and Technology Daily*, 06/10/ 2007, P.5

³² For a summary of scholarly literature recording these debates, see Jerome 1996 (Jerome 1996)

Past efforts to globalize the IPR norm have met as much applause as resistance from different socio-economic forces in different countries. As discussed in the following section, the IPR norm's journey in China has never been smooth, because of both the inherent contradiction within the IPR norm itself and China's specific domestic socio-economic context. Indeed, the concrete situation in China, compounded by the controversial point within the IPR norm, makes it even more controversial during the adoption stage.

The IPR Norm's Journey in China: 1949 to present

Part I: Pre-Reform Era Chinese IPR Regime: 1949-1966

Since the establishment of the People's Republic of China in 1949, the Chinese government enacted a series of legislation governing the realm of intellectual property rights. Despite some initial recognition of private property rights, the underlying principles of these laws were modeled after the Soviet notion of public ownership. That is, intellectual invention or creation is fundamentally a product of the larger society from which it emerged and the outcome of invention or other types of intellectual creation belong to all members of society. As such, the necessary socio-economic context to sustain IPR legislation was largely non-existent in pre-reform China. Chinese IPR laws in this period were at best porous and were hardly implemented in a meaningful way.

The Emergence of a Patent System in China: 1949- 1966

The founders of the People's Republic of China were not ignorant of the importance of science and technology in the country's economic development. Months after the establishment of the PRC, China adopted the Provisional Regulations on the

Protection of Patent Rights, known as the 1950 Provisional Regulations(*Baozhang Faming Quan yu Zhuanli Quan Zanxing Tiaoli*).³³

However, a close reading of the 1950 Provisional Regulations reveals a deeply-rooted contradiction. First, the crux of the 1950 Provisional Regulations was that patent rights were not protected as private property of the inventor. Under Article 6 and Article 7 of the 1950 Provisional Regulations, both proprietary patent rights and nonproprietary financial rights were granted. However, Article 8 provided that only invention right is granted if the inventor works with a factory, minefield, scientific research organ, or other research institutes. Since these branches handle the majority of scientific research activities in China during the 1950s, invention rights took a *de facto* precedence over patent rights although they were given equal weight on paper. (Sidel 1985)

Second, Article 14 provided that

“If the central government principal organ thinks it necessary for inventions or patent to be transferred to the State for the latter to use and manage, it may ask patent right to be transferred to the state upon consultation with the patent holder; if no agreement is reached upon consultation, the Government Administration Council may make the final decision, converting the patent right to invention right and decide the amount of financial reward.”

Under that article, the already vulnerable patent right was subject to the state’s seizure if the latter deems necessary. Last but not least, Section 3 of Article 7 provided that “others shall not utilize the invention without the authorization of patent holder; those who break the law shall compensate the patent holder’s loss.” Article 12 further specified five situations under which patent infringers shall be subject to civil or criminal

³³Full text of the 1950 Provisional Regulations can be found Page 2, *People’s Daily*, 08/17/1950;

punishment.³⁴ However, the following important aspects were not provided: (1) how should the patent holder's economic loss be calculated; (2) who is responsible for enforcing the law in cases where patent infringement happens.

With those inherent defects, the 1950 Provisional Regulations were seldom used. During its 13-year life span, only four patents and six invention certificates were approved. In fact, all the four patents were granted in 1953.³⁵ In that sense, the 1950 Regulations virtually ceased to function before it was replaced by the 1963 Regulations on Invention Awards (*Faming Jiangli Tiaoli*) and Technological Improvement Awards(*Jishu Gaijing Jiangli Tiaoli*), also known as the 1963 Regulations.³⁶

In 1963, China established a full-fledged planned economy model dominated by socialist public ownership. The notion of granting property rights to individual inventors was ideologically inconsistent with the predominant socialist ideology at that time. As the title of the 1963 Regulations revealed, the term “patent” was replaced by invention and technological improvements. The inventor was deprived of his patent right to the invention. The key provision in the 1963 Regulations regarding ownership of the invention is laid out in Article 23: “All inventions are the property of the state, and no person or unit may claim monopoly over them. All units throughout the country, including collectively owned units, may make use of the invention essential to them.”

Section 4 of both the 1963 Invention Regulations and 1963 Technological Innovation Regulations implemented a system of nonproprietary monetary awards for scientific inventions. However, in practice the financial reward warranted by those two

³⁴ Page 2, *People's Daily*, 08/17/1950;

³⁵ Zhao 2003(Zhao, 2003), P. 10

³⁶ Full text of these two regulations are available on Page 2, *People's Daily*, 12/02/1963

regulations did not materialize. According to the memoir of Wu Heng, then Vice Director of Chinese State Science and Technology Commission,

“(D)uring the over 2 years between 1963 and early 1966, the year when the Cultural Revolution broke out, 296 invention certificates were issued by State Science and Technology Commission. However, we neither awarded prize nor convened a national-level conference, except that we mailed invention certificates and medals to the inventors. Our country’s first prize-awarding conference for scientific invention never materialized as we planned.”(Wu 1992) (PP 252-253)

Although neither the 1950 Regulations nor the 1963 Regulations played a meaningful role in promoting China’s science and technological progress, later generation of scholars praised them as heralding the development of intellectual property regime in the reform era.³⁷ At least it was established as an appropriate notion that scientific invention should be rewarded. The core contention was, however, whether scientific invention should be protected as private property. As will be discussed later, the contention between public ownership of knowledge and granting property rights to inventors continues to haunt later generations of legislative decision-making.

Early Trademark Regulations: 1950-1965

China promulgated the Provisional Regulations on Trademark Registration, known as the 1950 Trademark Regulations, in August 1950.³⁸ At that time, capitalists were still allowed to operate their private enterprises. Therefore, a trademark under the 1950 Trademark Regulations was still viewed as the means for a business enterprise to distinguish and market its products. One of the major purposes of the 1950 Trademark Regulations was “to assure the right of exclusive use of ...trademarks of industry and

³⁷ Beijing Interview, 10/17/2007;

³⁸ Full text of 1950 Trademark Regulations is available on Page 2, People’s Daily, 08/30/1950;

commerce.”³⁹ For foreign trademarks, the 1950 Trademark Regulations permitted registration only of those originating from countries with diplomatic relations or trade agreements with the P.R.C.⁴⁰ Under the 1950 Trademark Regulations, trademark registration remained largely voluntary.⁴¹ In fact, few enterprises saw any reason to register since registration created little advantage to registrants.

In 1963, the 1950 Trademark Regulations was superseded by Regulations on Trademark Control, known as the 1963 Trademark Regulations. As the title of the new Trademark Regulations suggests, the 1963 Trademark Regulations emphasized control over, rather than, rights to trademarks. It did away with any reference to the “exclusive right” of a trademark registrant to the use of his trademark. (Dawid 1980) As discussed earlier, the Chinese government’s policies in the 1960s featured economic centralization and discouraged private business and commercial competition. Therefore, the 1963 Trademark regulations emphasize much more the recognition of quality and the defense of the consumer from low-quality goods rather than the protection of enterprises’ commercial advantage. As Article 1 of the 1963 Trademark Regulations provided that the purpose of 1963 Trademark Regulations was to “strengthen trademark control and encourage enterprises to ensure and improve the quality of their products.”⁴² Defining trademark as “a mark representing certain quality of a commodity,” Article 3 of the 1963 Trademark Regulation further states that “industrial and commercial administrative

³⁹ Article 1 of the 1950 Trademark Regulations.

⁴⁰ Article 5, 1950 Trademark Regulations

⁴¹ Article 2 and 33, 1950 Trademark Regulations

⁴² Full text of the 1963 Trademark Regulations can be found online at <http://www.lawon.cn/law/viewDetail.jsp?id=129953>

authorities should...exercise supervision and control of the quality of the commodity.”⁴³

In line with the stated purpose of the regulation and their definition of trademark, Article 11 provided that a registration should be cancelled by the Central Administration of Industry and Commerce if “the quality of a commodity deteriorates as a result of rough work.”⁴⁴

Like its counterparts in the realm of scientific invention and technological innovation, the 1963 Trademark Regulations was also greatly influenced by both the prevalent economic ideology and economic situation in China in the 1960s. Leading Chinese scholars later admitted that the 1963 Trademark Regulations were handicapped by the dominance of the planned economy during its lifetime. First, throughout the years of planned economy, the supply of many commodities constantly fell short of demand. When commodities were in short supply, consumers did not have the luxury to pick and choose between commodities bearing different brands. Therefore, trademarks were of trivial importance in the market place. Second, under a stringent socialist economy, the sale and production of commodities are separated. Producers did not produce for market demand. Instead, their top priority was to fulfill a planned quota set by the government. As long as an enterprise met the production quota for a particular commodity, generally irrespective of product quality, the production was assured payment. That is, the success of a product, which might have been enhanced by the reputation of its trademark, was of virtually no economic consequences to the manufacturer. (Sheng, 1980)

⁴³ Article 3, 1963 Trademark Regulations;

⁴⁴ Article 11, 1963 Trademark Regulations;

With the market mechanism suppressed by the government, the 1963 Trademark Regulations was largely unsuccessful. According to a survey in the early 1980s, only 29 percent of the products in Beijing, Shanghai, Tianjin and Harbin, the top four metro areas in China, bore registered trademarks (Sheng, 1980). Before China was about to adopt a new Trademark Law to replace the 1963 Trademark Regulations, an American scholar's comments thoroughly analyzed the reasons for the failure of the 1963 Regulations:

“(T)he existence of a law on trademarks in a socialist country is bound to be somewhat anomalous, if not as a downright abandonment of basic principles of the socialist system. After all, trademarks are used to identify and distinguish the products of individual manufacturers offered for sale...to the general public to foster fair and effective competition. In a socialist economy where private property rights in the means of production have been abolished and the state is the sole producer and distributor of goods, why should there be a need for trademarks? Should it not be sufficient to identify goods by their generic names?” (Dawid 1980) (P 217)

Early Years of Copyright Laws: 1950-1965

One year after the Communist Party gained power, the First National Publishing Conference in Beijing adopted the Resolution on the Improvement and Development of Publishing Work (1950 Publishing Resolution). Article 17 of the 1950 Publishing Resolution provided that “the publish industry must respect copyrights and the right to publish and must not allow unlawful reproduction, plagiarism, tampering and other acts.”⁴⁵ Article 12 of the 1950 Publishing Resolution provided that “Royalty measures shall be determined in consultation with the author, based on the principle of giving consideration to the interests of authors, readers, and publishers. In order to

⁴⁵ Article 7, 1950 Publishing Resolution

respect the rights of authors, in principle copyrights should not be sold off.”⁴⁶ The 1950 Resolution also stipulated that “royalty calculation standards should be based in principle on the nature and quality of the work, the number of Chinese characters, and the number of copies printed.”⁴⁷ This type of royalty structure was welcomed by the Chinese literature and artistic creators since it allowed continuing royalties to authors on a per-copy basis-not limiting royalties to a one-time payment basis- and thus resulted in relatively large payments to authors.

Despite these general notions of protecting authors’ rights, the 1950 Publishing Resolutions were not supported by any concrete implementation regulations or provisions for judicial review. Nor was there any enforcement mechanism to supervise its implementation. In response to these problems, China promulgated the Provisional Regulations on Management of Book and Periodical Publishing, Printing and Distribution (1952 Provisional Regulations). The 1952 Provisional Regulations not only re-emphasized copyright protection to authors, but also specified for the first time the statutory penalties for the violation of author’s rights. Under Article 7, the publishers of books and periodicals “must not infringe upon the copyrights and the rights to publish of others to their own works and to publication.”⁴⁸ Under Article 11, “if publishers, printers and distributors fraudulently utilize the name of the work of another or publish, print or distribute in the name of another...the publishing administrative organs must revoke that enterprise’s permit to publish.”

⁴⁶ Article 12, 1950 Publishing Resolution

⁴⁷ Article 10, 1950 Publishing Resolution

⁴⁸ Article 7, 1952 Provisional Regulations

In the same year, the Chinese General Publishing Office ushered in a publisher-author contract system to further clarify rights and obligations of the parties involved and avoid difficulties with copyrights and royalties. Under this contract system, publishers and authors “should sign contracts, with their principal contents to include the number of Chinese characters in the original manuscript, the due date for the manuscript, the amount of royalty and other provisions.”(Shen and Yu, 1982) (P 107) The contract system also prohibited the author from republishing all or part of the work, under the same or a different title, during the term of the contract. The contract system also stipulated the inception of the “copyright holder” and royalty terms upon agreement between the parties. ((Sidel 1985) The introduction of publishing contracts in 1952 further institutionalized the royalty system set up by the 1950 Resolutions of combined per-word and per-copy royalties and relatively high royalty rates.

In 1957, however, the Communist Party launched a campaign against authors and other intellectuals know as the Anti-Rightist Movement. The country’s general policy trend shifted to exert greater control over literature production. With the establishment of a public ownership economy, the Chinese government introduced policies to reduce the income gap between Chinese intellectuals and other citizens and to incorporate the former into the mass public. In July 1958, the Chinese Ministry of Culture issued the Draft Provisional Regulations on Royalties for Literary and Social Science Works (1958 Royalty Regulations). Under the 1958 Royalty Regulations, the per-word and per-copy royalties were cut by half.

In 1961, with the country's political climate getting more stringent, a new directive, known as the 1961 Royalty Directive, was issued by the Chinese Ministry of Culture. The 1961 Royalty Directive limited book royalties to a one-time payment based on the number of Chinese characters and the very vague term of "quality of the work." (Shen and Yu, 1982, P108) Moreover, authors would not receive royalties for reprinted editions. The 1961 Directive also stipulated that "professional authors" would receive regular salaries and the payment under the new restricted system.

The 1961 Directive was reflective of the increasingly tight control over intellectuals, particularly authors and writers, after the 1957 Anti-Rightist Movement and the dominant ideology of public ownership in China. The 1961 Directive, combined with the vague provisions for remedying copyright infringement, made the protection of copyright and author's rights virtually non-existent.

Moreover, it is necessary to bear in mind that the royalty regulations only covered a part of copyright protection. Actually some other significant copyright products such as audio-visual materials were totally uncovered by the country's copyright legislation during this period.

In sum, during the period between 1949 and 1966, the Chinese government still recognized the importance of scientific invention, technological innovation, and literature and artistic production. Legal regulations were promulgated to regulate those activities. However, the underlying principle of China's incipient IPR regime was that the market mechanism should be suppressed and that the country's economic activity should be organized around the state plan. Moreover, although the Chinese government

recognized the benefits of foreign trade, the country's economy remained autarkic and the total volume of foreign trade did not play a vital role in the country's economic development. Therefore, the protection of intellectual property rights, both domestic and foreign, was not an imperative issue for the country's legislature.

Cultural Revolution: 1966-1976

The cultural Revolution, a nation-wide turmoil caused by the internal strife within the Chinese top leadership, broke out in 1966 and plagued China until 1976. During the ten years of turmoil, radically hard-line ideology dominated the country's legal and economic activities while the country's formal legal system and most government administrative agencies were completely disintegrated.

The Cultural Revolution exerted a disastrous impact on China's incipient IPR regime. In the realm of science and technology, even the system of non-proprietary invention certificates and monetary rewards was terminated. Recognition and reward of intellectual creativity was regarded as completely opposed to the ideology of Cultural Revolution.

In the realm of trademark, ideology was put ahead of production, interrupting the manufacturing in many sectors of the economy. Even the earlier use of trademark to promote quality control was abandoned. Consumers experienced terrible difficulties in differentiating between products since many producers shared a few uniform marks to identify their goods.

During the Cultural Revolution, tens of thousands of authors and creative writers were sent to work on rural communes or were even labeled "reactionary

intellectuals” for what they have written. The country’s policy aimed to eliminate intellectual’s rights over their creative works. The system of publishing contracts was dismantled and those administrative agencies responsible for publishing were dissolved. In 1972, the Chinese government promulgated a new set of publishing regulations, which codified the elimination of copyright protection. Under the 1972 Regulations, a publisher reprinting another publisher’s work need only “generally note the name of the original publisher on the edition ormake some other explanation.”⁴⁹ Under the 1972 Regulations, even the already weak royalty payment in the 1961 directive was eliminated. Neither did the 1972 Regulations provide any provision on the permission to reprint by the author.⁵⁰

Part II: Reemergence of IPR Regime during the Early Reform Era: 1976-1990

Political and Ideological Context

1. Recognition of the Legitimacy of Private Ownership Economy

After the death of Mao Zedong in 1976 and the ensuing purge of his followers, Deng Xiaoping and other reform-minded leaders gained the upper hand in China’s decision-making circle. At the same time, intellectual recognition further came into shape that command planning and excessive public ownership were detrimental to China’s economic development.

Under such a general atmosphere, private ownership, previously regarded as associated with capitalism and therefore incompatible with the socialist value, gained legitimacy in Chinese society and was allowed to co-exist with public ownership. For

⁴⁹ Sidel 1985;

⁵⁰ Ibid;

example, in 1988, several months after the 13th Chinese Communist Party Congress, a clause was added to the Chinese constitution, endorsing the development of private economy as a supplement to the socialist public ownership sector. Under Article 11, it was provided that

“The private economy of urban and rural working people, operated within the limits prescribed by law, is a complement to the socialist public economy. The state protects the lawful rights and interests of the private economy.”⁵¹

Although this article still regarded private economy as a “complement” to the Chinese state-owned economy, it did represent a significant departure from the dominant ideology of excessive public ownership during the pre-reform era.

2. Increasing Level of Openness to the Outside World

Another important wing of China’s economic modernization campaign was the end of autarkic economy and the opening to the outside world. In 1980, a Hong Kong company established the first China-foreign joint venture, Beijing Aviation Food Inc., in Beijing.⁵² In 1986, China promulgated the Law of the People’s Republic of China Concerning Enterprises Operated Exclusively with Foreign Capital. Article 5 further provides that “(E)xcept under special circumstances...the state shall not nationalize or expropriate a wholly-owned foreign enterprise. Should it prove necessary to do so in the public interest, legal procedures will be followed and reasonable compensation will be made.”⁵³

⁵¹ For a discussion of Chinese constitutional amendment since 1988, see Alber Chen, *China’s 2004 Constitutional Amendment and the Prospect of Constitutionalism in China*, from *Twenty-First Century*, Jan. 2006. Full text of this article can be found online at http://www.fatianxia.com/paper_list.asp?id=4018;

⁵² See <http://mnc.people.com.cn/GB/7748890.html>, last accessed 08/01/2010;

⁵³ Article 5, Law Concerning Enterprises Operated Exclusively with Foreign Capital, full text available online at http://www.danmex.org/html-en/china-laws-details.php?news_id=18, last accessed 06/07/2011;

Since the late 1970s, Chinese political and economic development has irreversibly stepped on the road of reform and opening. The reintroduction of private property rights into the country's economic functioning and the opening to foreign investment inevitably shaped the re-emergence of China's IPR regime in the early reform period.

The Re-emergence of China's IPR Regime: 1978-1990

China's first interaction with the World Intellectual Property Organization(WIPO) happened in 1973, when China sent a small delegation as an observer of WIPO's conference in Geneva.⁵⁴ After the conference, Ren Jianxin, the head of that delegation, stressed the necessity to reestablish China's almost non-existent IPR system in a report submitted to then Chinese Premier Zhou Enlai (Ren 1973).

This initiative did not attract Chinese top leaders' attention until economic reform started in 1978. Legislative efforts were resumed to re-establish the IPR system shattered by the Cultural Revolution. With the surging inflow of foreign investment, foreign influence started to be felt in IPR protection in China. Both of the elements significantly shaped China's re-emerging IPR regime.

1. Patent Law

In 1978, China resurrected the 1963 Invention Regulations. Although that move was regarded as the "a first step back toward recognition of industrial property rights"(Hsia 1984), the exclusive right to patent was still not recognized. It was still widely believed that granting property rights to scientists and inventors contradicted the underlying principle of socialism. However, with the introduction of reform and opening

⁵⁴ People's Daily, 12/ 12/ 1973, Page 4;

policy, Chinese senior leaders decided that a patent system was necessary to speed up scientific development.

In 1979, a group of scholars and officials convened to draft China's first patent law. However, after the drafted version of the patent law was completed, certain ministries voiced skepticism and even opposition about the adoption of a patent law in China. According to a retired official at the State Intellectual Property Office (formerly State Patent Office), who participated in the aforementioned drafting group, the strongest opposition came from the Ministry of Machinery Industry and the Ministry of Chemical Industry.⁵⁵ On August 25th, 1980, a Vice-Ministerial Official with the Ministry of Machinery Industry wrote a letter to then top Chinese leader Deng Xiaoping, expressing strong opposition to the enactment of patent law. (Zhao 2003). For that official, a patent system would end up as only protecting foreign interests during the time when foreign technology led a dominant advantage over Chinese domestic technology. Moreover, in a socialist country like China, all invention should belong to the State, so the restoration of 1963 Invention Regulations should be sufficient while the adoption of a patent law would go against the principle of socialist public ownership.⁵⁶

Those debates postponed the formal adoption of Chinese patent law by several more years. It was not until with the intervention of then Chinese top leader, Deng Xiaoping, that the Standing Committee of the National People's Congress (NPC) adopted China's first Patent Law in 1984, which came into effect in 1985.

⁵⁵ Interview Beijing, 10/17/2007

⁵⁶ Major points of the letter is on file with Zhao 2003 (P 56);

Different from the sketchy 1950 Regulations and 1963 Regulations, the 1984 Patent Law consisted of 69 articles that covered requirements for the granting of patent rights (Article 22 through Article 25), procedure of application for patent right (Article 26 through 33), review process of patent application(Article 34 through Article 50), balance of interests in the process of applying patents(Article 51 through Article 58), and protection of patent rights(Article 59 through Article 66).

Despite those big steps forward, the 1984 Chinese Patent Law still bears the influence by socio-economic conditions during the early reform period. The 1984 Chinese Patent Law was different from that in developed countries, whose patent laws were in place for at least over one century. These differences are mainly represented as follows.

First, the duration of invention patents in China was 15 years⁵⁷, as opposed to 20 years in most developed countries. That is, technological innovation can be readily used by the public for free 15 years after the granting of patent right. A legal scholar interprets shorter duration of patents as a move that encouraged dissemination of certain technology. (Zheng 1984)

Second, the scope of patentability under the 1984 Chinese Patent Law was narrower than Western countries. Under Article 25, food, beverage, and flavorings, as well as pharmaceutical products and substances obtained through chemical processes shall not be granted patent rights. As will be discussed later, those articles came under

⁵⁷ Article 45 of 1984 Chinese Patent Law, full text of 1984 Chinese Patent Law can be found online at http://www.law-lib.com/law/law_view.asp?id=2824. Last accessed 06/05/2011;

serious attack by U.S. pharmaceutical industry with an intention to invest in China in the U.S.-China bilateral IPR negotiations in the 1990s.

2. Trademark Law

Unlike its counterparts in patent, Chinese Trademark Law did not encounter such heavy opposition during the legislation process and was promulgated earlier. In 1982, the Standing Committee of the National People's Congress (NPC) in China promulgated the new Trademark Law, which went into effect in 1983. A set of Detailed Implementing Rules went into effect in 1983 to supersede the 1963 Trademark Regulations.⁵⁸ As discussed earlier, Chinese enterprises were allowed a higher level of autonomy during the early reform period. Therefore, the incentive to increase sales and profits gave rise to an increasing interest as a means to develop consumer demand for their product in the market place.

The 1983 Trademark Law departed substantially from the 1963 Trademark Regulations in many ways. First and foremost was the reinstallation of exclusive rights to trademarks. As was stated by Ren Zhonglin, then Director of State Administration of Industry and Commerce,

“After the Third Plenum of the 11th Communist Party's National Congress in 1978, many enterprises attach increasing importance to exclusive rights of registered trademark with the expansion of enterprise autonomy. However, since the 1963 Trademark Regulations did not provide protection of exclusive rights to trademark, we do not have any legal instrument to rely upon for the purpose of protecting it. This is harmful to the interests of manufacturers and consumers. This is also

⁵⁸ It is necessary to note that the new trademark provisions were promulgated as a law (*fa*) rather than a regulation (*tiaoli*) as before. Therefore, the new trademark system will enjoy a higher degree of permanency than its predecessors. For a detailed discussion about the difference between a law and a regulation in China, see *What Are Decrees, Regulations, Orders, Precedents, and Legal Interpretations*. (1980)

harmful to safeguard our social economic order.”⁵⁹(Ren August 19, 1982)

Under that guideline, the 1983 Trademark Law provided in Article 1 that “(T)his law is specially formulated to strengthen the supervision of trademark, protect the right to use a specific trademark.”⁶⁰ Under Article 3, “the person who registers the trademark is entitled to the right to use the specific trademark and is protected by law.”⁶¹ The inclusion of these protection measures indicated the country’s new policy intended to encourage brand competition and put an end to the 1963 Trademark Regulations that left a trademark virtually unprotected against infringement.

Moreover, the 1983 Trademark Law also reflected the revival, albeit limited, of private enterprises, a significant change in the country’s economic policy. Under Article 4, the types of economic entities eligible to register trademarks were expanded from enterprises to institutions and individual industrialists or merchants.⁶² By doing so, the Chinese government expanded the protection against trademark infringement from government-run enterprises to private and individualist enterprises alike.

The 1963 Trademark Regulations only emphasized the function of quality control. The 1983 Trademark Law, however, added on top of that a series of concrete measures to protect the exclusive rights of trademark holders. As Ren Zhongling stated, In order to protect the trademark holder’s exclusive rights, the 1983 Trademark Law

⁵⁹Ren Zhonglin: Explanation of the PRC Trademark Law: Address Before the Standing Committee of the National People’s Congress (NPC), (August 19, 1982). Full text of Ren’s Speech is available online at http://www.legalinfo.gov.cn/zt/2005-01/19/content_183660.htm, last accessed 04/30/2009;

⁶⁰ Full text of the 1983 Trademark Law can be found online at http://www.cnipr.com/trad/trapage/tra_sbfnew.htm, last accessed 04/30/2009;

⁶¹ Article 3, 1983 Trademark Law;

⁶² Article 4, 1983 Trademark Law;

“Clarified the scope of infringement activity and specified punishment measure against it. The new trademark law also delineated the responsibility of administrative enforcement organ and legislative organ. (The new trademark law provides) that trademark owner can resort to county-level Industry and Commerce Administrations for protection against trademark infringement. Responsible state organs are authorized to order the trademark infringer to stop illegal activity, eliminate negative influence, and compensate for the economic losses.” (Ren August 19, 1982)

Under Article 37, 38, 39 and 40, a whole set of protection measures were specified to protect the registered trademarks.⁶³

Another key difference between the 1983 Trademark Law and the 1963 Trademark Regulations was the treatment to foreign trademarks. Under the 1963 Trademark Regulations, foreign words could not be used in registered trademarks.⁶⁴ However, this prohibition was eliminated in the 1983 Trademark Law. This move was interpreted by Western legal professionals as adding considerable flexibility to the marketing of commodities produced by foreign-Chinese joint ventures and bearing foreign trademarks. (Wu-Ohlson 1984)

Moreover, under the 1963 Trademark Regulations, foreign trademarks should meet two requirements in order to be registered in China: the home country of the applicant should have a signed trademark reciprocity treaty with China; the applicant should have registered in its home country and be able to present a certificate of registration.⁶⁵ However, under the 1983 Trademark Law, “A foreigner or foreign enterprises applying for the registration of a trademark in China should follow the procedures in accordance with the agreement signed between his own country and the

⁶³ Article 37,38,39,40, 1983 Trademark Law;

⁶⁴ Article 5, 1963 Trademark Regulations.

⁶⁵ Article 12, 1963 Trademark Regulations

PRC, an international treaty signed by both countries, or reciprocal principles.”⁶⁶ This move was again interpreted as following international practice to promote foreign trade.

In the 1990s, with the deepening of China’s domestic reform and its further integration into international trademark regime, significant changes were introduced to the 1983 Trademark Law. However, the 1983 Trademark Law set a solid foundation for the further buildup of Chinese trademark regime during the reform era.

3. Copyright Law

Among the three major laws consisting of the core of Chinese IPR regime, copyright law is the most controversial and its legislation process is the most time consuming. The main contributor to this prolonged process is not only economical, i.e. considerable economic interests by different groups shall be (in many cases painfully) readjusted, but also ideological, i.e. the subject of copyright law is mainly literary and artistic work.

During the early stage of reform, both foreign and domestic calls for copyright protection arose. In January 1979, the copyright issue was first mentioned in China-US High-Energy Agreement signed between then Chinese State Science and Technology Commissioner, Fang Yi and U.S. Energy Secretary James Schlesinger. In the first bilateral trade agreement between China and the U.S. signed in March 1979, the American side proposed that “(before Chinese Copyright Law is enacted), both sides should confer rights commensurate with the Universal Copyright Convention to nationals of both countries”.⁶⁷ On the Second Annual Session of the Fifth National People’s

⁶⁶ Article 9, 1983 Trademark Law

⁶⁷ Song, 2007, P 417

Congress (NPC) convened in June, 1979, Chen Dengke, a famous writer and an NPC Deputy, proposed that “freedom of publication as enshrined in Chinese Constitution should be further safeguarded by a copyright law, in which authors possess copyright to their works.”⁶⁸ Chen’s proposal received positive feedback from leading Chinese writers and painters, many of whom were Chen’s fellow NPC deputies.

Responding to both domestic and external appeals, the Chinese State Publication Administration submitted to the State Council an internal report, proposing that

“Although conditions are not ripe for our country to join Universal Copyright Convention and sign copyright protection agreement with foreign countries, copyright issue cannot be ignored and active measures shall be taken to handle this issue. At present, we propose to...draft copyright law and related regulations so as to get ready for the establishment of special copyright organ and join Universal Copyright Convention in the future.”(Song 2007) (P 417)

In July, 1980, a working group was organized to draft the Copyright Law. On May 2nd, 1986, a completed draft of Copyright Law was submitted to the State Council. In 1987, State Copyright Administration and State Council Legal Affair Bureau held more than 20 joint discussion panels in Beijing and asked for opinions from local governments outside Beijing.⁶⁹

However, according to the memoir of Song Muwen, then Director of State Copyright Administration, legislation of copyright law encountered strong opposition from several other ministries, which almost halted the legislation process. On August, 8th, 1987, State Science and Technology Commission, State Education Commission, China

⁶⁸ Shen Rengan, *Some Retrospections on the Adoption of Chinese Copyright Law* from Liu 1998 (Liu 1998), P 29

⁶⁹ Ibid. P 30;

Science Academy, and China Science Research Society jointly wrote a letter to the State Council, opposing the enactment of Copyright Law. For them,

“(T)he enactment of Copyright Law will hinder the use of foreign books and magazines and bring significant difficulty for China’s scientific research and high education. Moreover, enormous expense of Chinese foreign reserve will be incurred: annual budget to purchase copyrighted foreign works will reach 600 million U.S. dollars.”(Li and Chang, Qing 2007) (P.168)

Therefore, the above four ministries proposed that (1) the enactment of Copyright Law should be postponed. (2) even though copyright law is enacted, accession to Universal Copyright Convention should be postponed. In response to the doubts held by these groups, Chinese State Copyright Administration submitted to the State Council three consecutive reports on February 26th, October 5th and November 2nd, 1988. On November 18th of that year, Huang Shuhai, Vice Director of State Council Legal Affairs Bureau directly reported to the top leaders of Chinese State Council, who responded with a positive reply. The three reports by the Chinese State Copyright Administration and the letter by Huang Shuhai addressed the concerns of the four ministries mentioned earlier. According to the reports, the 600 million U.S. dollars of expense to purchase copyrighted foreign works was significantly exaggerated. China only spent less than 3 million U.S. dollars in 1983 and 1986 on foreign copyrighted works. Moreover, China could purchase the right to reprint science and technology works from foreign presses. Therefore, the worry that the copyright law will cause difficulty for scientific research and education in China was unnecessary.⁷⁰

⁷⁰ Song 2007, PP 428-429;

On January 15th, 1989, General Secretary of State Council, Luo Gan, further commented on Huang's report, stating that "it is inevitable to adopt a copyright law. Please distribute the draft law to greater audience and ask for their opinion."⁷¹ On December 14th, 1989, Chinese Premier, Li Peng, submitted the draft of Copyright Law to the Standing Committee of Chinese National People's Congress (NPC) for legislative review.

On December 24th, 1989, the 11th Session of Standing Committee of 7th Chinese National People's Congress (NPC) was convened, with the discussion of Copyright Law on its agenda. Although in principle different ministries at the State Council agreed that a copyright law was necessary, strong disputes arose among the legislators over some specific but important provisions of China's first copyright law.

Specifically, the dispute was concentrated on whether to grant copyright protection to literary or artistic work prohibited from publication under Chinese mainstream ideology; whether or not Chinese Radio or TV Station should pay royalty under the circumstance of playing audio-visual materials for "non-commercial purpose"; whether computer software should be protected as copyright work; if yes, how should it be protected, etc.⁷²

Those issues were bitterly debated for several months on the 12th, 14th, and 15th Sessions of the Standing Committee of the National People's Congress. According to a former official of Chinese State Copyright Administration, although the drafting committee attempted to pass a law that provides higher level of copyright protection,

⁷¹ Song, 2007, P 430;

⁷² Zhang 1997 (Zhang 1997)

Vice-Chair of the Legal Affairs Commission of Standing Committee of National People's Congress, Song Rufen, passed a short note to then Chair of the Drafting Committee as well as Director of State Copyright Administration, Song Muwen, advising him not to get stuck on the secondary issues and let the Copyright Law pass first.⁷³ On September 7th, 1990, the Chinese Copyright Law was adopted after almost one decade of legislative efforts, featured by 30 major revisions.

The 1990 Copyright Law consists of 56 articles, divided into 6 sections, including issues relating to the scope of copyrightable works (Article 2 through 8), the scope of copyright (Article 9 through 19), the duration of copyright (Article 20 through 22), the fair use of copyright (Article 23 through 44), and the remedy for and protection against copyright infringement (Article 45 through 50). With the adoption of the 1990 Copyright Law, a full-fledged copyright regime was established in China.

However, the controversies over some specific provisions of the 1990 copyright law during the drafting stage remained unresolved and would constitute obstacles for China's future interaction with the international copyright regime. These issues were brought to saliency during the China-U.S. IPR negotiations in the early 1990s.

Part III: Chinese IPR Regime's Deeper Integration with the Global IPR Regime: 1990-2001

As China re-established its IPR regime in the 1980s, external influence began to be felt with both the increase of China's foreign trade and the growing foreign investment. Indeed, a significant factor impacting Chinese IPR legislation during the post

⁷³ Interview Beijing, 11/03/2007. Later this anecdote was confirmed by Song Muwen's memoir published in 2007. For more information on this debate, see Song, 2007, P 443;

reform period was its deeper interaction with the external world. In this part of the chapter, I contend that external pressure played a key role in quickening Chinese IPR regime's deeper integration with the global IPR regime in the 1990s.

The Rise of China-U.S. IPR Disputes and Its Impact on Chinese IPR Regime

In 1988, the United States revised its 1974 Trade Act and adopted the Omnibus Trade and Competitiveness Act. Under Section 301 of the 1988 Omnibus Trade Act, the U.S. Trade Representative (USTR) were empowered to identify and investigate countries deemed as doing “unfair trade practices” and impose sanctions where appropriate. Under the lobbying efforts by trade interest groups, the 1988 Omnibus Trade and Competitiveness Act further empowered the USTR to investigate and level trade sanctions against countries considered as the violators of U.S. IPR. This part of the 1988 Omnibus Trade Act was later known as “Special 301.”

Although the U.S. private sector and IPR lobbying groups had already raised complaints about China's insufficient efforts to protect IPR in the mid-1980s,⁷⁴ this issue was not brought to the government level until the late 1980s. In 1989 and 1990, China was put on the “priority watch list” by the USTR. In 1991, China was regarded as one of the “priority foreign countries”. Under the U.S. special 301 regulations, a country would not be subject to U.S. trade retaliation if put on the “priority watch list”. However, if a country is included on the “priority foreign countries”, the U.S. government would be authorized to launch trade retaliation if that country cannot improve its IPR protection in six months. On May 26th, 1991, the USTR published a report, pointing towards four

⁷⁴See, for example, Eric McDowell, *Lack of Copyright Disturbs US Authors*, from *New York Times* 01/10/1984;

glaring inadequacies in the Chinese IPR regime: first, Chinese Patent Law is flawed in that it does not grant patent right to pharmaceutical and chemical products; second, Chinese copyright law does not grant protection to American works published outside China; third, Chinese Copyright Law does not grant protection to copyright in computer software; fourth, China did not grant sufficient protection to trade secrets.⁷⁵

After the publication of the U.S. Special 301 report in 1991, China and the U.S. went into several rounds of extremely tough negotiations. On several occasions the two countries almost entered into a trade war with each other. On January 17th, 1992, the two sides came to terms with each other, signing the first Memorandum of Understanding (MOU) over the issue of IPR Protection (known as the 1992 MOU).

The 1992 MOU was composed of seven parts that covered the revision of Chinese IPR laws (Article 1 through 4), the establishment of U.S.-China bilateral dialogue on IPR issues in the future (Article 5 and 6), and the termination of U.S. Special 301 investigation against China(Article 7).⁷⁶ The core part of the 1992 MOU was China's promise to revise its IPR laws to address the concern on the U.S. side.

Under Article 1 and 2 of the 1992 MOU, China agreed to grant patent rights to pharmaceutical and chemical products and extend the duration of invention patents from 15 to 20 years; China also agreed to increase foreign patent holder's rights by providing nondiscrimination of patent rights regarding compulsory licensing and providing national treatment as well as administrative protection for chemical and pharmaceutical inventions.

⁷⁵ USTR: Report to Congress on Section 301 Developments, Jan. 1995- June 1996(<http://www.ustr.gov/reports/301report>)

⁷⁶ Full text of the 1992 MOU is available from Page 368 to Page 375 as the appendix to Li 2000

Article 3 provided that China agreed to accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Geneva Convention for Protection of Producers of Phonograms (Geneva Convention). China also agreed to adjust its copyright law to the standard as laid out in these two conventions. Moreover, China agreed to protect software as literary works.

The 1992 MOU had a tangible impact on China's already existing IPR regime. On June 23rd, 1992, Director of the Chinese Patent Office, Gao Lulin, reported to the Standing Committee of Chinese National People's Congress about the revision of 1984 Chinese Patent Law.⁷⁷ The revised Patent Law incorporated the spirit of the 1992 MOU by expanding the scope of patent protection, extending the duration of patent protection, and augmenting the protection of imported patent products. In December, 1992, China promulgated the Regulations on Administrative Protection of Pharmaceutical Products and the Regulations on Administrative Protection of Agricultural and Chemical Products.⁷⁸ Those two regulations improved on the 1984 patent law and extended patent protection to pharmaceutical, agricultural, and chemical products.

The 1992 MOU also accelerated China's participation in the international IPR regime. On October 15th, 1992, China acceded to the Berne Convention. On October 30th, 1992, China acceded to the Universal Copyright Convention. On April 30th, 1993, China acceded to the Geneva Convention. On September 25th, 1992, China promulgated

⁷⁷ Gao's address is available online at http://www.legalinfo.gov.cn/zt/2005-01/19/content_180186.htm, last accessed 01/04/ 2009;

⁷⁸ Full text of these two regulations are available online at <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/7/7-5-01.html>, last accessed 01/05/2009;

the Regulation on Implementing Universal Copyright Convention, which included related content of the 1992 MOU, such as protection of foreign computer software as literary works, 50 years of duration of foreign computer software, and protection of foreign audio-visual materials.⁷⁹

Although the 1992 MOU did not address the issue of trademark, China amended its trademark law in 1993, expanding the scope of trademark protection from commodity trademark to service trademark.⁸⁰

In 1995 and 1996, China and the United States engaged in two other bilateral IPR negotiations, mainly focused on the enforcement of IPR laws in China.⁸¹ Since 1996, the United States side ceased to threaten China with Special 301 investigations.

Revision of Chinese IPR Laws during the Country's Bid for WTO Entry

While bilateral pressure from the U.S. propelled China to improve its IPR protection level at a quicker rate, external pressure also came from multilateral sources during the 1990s. The most important of these multilateral sources was the TRIPS Agreement. Specifically, China started its bid for General Agreement on Tariff and Trade (GATT) membership in the mid-1980s. During this process, the Uruguay Round of Multilateral trade negotiations incorporated the issue of intellectual property rights at the request of developed countries. In 1993, the TRIPS Agreement was reached and came into effect on January 1st, 1995. On the same day, GATT was transformed to a more powerful multilateral trade organ, the World Trade Organization (WTO). As discussed

⁷⁹ People's Daily, 02/25/1992, P 5

⁸⁰ Standing Committee of the National People's Congress: *Decision on Revising Trademark Law*, from *National People's Congress Gazette*, 02/22/ 1993;

⁸¹ For a discussion of these two rounds of negotiations, see Li, 2000(Li 2000)

earlier, the TRIPS Agreement possesses more enforcement power than the previous multilateral IPR treaties. During its bid for WTO entry, China was obliged to meet the minimum standards outlined by TRIPS Agreement.

Before China acceded to WTO in 2001, the Chinese National People's Congress made important revisions to Chinese Patent, Trademark, and Copyright Law, adjusting the level of IPR protection to the standard set by TRIPS.⁸²

Specifically, the Chinese National People's Congress introduced 35 revisions of the 69 articles of the Chinese patent law in 2000. The major revisions are as follows: first, the revised version of article 14 provided that state-owned enterprises, as market entities, should be treated equally as non-state-owned enterprises in terms of their obligation and rights to patent application. Second, articles 41 and 46 provided that the authority to grant and invalidate of the patent right was shifted from the patent bureau to the Chinese People's Court.⁸³

On October 31, 2001, China made 53 major revisions in its copyright law. The major revisions are as follows: under the revised copyright law, TV and radio stations should pay royalty to the copyright holders of audio-visual materials even though the audio-visual materials are used for "education purpose" (Article 39). The newly revised copyright law also added the right of screening, renting, and internet circulation (Article 10).⁸⁴

⁸² For related information on these revisions, see People's Daily respectively on 08/25/2000 and 10/27/2001;

⁸³ People's Daily, 08/28/2000, Page 5;

⁸⁴ People's Daily, 10/31/2000, Page 6;

In November, 2001, the Chinese National People's Congress made 47 major revisions in the trademark law. Under the newly revised trademark law, the scope of trademark holders was expanded from corporate entities to individuals (Article 4). In accordance with the TRIPS agreement, the newly revised trademark law also included articles on the protection of internationally well-known trademarks (Article 14). Moreover, the 2001 trademark law also confirmed the final say of the People's Court, instead of the trademark administrative units, over trademark disputes (Article 23).⁸⁵

The salient feature of IPR legislation in China during the 1990s was the impact of foreign sources. Bilateral and multilateral pressure quickened China's integration into the global IPR regime. The very fact that China faced increasing foreign pressure can be explained by the increasing presence of foreign investment in China. However, as discussed in the following section, with more actors' interests involved, resistance to the IPR norm also rose during the post-WTO era.

Part IV: Chinese IPR Regime during the Post-WTO Period: 2001 to present

Even before China's entry into WTO, economic nationalists in China had complained that too many concessions had been made and that China moved too fast to merge into the international track of IPR protection.⁸⁶ The statement by one of the officials that I interviewed expressed sentiments popular among the Chinese social public:

The Americans copied European countries for more than one century; why can't we copy the Americans for twenty years? They

⁸⁵ People's Daily, 11/05/2001, Page 5;

⁸⁶ For example, the US-China Bilateral Protocol on China's entry into WTO remains confidential almost ten years after it was signed in 1999 partially for fear of Chinese domestic critique of too much concessions made by the Chinese side.

just want to impose their standard upon us. But did they follow these standards when they were at our stage of economic development? The U.S. practices double standard on the issue of human rights. They did the same thing on the issue of intellectual property rights!”⁸⁷

The incorporation of related norms embodied in the TRIPS Agreement is not the final settlement for the disputes. According to an official at the Chinese Ministry of Commerce, with China’s bid for WTO membership completed, the issue of intellectual property rights in China has passed through the initial stage of adoption and entered into a new stage of “interest games in depth.”⁸⁸ During this stage, foreign influence reaches deep into the Chinese political economy; more actors collaborate and compete with each other along more complex axes.

After China entered into the WTO, Chinese domestic companies were put to a more stringent test on IPR issues by their international counterparts. The battles took place both on the international arena and domestic arena. In 2002, China’s leading producer of Communication equipment, Huawei was brought to a patent lawsuit in Texas by Cisco, accusing the former’s American branch, Huawei America of infringing upon the latter’s patent.⁸⁹ In 2003, GM filed a patent lawsuit in Beijing against Chery, a private auto company based in Anhui, accusing a type of Chery’s auto products, QQ, of copying the industrial design of the auto body of Spark, a type of mini-car developed by GM.⁹⁰

Those two leading IPR cases indicated that, after China’s WTO entry in 2001, the main

⁸⁷ Interview Beijing, 11/28/2007;

⁸⁸ Interview Beijing, 10/22/2007;

⁸⁹ See, for example, Zhao Ping, *Enormous Stake is Tied to the Result of Cisco vs. Huawei: If Huawei Loses, The Consequence Can be Serious*, from *China Business News*, 03-03-2003;

⁹⁰ See, for example, Alysha Webb: *GM probes alleged case of car theft; Local maker Chery says its QQ is not Chevrolet Spark*, from *Automotive News*, July 14, 2003, P. 4

fighters on the IPR battlefield shifted from states to companies. More importantly, as leading Chinese domestic companies, both Huawei and Chery are considered strong competitors for the multinational corporations such as Cisco and GM. Not surprisingly, the two cases were interpreted by both the Chinese academia and public as the abuse of intellectual property rights by foreign companies investing in China.⁹¹

Eventually both cases ended up in outside court reconciliation,⁹² but critiques of Western companies have launched accusations of their abuse of intellectual property rights. These feelings were also felt by the officials inside the Chinese government.⁹³ At the same time, policy researchers published reports on internally circulated materials, warning against the danger of foreign companies' dominance on the Chinese market.⁹⁴

These appeals reached decision-makers of the country's IPR bureaucracy. In January, 2005, the Chinese State Intellectual Property Office (SIPO) launched the process for the third revision of Chinese Patent Law. This process was completed on Dec. 27, 2008, when the Standing Committee of National People's Congress passed the revised draft of Chinese Patent Law.⁹⁵

According to a Beijing-based IPR judge, the third revision of Chinese patent law was not driven by foreign pressure as much as the previous revisions; instead, the

⁹¹ Interview Anhui, 08/30/2007;

⁹² For the result of GM vs. Chery, see, for example, Xinhua News Agency, *GM and Chery Reached Reconciliation over Their IPR Dispute*, Nov. 19, 2005; for the result of Cisco vs Huawei, see, for example, Wu Hui, *Leading Case on IPR between China and the US Ended up in Reconciliation*, from *China Intellectual Property News*, July 31, 2004;

⁹³ Working Group from State Intellectual Property Office *Investigation Report on IPR Disputes between GM and Chery*, 2004 (unpublished internal material).

⁹⁴ These materials were published on *Internal Reference Material on Economic Reform (改革内参)*. Representative among these views are *Foreign Monopoly Comes Near (渐行渐近的洋垄断)*, from Volume 31, 2004 and *Four Major Problems in China's Foreign Investment Policy*, from Volume 36, 2004;

⁹⁵ A chronology of major events during the third revision of Chinese Patent Law is available online at http://www.sipo.gov.cn/sipo/tfs/dttx/jndt/200812/t20081229_435672.htm

primary driving force was the need of China's own economic development.⁹⁶ This point was further elaborated in a document issued by State Intellectual Property Office in March, 2005. According to this document,

“Various signs indicate clearly that developed countries intend to control the practice of international patent affairs....In order for our country to avoid being marginalized on the issue of patent affairs, ...(we have to) summarize the experience of the practice of patent system during the past two decades so that it can better accommodate our country's concrete condition. We should further kindle the passion of innovation by our country's enterprises and individuals and better balance the interests of patent holder and social public.”⁹⁷

On August 30th, 2007, the Chinese National People's Congress enacted China's first Anti-Trust Law, which came into effect on August 1st, 2008.⁹⁸ Before the Anti-Trust Law came into effect, there was suspicion that Microsoft would likely be the first target of anti-trust lawsuit due to its dominance on the Chinese software market.⁹⁹

On December 27th, 2008, the 6th Session of Standing Committee of 11th Chinese National People's Congress passed the revised draft of Chinese Patent Law.¹⁰⁰ Compared with the previous draft, the current draft further increased the financial punishment for patent infringement (Article 63). The current draft also added provisions that outline the protection of traditional knowledge and genetic resources (Article 5 and

⁹⁶ Interview Beijing, 11/01/2007;

⁹⁷ State Intellectual Property Office *Guidelines for the Third Revision of Patent Law and Its Implementation Regulations*, March, 2005, unpublished manuscript;

⁹⁸ Full text of Chinese Anti-Trust Law is available online at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm, last accessed 01.13/2009;

⁹⁹ *Microsoft is likely to be the first target of Chinese Anti-Trust Law*(微软或成中国《反垄断法》第一被告) from *Financial Times*(财经时报), 07/11/2008;

¹⁰⁰ Full text of the revised Chinese Patent Law is available on Page 3, December 28th, 2008; A comparison between the third revision and the second revision of Chinese Patent Law is available online at <http://www.chinaiprllaw.cn/file/2009010514281.html>, last accessed 01/14/2009;

Article 26). The most significant revision pertains to the conditions that apply to compulsory licensing: Under Article 48, under conditions that patent holder 's business behavior is deemed as constituting monopoly, compulsory license can be issued by related state organ to corporate or individual applicants capable of applying the patent. Under Article 50, patent to pharmaceutical products can be applied under compulsory license in case of public health emergency. To put it simply, in both cases, patents can be readily used by relevant parties without the authorization of patent holders. At the same time, the revision of Chinese trademark and copyright law is also under way.¹⁰¹

Although the aforementioned development was noted by some foreign business as one of the signs marking the pendulum of economic nationalist sentiment swinging back,¹⁰² history is not merely repeating itself. Behind the third revision of Chinese Patent Law is the interest competition that demarcates a new era, with more complex set of actors involved.

Conclusion

With China's WTO entry in 2001 and a series of revisions of the existing IPR legislations, the formal IPR laws in China have come into full *de jure* compliance with the international IPR norms. The evolution of China's IPR regime between 1949 and present has been a dynamic and complex process, affected by the broad political and economic factors at both the international and the domestic levels, and by a complex intertwining of bilateral and multilateral negotiations. Different socio-political and economic groups try to defend their interests during the different stages of this evolution

¹⁰¹ Interview Beijing, 11/30/2007;

¹⁰² Interview Shanghai, 07/21/2008; Interview, Shanghai, 08/05/2008;

process. Their influence was not only present before certain law was adopted; they also pick and choose specific parts of the IPR norm- a norm still evolving- to suit their needs. In that way, they influence the specific parts of the legal arrangements for the purpose of safeguarding their interests. Starting from the 1990s, apart from political bureaucracies, societal factors such as domestic and foreign business groups are also worth noting. They played a growing role in China, which affected the legislation process. As will be demonstrated in the later chapters, they also contributed to influencing the implementation of these legislations.

While a full-fledged IPR law system was finally established in China in the early 21st century, who enforces these laws? What is the relationship between the Chinese administrative and legal apparatus responsible for enforcing these laws at different levels? What is the relationship between the Chinese state and societal actors? How does this relationship impact the enforcement outcome? Those questions will be addressed in the next several chapters.

Chapter 3. Protecting Intellectual Property Rights In a Decentralized Polity:

The Relationship among Chinese IPR

Administrative, Legal and Criminal Enforcement Bureaucracies

Introduction: Why is it so Hard to Bring the IPR Infringers to Trial?

Chapter 2 demonstrates that a full-fledged IPR legislation system has already come into shape in China. It is generally agreed that Chinese IPR laws have reached the minimum standard of IPR protection as delineated by TRIPS. However, how are those IPR laws enforced in China, particularly at different levels of local government? The following field work example well illustrates the difficulty in enforcing the IPR legislation.

In Spring 2007, Company C, a leading architecture material company in East China's Anhui province detected counterfeit goods on the market and reported the deception to the city's Administration of Industry and Commerce (AIC). Through investigation, the City AIC discovered that the counterfeit goods were produced by Company X, a smaller company located under the jurisdiction of the City. They immediately confiscated the counterfeit goods, which were altogether worth over 1 million RMB (about 16,000 US Dollars).¹⁰³ Since the total value of the counterfeit goods far exceeded the minimum line for criminal prosecution, the AIC was ready to bring the case to the city's Court for criminal prosecution. However, the Party Secretary of Q County went to lobby the city AIC enforcement team and asked them not to sue Company X since it is one of the major contributors to the county's tax revenue. With the

¹⁰³ Full name of the city and the companies involved are concealed at the request of my interviewees.

help of one of the officials affiliated with the City AIC enforcement squad, I participated in several meetings between the officials of Q County and the City AIC. The most cited reason by Q County to protect the Company X from legal punishment was that punishing Company X would reduce Q County's tax revenue or even eliminate job opportunities. These reasons did not convince the City AIC at the beginning. However, when Q County officials told the City AIC that many workers with Company X were previously laid-off employees of several other local state owned enterprises and that economic punishment of Company X would drive those workers out of their jobs again and thus endanger social stability, the City AIC softened on its position. With Q County Government's lobby efforts, the legal procedure was greatly slowed down. At this point, some "insiders" predicted that Company X was very unlikely to face criminal prosecution and that there would only be slight financial punishment.¹⁰⁴ In November, 2007, as expected, company C and company X reached "outside court reconciliation". According to this decision, Company X paid 50,000RMB (9,000 US Dollars) to Company C, a result that hardly punished the trademark infringer.

The dilemma confronted with A City AIC's IPR enforcement team is one of many stories I heard during my field work about the way in which enforcement efforts are handicapped by the collaborative efforts between the IPR infringers and their patrons. Indeed, stories similar to the aforementioned case are not unusual in China. Complaints about the hindrance of enforcing IPR laws have been heard among the country's senior

¹⁰⁴ Participant observation, August 8th-18th, Anhui Province;

officials and were reported even by the mouthpiece media of the Chinese government.¹⁰⁵ This phenomenon demonstrates that while, as elucidated in the previous chapter, IPR legislation is largely a project between different interest groups at the central government level, enforcing these laws goes down deep to the local level, with more complicated sets of actors involved. Moreover, although an important component, enforcing IPR laws has not yet reached the level of complete compliance: in the former case, the state takes action to stop IP theft; in the latter case, the state willingly embraces the IPR norm. In China, however, even the enforcement of IPR laws is hindered by the competition among various interest groups.

Specifically, while an IPR enforcement apparatus composed of administrative and legal bureaucracies has come into shape in China, it is still torn among interests from different actors, both horizontally (among government bureaucracies of the same ranking within a given locality) and vertically(among government actors from the center to locality). Most IPR enforcement efforts have to pull through this complex matrix in order to succeed.

Although still sparse, previous scholarship has addressed the issue of IPR administrative enforcement and legal enforcement in China in various academic works(Dimitrov 2004; Mertha 2006, 2005(a)). While these scholars make an important contribution to the study of China's IPR enforcement, the following questions still need further analysis: What is the political and economic backdrop under which Chinese IPR

¹⁰⁵ For example, on the 27th Session of Standing Committee of the 7th National People's Congress in 1992, Hu Keshi, former Vice President of Chinese Science Academy, delivered a speech about the rampancy of local protectionism and its impact on the enforcement of Chinese IPR Laws. Part of his speech was published by the official *People's Daily*, 09/04/1992, Page 4;

bureaucracies function? What kind of IPR cases are enforced and under what kind of circumstances? What is the division of labor between the administrative and legal enforcement bureaucracy? How does this configuration in the division of labor impact the enforcement outcome?

In this chapter, I attempt to answer these questions by delineating the bureaucratic setup of the Chinese IPR administrative (section I), legal (section II), and criminal (section III) enforcement apparatus and their strengths and weaknesses. I argue that, despite the impressive progress China has made in the past two decades in IPR protection, coordination between different IPR enforcement bureaucracies remains vulnerable to influence posed by intra/inter bureaucracy competition and a frequently unfriendly environment to IPR enforcement.

Administrative Enforcement: Pull Through the Matrix Muddle

This section will consist of two major parts. I will start by defining the meaning of administrative enforcement. This will be followed by the analysis of historical and political background for Chinese IPR enforcement and explain why administrative enforcement handles dominant portions of IPR cases in China. I will conclude this section with an analysis of the strengths and weaknesses of the administrative enforcement apparatus, which foreshadows the analysis of the Chinese IPR legal enforcement apparatus in the next section.

Administrative Enforcement: A Definitional Issue

Although intellectual property right stem from the protection of knowledge as private property, in practice, the protection of intellectual property rights goes beyond the

private sphere and requires the intervention of government. A commonly accepted definition of administrative enforcement is provided as follows: “(administrative enforcement) refers to related IPR administrative bureaucracies’ handling of IPR disputes and protection of IPR holder’s interests under administrative procedure and through administrative means.” (Deng and Shan 2007)(P 67)

Historical and Political Background for Chinese IPR Administrative Enforcement

Historically, China had been ruled by successive imperial dynasties for a longer time than most countries in the world. Since its establishment in 1949, the People’s Republic of China (PRC) followed the Soviet model in designing the country’s political infrastructure. Under that model, the Chinese Communist Party dominates the decision making process of the country’s political, economic and legal policy. Unlike the Western countries, the level of autonomy of the legislative branch from the executive branch is very limited although scholars have called for more substantial legislative and judicial independence in recent years.¹⁰⁶ Therefore, in most parts of China’s contemporary history, administrative policy takes precedence over law(Zhang 2002) (Lee and Lai 1978). Such historical context constitutes the backdrop for the dominance of the administrative enforcement bureaucracy over its legal counterparts. According to a 2007 survey conducted by the Municipal Intellectual Property Office of Shanghai, China’s economic capital that presumably holds a higher level of rule of law and whose public possess a higher level of IPR awareness, 38.1 percent of the respondents believed that the administrative branch should take foremost responsibility to protect IPR as opposed

¹⁰⁶ For a discussion of callings for reform in Chinese legal system, see Pitman Potter: *The Chinese Legal System: Globalization and Local Culture*, Routledge 2001

to 15.2 percent who placed court in the first place; Moreover, according to the survey, 59 percent of the respondents resorted to administrative protection/mediation in case IPR infringement happened while 40 percent resorted to legal enforcement.¹⁰⁷ As indicated by the following statistical data, during the past decade the Chinese administrative enforcement apparatus handled most of IPR enforcement cases on the nationwide level, except on the more technical area of patent rights.

Table 3.1: Administrative and Legal Enforcement of Patent Case (1985-2006)

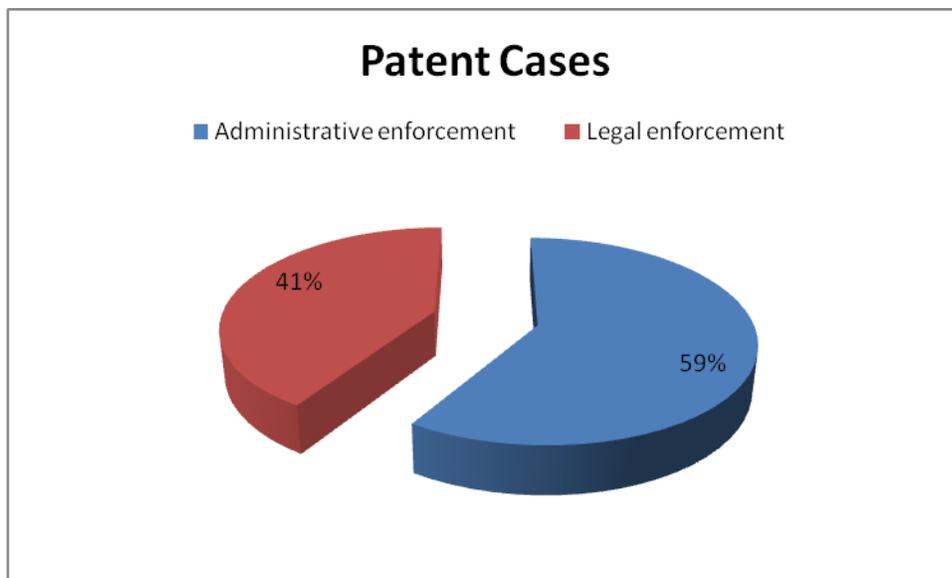
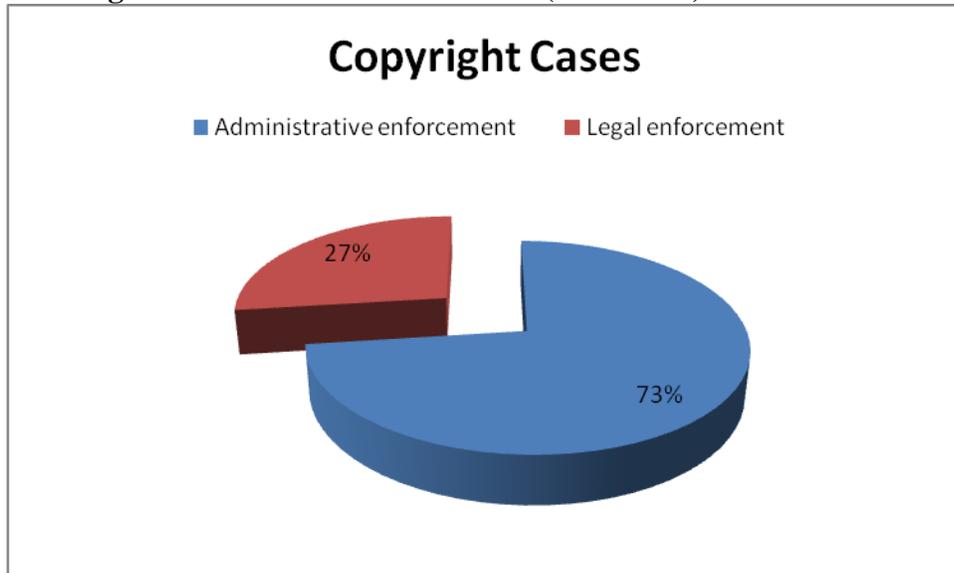


Table 3.2: Trademark Cases Handled by Administrative and Legal Enforcement Bureaucracies (2000-2006)

¹⁰⁷ Shanghai Municipal Intellectual Property Office 2007 Report of Shanghai Social Public's IPR Awareness, <http://www.sipa.gov.cn/zscq/node1/node11/userobject1ai5530.html>, last accessed 04/07/2009;



Table 3.3: Copyright Cases Handled by Administrative and Legal Enforcement Bureaucracies (1997-2005)



Source: China Intellectual Property Yearbook (2000-2005)

As illustrated by the story in the beginning of this chapter, the Chinese IPR administrative enforcement bureaucracy does not operate in vacuum. Instead, it is deeply enmeshed in the political context of contemporary China. Politically, China is a unitary state, with five tiers of government: central government, province, prefecture/city,

county, and township. Although the village is not officially regarded as a layer of the government, its existence does play an indispensable role in shaping social and political life at the sub-township level.¹⁰⁸ As of 2008, there are 31 provincial level administrative regions in China: 22 provinces, 5 autonomous regions, and 4 provincial-level municipalities. Under the provinces, there are 332 prefectures/cities and over 2,500 counties. Under this scenario, China is not as unitary as described on the country's constitution. It has been recognized by an increasing amount of scholars that, instead of being governed by a monolithic communist bureaucracy, the contemporary governance structure in China can be aptly described as “fragmented authoritarianism”, featuring not only collaboration but also competition between central and local governments as well as between different branches of local governments. Both horizontal fragmentation and vertical fragmentation can be readily seen in the implementation of important public policies (Lieberthal 1995; Lieberthal 1988; Yang 1997). IPR is no exception.

The feature of governance decentralization is particularly salient after China introduced fiscal and tax reform in 1994. Under this reform the Chinese central government and local governments, as a popular metaphor goes, started to “eat in separate kitchens”.¹⁰⁹ That is, the local governments acquired higher fiscal autonomy devolved from the central government.

¹⁰⁸ There are enormous literature on the fiscal federalism in China. Representative works include (Wang, Shaoguang (王绍光) 1995), Wang and Hu 2001(Hu and Wang 2001), Zheng, 2000, (Zheng 2000)etc;

¹⁰⁹ For the full text about Chinese State Council's Decision to introduce fiscal reform, see State Council Gazette: *State Council's Decision on the Implementation of Fiscal and Tax Reform*(国务院 关于实施分税制财政管理体制的决定), Dec. 15th, 1993.

Such a system plays a dual role in China's economic development: on one hand, it enhances Chinese economic growth by providing greater autonomy and incentives to local governments; on the other hand, this system also provides grounds for local government's disobedience to laws and policies made by the Central government. Moreover, after China introduced a new round of market reform policies in the early 1990s, Chinese government officials heavily rely on their localities' economic performance as a vital part of their profile for upward mobility along the bureaucratic hierarchy. (Bo 2002) Therefore, when IPR enforcement conflicts with generating revenue for local government, economic performance always took precedence over the implementation of central-level IPR laws.

As frequently evident by interview data, such problems will be more and more acutely felt as one move deeper down the Chinese bureaucratic hierarchy, where IPR infringement activities such as counterfeiting or piracy are often a generator of local income and where the local bureaucracy is increasingly vulnerable to the impact of local business interests. It is unfair to conclude that the Chinese central government's authority is completely ignored by the local government. However, on the issue of IPR enforcement, the local government actors are far from willingly embracing the IPR norms. Although the Chinese central government repeatedly emphasizes the importance of IPR protection, more often than not the local government only paid lip service to the central government's calls for implementing IPR laws.

Inter-bureaucracy Competition in IPR Enforcement

While vertically Chinese IPR enforcement efforts meets local resistance from local protectionism, horizontally inter-bureaucracy competition between different IPR enforcement agencies turn the overall bureaucratic setup into a wagon dragged by several horses in often diverting directions.

When China established its incipient IPR system in the early 1980s, it was mainly the administrative agency’s responsibility to protect intellectual property rights.

¹¹⁰As IPR issues reached deeper into Chinese political and economic life, more government branches got involved in IPR enforcement. In 2004, the Chinese government set up a State Council Working Group on Intellectual Property Rights Protection consisting of 17 Ministries/Vice-Ministerial Level Bureaucracies., with then Vice-premier, Wu Yi, serving as the director, for the purpose of enhancing the coordination between different ministerial level bureaucracies related to IPR(See Table below).¹¹¹ A similar working group was established at the Provincial Level and, in some regions, the City level.¹¹²

Table 3. 4: Composition of Chinese State Council Working Group on Intellectual Property Rights (As of 2008)

	Chinese Communist Party Central Propaganda Department (中宣部)
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¹¹⁰ See, for example, Article 40, 1982 Chinese Trademark Law; Article 60, 1984 Chinese Patent Law; Article 46, 1990 Chinese Copyright Law.

¹¹¹ See <http://www.ipr.gov.cn/cn/WorkIdor.shtml>, last accessed 04/1/2009;

¹¹² Interview, 06-26-2007, Anhui, Interview, 04-29, Nanjing, Jiangsu;

Ministerial-level with the Chinese State Council	Ministry of Public Security(MPS, 公安部) Ministry of Justice (MOJ, 司法部) Ministry of Information Technology (MIT, 信息产业部) Ministry of Commerce (MOFCOM, 商务部) Ministry of Culture(MOC, 文化部)
Vice-Ministerial Level Agencies under the Chinese State Council	State Administration of Industry and Commerce(·SAIC, 工商总局) State Press and Publication Administration(including State Copyright Administration(SPPA国家新闻出版总署, SCA国家版权局) State Food and Drug Administration(SFDA, 食品药品监督管理局) State Quality and Technology Supervision Bureau(QTSB,质检总局) State Intellectual Property Office(SIPO, 知识产权局) State-owned Asset Management Commission(SAMC, 国资委) State Council Legal Affairs Office(SCLAO, 国务院法制办) General Customs House(GCH, 海关总署) State Council Information Office(SCIO, 国务院新闻办)
Judicial Enforcement Bureaucracies	Supreme People's Court (最高法院) Supreme People's Procuratorate (最高人民检察院)

Source: Intellectual Property Rights Protection in China (中国保护知识产权网): <http://english.ipr.gov.cn/en/index.shtml>, last accessed 04-07-2009

Although this working group was established out of a good purpose to coordinate different IPR branches, the real implementation outcome more often than not comes as a significant departure from this purpose. Specifically, the current layout of IPR management bureaucracy still bears the influence of the planned economy, which does not fit the needs of managing IPR under a market economy. First, as indicated by table

3.5 below, three major issue areas of IPR are managed by different bureaucratic branches that belong to different *xitong*¹¹³ with different organizational histories and, more importantly, organizational cultures, serving different policy goals: the major bureaucratic organ managing patent affairs, the Patent Bureau, used to be affiliated with the Ministry of Science and Technology. Although Patent Bureaus at different levels changed their names to Intellectual Property Offices in 1998, their bureaucratic mandate remains restricted to patent affairs and they cannot dip their nose into trademark and copyright affairs. The major bureaucratic organ in charge of trademark affairs, Administration for Industry and Commerce at different levels, are affiliated with the economics and finance *xitong* while the major bureaucratic organ in charge of copyright affairs, Copyright Administration, are affiliated with the ideology and publicity *xitong*.

Reflecting the impact of the planned economy's legacy, such bureaucratic layout appears odd compared with other countries: according to two Chinese scholars' study of 196 countries/regions that establish IPR management system (Zhu and Huang 2004), China is one of a small handful of countries that separates the management of patent affairs from the management of trademark affairs.¹¹⁴ According to this study, over 180 countries/regions manage patent and trademark affairs under an overarching bureaucracy of Industrial Property Office or Patent and Trademark Office. Based on this fact, there have been calls for establishing an overarching IPR bureaucracy in China even

¹¹³ Under the Chinese political system, *Xitong* refers to "groupings of functionally related bureaucracies; the most important are Party Affairs, Propaganda/Ideology/Education, Organization/Personnel, Political/Legal Affairs, Military Affairs, Finance/Economics." (Lieberthal, 2004)(P 217) For further discussion of the function of *Xitong*, see Lieberthal, 2004(pp218-233)

¹¹⁴ These eight countries with similar practice as China are United Arab Emirates, Saudi Arabia, Pakistan, Libya, Greece, Ethiopia, Egypt, and Brunei. Related information can be accessed at <http://www.wipo.org/news/en/links/addresses/ip/index.html>.

before China entered WTO(Xu and Changwen (戚昌文) 06-23-2000). However, the inertia left over by the planned economy is never easy to overcome. During my field work, I kept hearing complaints about the awkwardness in the functioning of Chinese IPR bureaucracy, even from Chinese IPR officials themselves. However, when I asked why concrete measures have not been taken to streamline the redundant IPR bureaucracy and improve its efficiency, frequently the interviewee either refused to answer my question or attribute to the very vague “historical reasons”. For them, the establishment of an overarching IPR bureaucracy would lower the cadres’ ranking in their previous bureaucratic units and therefore has never been a popular policy initiative.¹¹⁵

To further complicate this situation, the afore-mentioned bureaucracies maintain their own IPR enforcement teams. However, the teams are not staffed and financed at the same level. Specifically, IPR enforcement teams under the Intellectual Property Office (IPO), the Administration for Industry and Commerce (AIC), the Quality and Technology Supervision Bureau (QTSB), the Public Security Bureau (PSB), and the Market Order Regulation Office (MORO) employ about 330,000 staff in 2007 nationwide.¹¹⁶ However, trademark enforcement personnel with AIC and QTSB disproportionately outnumber their counterparts in patent and copyright, who in many regions do not even reach down to the county level. According to a newspaper run by the State Intellectual Property Office, the Provincial Intellectual Property Office of Central China’s Hubei Province could only afford the budget to employ 4 people in 2000 (Xu and Qi Changwen, 06-23-2000). Moreover, according to a scholar attached to one of China’s top think tanks, the

¹¹⁵ Interview, 06/27/2007, Anhui; Interview 11/28/2007, Beijing,

¹¹⁶ Interview with an IPR official, 10/22/2007, Beijing;

State Council Development Studies Center, China has established a full-fledged trademark administrative protection system extending from central to local governments. The institutional setup of the intellectual property office relies much more on local leadership's attention rather than on well-organized regulations. The more attention they receive from local leadership, the higher their position(Lu 07-14-2003). During my field work in Anhui Province, I was told by a Copyright official that, in West Anhui Province's Lingquan County with 1.6 million population, the local Cultural Affairs Bureau only has the budget to hire 8 staff.¹¹⁷ Hence, although it is stipulated on the paper that patent, trademark and copyright bureaucracies have their own enforcement mandate, in practice enforcement officials have to cross the inter-bureaucracy borderline to seek other enforcement unit's help when problems such as shortage of personnel and budget arises. Therefore, more often than not IPR enforcement agencies trespass in others' domains (See Table below).

Table 3.5. Chinese Bureaucratic Agencies' *de facto* involvement in Administrative IPR Enforcement

Type of Intellectual Property Rights	Bureaucratic Agencies with a <i>de facto</i> IPR Enforcement Portfolio in Related Issue Area
Patent	Intellectual Property Office(IPO, 知识产权局)
	Administration for Industry and Commerce(AIC, 工商局)
	Quality and Technology Supervision Bureau(QTSB, 质检局)
	Customs House (GCH, 海关)

¹¹⁷ Interview, 07/05/2007, Anhui;

Trademark	Administration for Industry and Commerce(AIC, 工商局)
	Quality and Technology Supervision Bureau(QTSB,质检局)
	Customs House(GCH, 海关)
Copyright	Copyright Administration/Press and Publication Administration (PPA, 版权局)
	Administration for Cultural Affairs (ACA,文化局)
	Administration for Industry and Commerce(AIC, 工商局)
	Quality and Technology Supervision Bureau(QTSB,质检局)
	Customs House(GCH, 海关)

Source: Interview, 10/18/2007, Beijing; Interview, 10/25/2007, Beijing; Interview, 10/30/2007, Beijing;

On one hand, this kind of bureaucratic fragmentation generates overlapping mandates and conflicting interests between different bureaucratic branches, under which different IPR agencies vie for the power to enforce “easy cases”, i.e., IPR infringement activities that are easier to identify and prosecute and thus can enhance their prestige and power. On the other hand, they just pass the bucks to one another on the enforcement of “tricky cases”.¹¹⁸ This puts IPR holders in confusion in deciding the right one to resort to when IPR infringement happens. For IPR holders, the absence of an effective and timely response from administrative enforcement agencies at the time of IPR infringement is as harmful to their interests as the abuse of power.¹¹⁹

¹¹⁸ Interview, 09/27/2007, Beijing

¹¹⁹ Interview with an IPR holder, 08/23/2007, Anhui; Interview with an IPR holder, 06/19/2008, Shanghai;

Analysis of problems with Chinese IPR administrative enforcement does not intend to downgrade their important role in the Chinese IPR protection system. Despite the above-mentioned problems, for most part administrative enforcement stands at the forefront of IPR protection; it also serves as the provider of evidence for legal enforcement on many occasions. As an IPR official told me, “Chinese IPR protection will be screwed up if we totally rely on administrative enforcement. The situation will also be screwed up if we totally get rid of administrative enforcement.”¹²⁰

In fact, compared with legal enforcement that will be discussed later, administrative enforcement is cheaper and quicker because it does not require lengthy procedure. Because of that, a dominant majority of Chinese IPR holders still resort to administrative enforcement in IPR protection. As will be discussed by next section, the weaknesses with administrative enforcement can at least partially be compensated by legal enforcement.

Civil Enforcement

Although the dominant majority of IPR enforcement happens outside the courtroom in China, the Chinese civil enforcement bureaucracies maintain their own important influence in IPR protection. According to the Chinese legal regulations, the result of IPR administrative enforcement is subject to judicial review by a Chinese IPR court. Specifically, under Article 14 of the Chinese Administrative Reconsideration Law, if the parties involved feel treated unfairly during the administrative enforcement and therefore are dissatisfied with the result, they can submit the case to a local IPR court for

¹²⁰ Interview, 07/03/2007, Anhui;

reconsideration.¹²¹ As such, although many administrative enforcement cases are not brought to the court for final judgment, the civil enforcement bureaucracy has the final say on the result of administrative enforcement. Therefore, the lower quantity of cases handled by IPR civil enforcement bureaucracy compared with their administrative counterpart does not indicate that its position in the IPR enforcement buildup is lower. In fact, staffed by high-caliber judges and functioning at a higher level of autonomy in making the legal decisions, the Chinese IPR specialized chamber was praised by Dimitrov as a “bright spot” in China’s IPR legal enforcement bureaucracy. (Dimitrov, 2004) (P 82) In this section, however, I will dig deeper into the workings of Chinese IPR specialized chambers. I will demonstrate that while Chinese IPR specialized chambers deserve praise for their achievements, problems still exist in different stages of IPR trials.

Chinese IPR Specialized Chamber: An Overview

In 1993 the first two IPR special chambers were set up in the Intermediate People’s Courts in Chaoyang and Haidian Districts in Beijing. In 1996, the Chinese Supreme People’s Court established its IPR Chamber. (Su and Dongchuan(罗东川) 1998) Since then, an IPR civil enforcement system that operates at 4 major levels was established in China: the Supreme People’s Court (State level in Beijing); the High People’s Court (province level, at capital cities of each province) the Intermediate People’s Court (city level, at intermediate-size cities); and County/District People’s Court

¹²¹ Article 14, Chinese Administrative Reconsideration Law, available online at http://www.gov.cn/banshi/2005-08/21/content_25100.htm, last accessed 04/08/2009;

(county level, at counties and district of cities)¹²²

In less than two decades, the High People’s Court in 4 Municipalities (Beijing, Shanghai, Tianjin, and Chongqing), and 10 provinces (Heilongjiang, Hebei, Guangdong, Fujian, Jiangsu, Sichuan, Hainan, Zhejiang, Henan, and Anhui) have established an IPR chamber. Moreover, special IPR chambers also reach into 30 Intermediate People’s Courts at the City Level (See table below) In South Jiangsu Province’s Nantong City, an IPR Specialized Chamber reached down to a village in 2002, the first of its kind in China.¹²³

Table 3. 7: Number of Intermediate IPR Tribunals in China and their Locations

Province/Municipality		Number of Intermediate IPR Tribunals	
Municipality	Beijing	2(Haidian, Chaoyang)	
	Tianjin	2	
	Shanghai	2(Pudong, Huangpu)	
Coastal China	Jiangsu	13	
	Guangdong	4(Guangzhou, Shenzhen, Foshan, Shantou)	
	Hebei	4(Shijiang Zhuang, Qinhuangdao, Baoding, Xingtai)	
	Fujian	9	
	Zhejiang	1(Hangzhou)	
	Shandong	3(Jinan, Yantai, Qingdao)	
	Hainan	1(Haikou)	
	Central China	Jiangxi	11
		Anhui	2
		Henan	2(Zhengzhou, Anyang)
Hubei		10	
Heilongjiang		1(Harbin)	
Shanxi		10	
Western China	Chongqing	1	
	Sichuan	1(Chengdu)	
	Total	81	

¹²² See, for example, (Jiang, Zhipei (蒋志培) 1998)

¹²³ Interview, 05/29/2008, Nantong, Jiangsu; Also see (Zhou and Lei 05-17-2007)

Source: State Intellectual Property (Office (国家知识产权局) 2000)

These IPR specialized chambers are mostly located in economically affluent municipalities, coastal provinces, and central and western China's major urban centers. Therefore, as Dimitrov(2004) rightly points out, they are less likely to fall prey to local protectionism and benefit from hospitable conditions from relatively higher levels of local economic development. Moreover, these courts are staffed by China's elite IPR judges, who possess at least a university degree and are conversant with domestic IPR regulations and international legal norms.¹²⁴

Some other strengths at the deeper level of the Chinese IPR civil enforcement should not be neglected. First, under the Chinese IPR litigation system, the plaintiff possesses the leeway to choose the chamber where the infringement case will be heard. This allows the IPR holder to bring the case to places with most favorable conditions. However, administrative enforcement usually happens within the jurisdiction where the infringement takes place, where the environment is generally more favorable to the infringer. (Clark 08-08-2008)

Second, staffed with well trained judges, Chinese specialized IPR chambers possess the authority and the expertise to combine into a single legal claim under the jurisdiction of various IP laws. For example, in cases of the infringement of computer software, which often involves both patent and copyright, two different administrative authorities would be responsible, which will cause buck-passing behavior discussed earlier. However, these claims can be combined in a single civil litigation brought up to

¹²⁴ This is supported by interview data that I collected through my field work trip. A significant portion of IPR court's budget is devoted to the training of IPR judges. Interview, 08-21-2007, Anhui; Interview, 06-06-2008, Wuxi, Jiangsu; Interview, 07-02-2008, Shanghai;

the IPR courts. Chinese IPR courts have the expertise and resources to consider more difficult issues of law which may be too tricky for administrative authorities. This is one reason why civil actions are the preferred enforcement choice for cases related to technical rights like patents.

In fact, the work of IPR special courts won praise not only from domestic and foreign IPR holders but also from former foreign critics of Chinese IPR enforcement.¹²⁵ The Chinese IPR judges themselves are also confident about the quality of the legal decision they make and are required by the People's Supreme Court to post these decisions online for the general public to review.¹²⁶ Hence, Chinese specialized IPR chambers are also praised for its high level of transparency.

Complaints about the Chinese IPR Civil enforcement Bureaucracy

However, some other questions still remain unanswered: 81 IPR courts in a country of over 300 cities and 2,500 counties is a tiny portion, how about other areas that IPR special chambers cannot reach? While the decisions made by IPR specialized chambers are received as sound and well-grounded legally, are they really observed by parties involved? Or if they are really observed by the parties involved, do they really deter to the other potential IPR infringers? Indeed, while the Chinese IPR civil enforcement apparatus can readily bypass the administrative enforcement apparatus, which is easily swayed by local interests, it is more about the *making* of these legal decisions rather than the *execution* of these decisions. How do these legal decisions impact the broader environment of intellectual property rights protection in China?

¹²⁵ Interview, 11/08/2007, Beijing; Interview, 06/12/2008, Shanghai.

¹²⁶ Interview, 08/30/2007, Anhui; Interview, 03/20/2008, Nanjing, Jiangsu; These legal decisions can be accessed online at <http://ipr.chinacourt.org/>;

Finally, what is the relationship between the administrative enforcement and civil enforcement bureaucracies? For IPR holders, under what occasions do they resort to administrative enforcement? Under what occasions do they resort to civil enforcement? As discussed later, while Chinese civil enforcement is maturing at an impressive pace, further improvement is still necessary in stages before, during, and after the IPR trial.

During the pre-trial stage, the most commonly heard complaint from the IPR holder is the heavy burden on the plaintiff to provide evidence: modeled after the continental law system, the Chinese IPR court places dominant portion of responsibility on the plaintiff to provide evidence. Moreover, the emphasis is laid on documentary evidence while oral evidence is rarely relied on as it is considered unreliable. Judgments are usually made based on documentary evidence and oral evidence is given low weight. Therefore, there is a very high burden of proof on the plaintiff and most elements of infringements must be proved by the plaintiff in the court to a very high standard.¹²⁷

During the trial, the most commonly heard complaint is the lengthy process of initial hearing and appealing. With the process of evidence collection completed, the initial hearing will be finished at the intermediate people's court and it takes three months to complete. If the parties involved are not satisfied with the result of the initial hearing, they can appeal to a higher level court, which usually takes another three months. (See Appendix B for IPR trial procedure in steps) If either of the litigants is a foreign party, the time period for the initial trial or appellate hearing may be even longer.

The biggest headache during the post-trial stage is how to calculate the economic compensation. Chinese IPR professionals disagree over the way of calculating

¹²⁷ Interview with an IPR holder, 10/25/2007, Beijing;

the level of economic compensation: some argue that the level of economic compensation shall be based on the economic loss incurred by the IPR holder; some others argue that the level of economic compensation should be based on the IPR infringers' illegal income gained from infringement activities.¹²⁸

In practice, however, both methods arouse disputes. There is disagreement with the former method on the ground that IPR holder's economic loss can be incurred by reasons other than IPR infringement activities. According to an IPR lawyer, the shrinking market share in the IPR holder's product during certain periods could be attributed to factors such as the emergence of substitute products, the problem with the IPR holder company's marketing strategy, and the rise of new competitors; it is therefore very hard to establish an accurate causal relationship between infringement activity and IPR holder's economic loss.¹²⁹ For example, during the unsuccessful enforcement activity mentioned at the beginning of this chapter, one of the reasons that Company X (trademark infringer) cited to minimize the economic fine was that the design of the product of Company C (trademark holder) did not suit the taste of local residents. Therefore, Company X insisted that the major contributor to the decline of Company C's market share was not counterfeit goods produced by Company X- a troublesome reason for Company C to refute.¹³⁰ A Hong Kong-based IPR lawyer cited another example to illustrate the difficulty in reaching an accurate calculation of the economic compensation: one of her clients, a Hong Kong music company found that the market share in the year

¹²⁸ Literature on the debate over calculation methods is enormous, for leading scholars and judges' discussion, see, for example, Zhou 2003; Song 2005; Zhang 2008 (Zhou 2003) (Song 2005; Zhang 2008)etc;

¹²⁹ Interview, 10/10/2007, Beijing

¹³⁰ Participant observation, August 8-18, Anhui Province

of 2006 declined by 2 million RMB. At the same time, pirated versions of that company's CD appeared on the market of the neighboring Guangdong province. When that Hong Kong music company asked the lawyer to appeal to the Guangdong Provincial copyright authority, the reply was that the copyright owners could not readily conclude that they lost 2 million Chinese RMB because of piracy: it could be that the people in Guangdong enjoyed the music from Taiwan more than that from Hong Kong; or in other instances, the audience's taste has been shifted from listening to music to other entertainment activities such as watching movies or dancing. Therefore, even though the copyright owners could bring the copyright infringer to court, they could not retrieve their economic loss completely.¹³¹

The second method based on the IPR infringers' illegal income is also controversial: the illegal income of the IPR infringers does not belong to them in the first place; therefore, the return of this part of illegal income to the victim of IPR infringement does not really hurt the IPR infringer. Moreover, what IPR infringers gain from infringement activities can be more than economic income. These gains at least include the savings on the cost of R&D (research and development) and the expense on marketing, which do not necessarily appear on the account of IPR infringers and get included in their illegal income. This is, therefore, unfair for the victim of IPR infringement.¹³² An example cited by the IPR lawyer that I interviewed may illustrate this point: company B (defendant) enticed several key engineers of company A (plaintiff) to work for them, the tangible income was obviously company B's rising market share.

¹³¹ Interview, 05/27/2007, Hong Kong;

¹³² Interview, 08/27/2007, Anhui;

However, what worried company A most was that the technological material acquired by company B shortened the technological gap by at least one generation. Therefore, they asked the court to also include the amount of R&D investment saved by company B, the intangible part of company B's illegal income, when calculating the level of economic compensation. Finally the court ruled that company B pay company A 46,000 RMB (about 5,500 US Dollars),but company A insists that their economic loss amounts to 180,000RMB(about 30,000US Dollars).¹³³ The above examples demonstrate that the very task of calculating the “intangible part” of illegal income is also very hard in itself.

Due to the above hurdles in legal enforcement, the dominant portion of domestic IPR holders still resort to administrative enforcement as their primary avenues for IPR protection. Due to the problems that arise during different stages of IPR civil enforcement, it is often the case that IPR holders win the lawsuit, but lose the time and business.¹³⁴ Therefore, IPR holders do not choose to go to court unless absolutely necessary. The burdensome evidence collection, the lengthy trial process, and the difficulty in calculation of economic compensation make IPR civil enforcement a luxury for IPR holders with weaker economic backup such as individuals or small and medium companies. Even for IPR holders with stronger economic backup, they resort to civil enforcement only on cases with higher levels of technical complexity, with a higher probability to win, with the potential to attract public attention, or with the potential to impact the future rules of game between different industries on the market.¹³⁵ Therefore,

¹³³ Ibid;

¹³⁴ Interview, Guangdong, 10/10/2008; For a representative example, see (Qiao 01-14-2006)

¹³⁵ Interview with a Beijing-based IPR attorney, 01/04/2008;

the IPR specialized court, as described in the beginning story of this chapter, is for significant part detached from the forefront of IPR protection.

For sure, the complaints about China's legal IPR enforcement apparatus mean no denial for the big strides that the Chinese IPR special chambers made during its less than 20 years existence. In fact, the issues as outlined above are not unique with China. To some extent, they are the embodiment of the contradiction between the two legs of IPR legal norm as discussed in chapter 2: the protection of knowledge as private property and the ready access of knowledge by the broader social public.

Criminal Enforcement

Statutory and Bureaucratic Setup on IPR Criminal Enforcement in China

Criminal protection of IPR is the latest comer to China's IPR enforcement apparatus. The earliest legal instrument of IPR criminal protection can be found in Article 127 of the 1979 Chinese Criminal Law, which stipulated a maximum of 3 years for trademark infringement liable for counterfeiting the registered trademark of other enterprises. In 1993 and 1994, the Chinese National People's Congress passed the Supplementary Regulation on Punishing the Crime of Counterfeiting Trademark and the Resolution on Punishing the Crime of Copyright Infringement. At the same time, Article 63 of the Chinese Patent Law stipulated that similar patterns can be followed in punishing the crime of odious infringement of patent rights.¹³⁶ However, for a significant period of time, these laws were regarded as tigers without teeth since there was no legal apparatus to handle IPR related crime. The IPR specialized chambers discussed in previous section were initially set up to try IPR civil litigation. In 1997, China revised its criminal code.

¹³⁶ See, for example, (Zheng 1998)

Under Section 7 of Article 3, Chinese government incorporated the spirit of previously issued regulations on punishing intellectual related crimes and set IPR infringement as a crime.¹³⁷ From then on, a criminal protection system of IPR started to be set up in China.

IPR criminal protection in China involves the Public Security Bureau (PSB), China's police, the People's Procuratorate, and the IPR Courts. The PSB is responsible for the criminal investigation and detention of suspects, which normally lasts 3 - 6 months. Two departments under the PSB hold the responsibility to crack down on IPR related crimes: the Social Order Department handles both knock-off commodities and copyright infringement while the Economic Crimes Department handles trademark and patent counterfeiting.¹³⁸ The People's Procuratorate is empowered to approve the formal arrest of suspects and file prosecution with the People's Court. It usually takes the People's Procuratorate two to three months to prepare the prosecution. IP criminal cases are generally accepted and heard first by the Criminal Chamber of the People's Court at the county (district) level, and then at the Intermediate People's Court for the appellate hearing if an appeal is filed. The appellate decision is final; it cannot be appealed further. Each Court will normally spend one to two months to hear the case and issue judgment.

Challenges Confronting Chinese IPR Criminal Enforcement

Compared with its administrative and civil legal counterparts, Chinese IPR criminal enforcement bureaucracy handles the smallest portion of cases, but that does not mean that their challenge is the smallest. Like their administrative counterparts, the PSB has the headache to coordinate the intra-bureaucracy relationship between Social Order

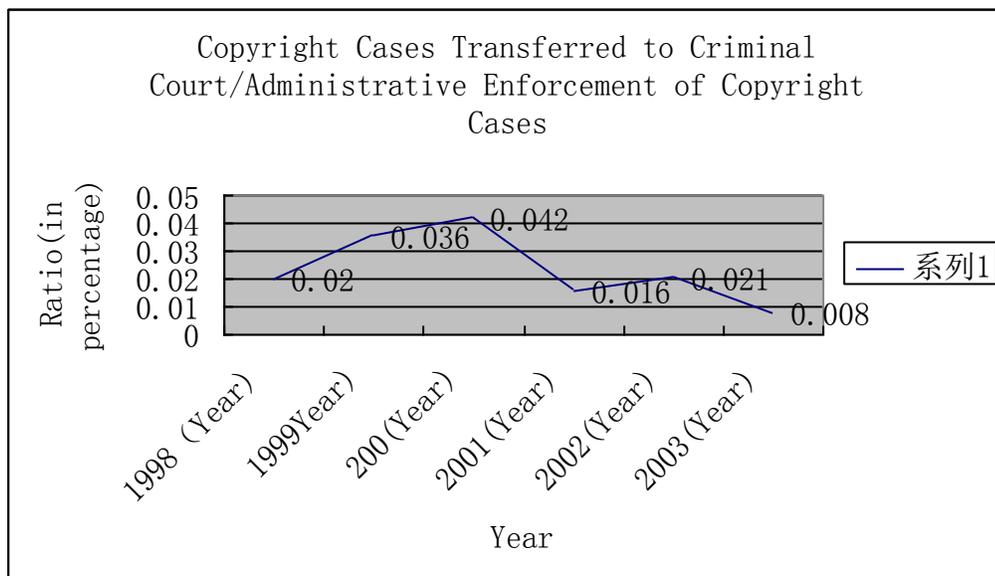
¹³⁷ Related articles can be accessed online at http://www.chinabsa.com/Policy/200811/Policy_20081125160448.html, last accessed 04/12/2009;

¹³⁸ QBPC(09-16-2002) Report on the Production and Sale of Counterfeit Goods in China, available online at <http://www.jahd.gov.cn/info/show.asp?id=243>, last accessed 04/17/2009;;

Department and Economic Crime Department; they also have to face lobbying efforts from local protectionism on behalf of IPR infringers.

However, the most challenging aspect of IPR criminal enforcement in China was the appropriate handling of inter-bureaucracy relationship between administrative, legal, and criminal enforcement bureaucracy. As mentioned earlier, the primary task of IPR criminal enforcement was to crack down the most serious IPR infringement, i.e., the type of infringement that can amount to the threshold of criminal prosecution. The Chinese IPR criminal enforcement bureaucracy is staffed at a much lower level than their administrative counterparts, which makes it very dependent on the transfer of IPR cases from administrative organ. While an IPR infringement case that is likely to be brought to criminal prosecution reaches the administrative enforcement organ, does the administrative organ transfer it to the police and the IPR court for criminal prosecution, or just impose some economic fines (an important source of their bureaucracy's income) on the IPR infringer and treat it as an administrative case? (Wang /03-29-2006) The exact statistical data of IPR cases stopped at the administrative level and not transferred to criminal enforcement is not known yet- maybe people can never get the exact statistical data, but complaints from IPR holder association may reveal part of this problem: according to the Quality and Brand Protection Commission (QBPC), an IPR holder association composed of 83 leading foreign companies investing in China, in the first 6 months of 2002, Chinese Quality and Technology Supervision Bureau(QTSB) at different levels practiced enforcement on 65,000 IPR cases, but only transferred 66 of them to the Chinese Public Security Bureau. In 2001, the Chinese Administration for

Industry and Commerce (AIC) at different levels practiced administrative enforcement on 10,804 cases nationwide, but only transferred 71 of them to public security bureau for criminal prosecution. (QBPC, 07-08-2002) A similar situation exists in the area of copyright protection as well, as demonstrated by the table below, from 1998 to 2003, copyright cases transferred to criminal prosecution has never exceeded 0.05% of the entire pool of administrative enforcement of copyright cases.



Source: Chinese Intellectual Property Yearbook (2000-2003)

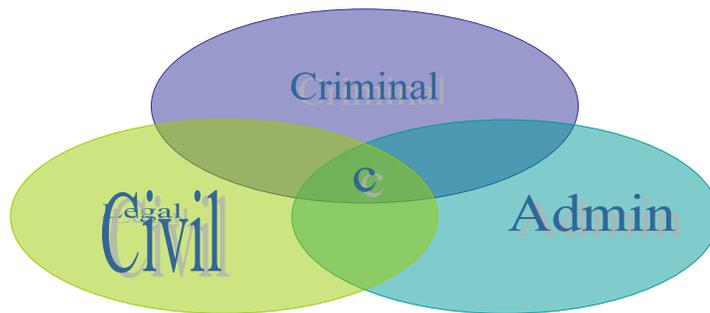
In response to the complaints by IPR holders, Chinese officials hold that it is impractical to bring all the IPR infringers, particularly those involved in the minor IPR infringement cases, to criminal prosecution,¹³⁹ but the publications by certain Chinese government branches did not deny the existence of problems as outlined above and admit that coordination between administrative, civil and criminal enforcement still deserves much room for improvement. According to them, “a significant portion of IPR infringers

¹³⁹ Interview, 09/18/2007, Beijing;

are not brought to criminal liability after they are imposed administrative and/or civil liability. This involuntarily allows the serious IPR infringement activities to add to IPR related crime and thus escape the punishment that they deserve.”¹⁴⁰

Although the IPR administrative, civil, and criminal enforcement bureaucracies in China have their own distinctive bureaucratic mandate, their work overlaps with one another on small but important portion of IPR cases. (See table 3.8 below) Cases under the jurisdiction of criminal enforcement bureaucracy are not the biggest portion in terms of quantity, but as the most serious IPR infringement- that type of infringement that amount to the threshold of criminal enforcement- bringing these cases to justice is certainly important in itself.

Table 3. 8. Relationship between Domains of IPR Administrative, Civil, and Criminal Enforcement



Source: Deng (2008)(With minor revision)

¹⁴⁰ No. 3 Division of Supreme People’s Court (最高人民法院民三庭) Investigation Report on Certain Issues Related to IPR Criminal Protection in China(知识产权刑法保护有关问题的调研报告), available online at <http://review.jcrb.com/zyw/n464/ca330518.htm>, last accessed 04/16/2009;

It is unfair to say that all the administrative enforcement IPR cases are handled unfairly. However, it is fair to expect that a substantial percentage of these cases are more vulnerable to the influence from local interest groups. It is also fair to expect that a substantial percentage of egregious cases cannot reach the criminal enforcement stage since the evidence against the infringers disappear before they can add up to the threshold for criminal enforcement.

Chinese IPR enforcement authorities are fully aware of the challenges confronting criminal enforcement. In fact, they issued a series of regulations on strengthening the work of transferring IPR cases from administrative organs to criminal prosecution.¹⁴¹ In the most recent judicial interpretation, the Chinese Supreme People's Court and the People's Procuratorate further lowered the threshold for criminal prosecution of IPR infringement.¹⁴²

These moves demonstrate the determination by the Chinese government to protect IPR. As a scholar associated with one of China's top think tanks, the Central Party Academy, told me, China does not protect IPR only for the interests of foreign business investing in China; it is also in China's interests to protect IPR.¹⁴³ However, the comment by a police officer describes the daunting difficulty faced by the Chinese IPR protection apparatus, be it administrative, legal, or criminal, "Everyday we face criticism. Everybody criticizes us for not working hard enough to protect IPR, for being corrupt, for being swayed by the influence of various interest groups. However, as IPR enforcement

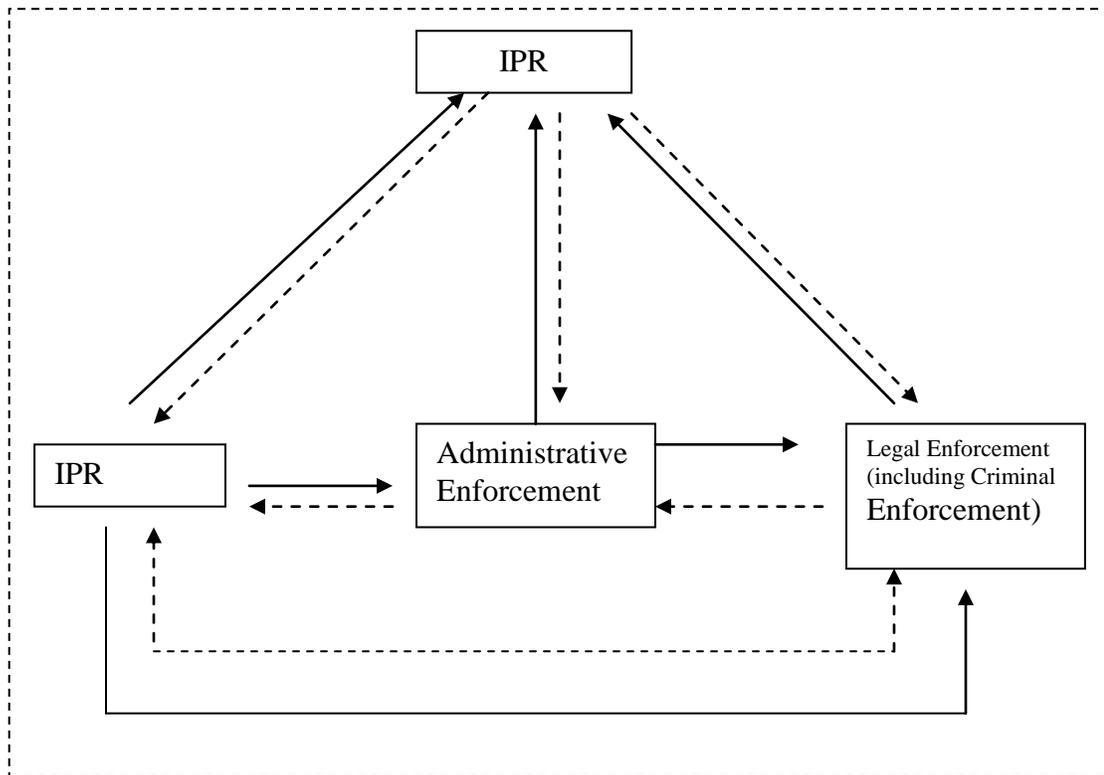
¹⁴¹ See, for example, State Council (07/09/2001), *Regulations on Transferring IPR-Related Crime from Administrative Enforcement Organ to Criminal Prosecution*(行政执法机关移送涉嫌犯罪案件的规定);

¹⁴² Wei, Xiaomao(卫) *Recent Judicial Interpretation Strengthens IPR Criminal Protection*, from *China Intellectual Property News*, 04/17/2007;

¹⁴³ Interview, 06/25/2007, Nanjing, Jiangsu;

professionals, we have a sincere wish to fulfill the task of IPR protection. But our enemies are more than the IPR infringers. Instead, the most difficult enemies for us are the interest groups behind the IPR infringers. Confronting these additional challenges, we are leading a really hard life.”¹⁴⁴

Table 3. 9 Choice of Means of IPR Protection



Source: . (Deng 2008)Deng (2008) (P239)

Conclusion

¹⁴⁴ Interview, 04/28/2008, Shanghai;

As illustrated by the story at the beginning of this chapter and the analysis that follows, Chinese IPR enforcement bureaucracies never operate in isolation to each other. Instead, coordination between different bureaucracies is essential for the enforcement efforts to be successful. A fuller understanding of IPR enforcement in China should combine the factors of both administrative enforcement and legal enforcement into the analytical framework. Chinese IPR enforcement bureaucracies never operate in vacuum, either. A fuller understanding of IPR enforcement in China should adopt a holistic approach and consider the social, economic, and political environment that these bureaucracies operate. In this chapter, I advocate an integrative analytical approach, which can better capture the Chinese enforcement bureaucracies and thus yield more nuanced understandings.

This relationship between different IPR enforcement bureaucracies in China can be illustrated by table 3.9 above. In this table, IPR legislation, administrative enforcement, and legal enforcement/criminal enforcement are woven into a complex web, in which each knot plays its own indispensable role. The real line indicates the conventional process of choosing between different means of IPR protection; the dotted line indicates the relationship of mutual supervision, or in the words of Chinese bureaucratic jargon, “professional guidance” (*yewu zhidao*), between different aspects of IPR protection. As demonstrated by the table above, IPR legislation provides legitimacy to IPR holders and IPR protectors to claim and defend their rights. IPR holders can resort to the administrative or legal enforcement organs as they deem

necessary in cases of IPR infringement. Administrative and legal enforcement organs possess the mandate to enforce IPR laws.

Having discussed the complex relationship between Chinese IPR enforcement bureaucracies in this chapter and the politics of IPR legislation in chapter 2, I have not adequately discussed the cell on the lower left part of table 3.9: IPR holders. This is probably the least parsimonious variable in the equation, but they are by no means the least important. In fact, they are the logical starting point of IPR work: intellectual property rights protection will not work unless intellectual property rights are recognized by the holder as a right first. However, as illustrated by the story at the beginning of this chapter, differentiation exists between different actors in the private sphere of IPR: on one hand, IPR holders value IPR (C Group); on the other hand, IPR infringers (X Group) do not value it and even infringe upon IPR. What explains this differentiation? How does this differentiation impact the work of IPR protection? In chapters 4, 5, and 6, I will demonstrate that differentiation among different actors in the private sphere reflects a more complex set of interest relationship as analyzed in previous chapters.

**Chapter 4. Meeting the Challenges of Building an Innovative Country:
The Political Economy of Chinese Patent Policy
At the Turn of the New Century**

While chapter 2 and 3 mainly focus on the role of state actors in the operation of Chinese IPR policy, I will move on to discuss the role of Chinese societal actors in the next three chapters, respectively focusing on patent, copyright, and trademark. This chapter focuses on the issue of patent. The following questions guide my discussion in this chapter: Who create patents and who hold them? Who infringe upon patent? What does the notion of patent mean for patent holders as well as patent infringers? How important (or unimportant) is the issue of patent for them? Or why is the patent issue important for some business actors, but not the others? During the defense and infringement activities, who are the winners and who are the losers? What explains the contemporary configuration of patent policy in China?

I argue that, due to the legacies from a planned economy and the imperfections in market reform, the Chinese domestic business community, except some elite enterprises, contributes fewer patents than foreign companies investing in China. They do not yet hold technological innovation as the core component of their market competitiveness. IPR holders of different kinds have to overcome the challenges on the way to innovation in different ways. This in turn contributes to their low levels of sympathy for IPR. The low level of sympathy for IPR among the majority of the Chinese business community explains the gap between China's *de facto* compliance and *de jure* compliance with international IPR norms.

Due to the constraints of the planned economy's legacy, a market oriented science and technology policy has not yet come into full shape in China. Under China's

transitional economy, foreign and private enterprises constitute the majority of IPR holders in the country. Although China has accumulated impressive resources for science and technology innovation in the past three decades, the negative impact of planned economy and the imperfections in market reform remains key hindrance to bring those resources into full play. Specifically, those factors include the state's tight grip over China's academic and research system and the separation between academic inquiry and market application.

While extant literature mainly focus on the role of state actors in the operation of Chinese IPR policy (Mertha 2005; Dimitrov, 2003), I will move on to discuss the role of Chinese societal actors in the formation and implementation of Chinese patent policy in this chapter. In fact, even in a non-democratic country like China, societal actors do not just follow state policy passively. Instead, they are active agents vying for a bigger voice in the formulation and implementation of IPR policy. Some of them benefit from the market profits created by IPR; others fall victims to IPR infringement. They influence and are influenced by Chinese IPR policy designed by China's bureaucratic body. Moreover, I also demonstrate that while IPR is popularly regarded as an economic and legal issue, the design and implementation of patent policy in a country such as China goes beyond the politically neutral realm.

There has been an enormous literature on contemporary Chinese science and technology policy, an issue area closely related to patent (Simon and Rehn 1988; Fred and Goldman 1989; Lu 2000; Cao 2004; Rowen, Hancock et al. 2008; Zhou 2008)¹⁴⁵.

¹⁴⁵ The most prestigious study of Chinese traditional notion of science and technology, however, is Needham, J. (1981). Science in traditional China : a comparative perspective. Cambridge, MA : Harvard

However, scholarship on how China's science and technology policy impacts the country's patent policy remains scant. The very few works by U.S.-based scholars on Chinese patent policy almost exclusively focus on the poor coordination between various Chinese IPR bureaucracies to explain the rampancy of patent infringement in China (Mertha, 2005; Dimitrov, 2009). According to a Beijing-based Chinese IPR scholar, this kind of analysis focuses too much on the state actors and pays inadequate attention to the impact from societal actors. It is necessary to move the level of analysis further down. In fact, most IPR related activities happen at the interface of Chinese state and society. Hence, an over-emphasis on one side and ignorance of the other will yield but an incomplete understanding of the entire picture.¹⁴⁶

This chapter starts with a delineation of the three aspects of IPR work in China and their relationship with each other. I will proceed to analyze the mechanisms that prevent the Chinese science and technology sector from creating high-quality patents, applying them to market use and generating profits. I conclude this chapter by contending that the study of Chinese patent policy should go beyond patent policy *per se* and that a full appreciation of the broader context in which Chinese patent policy is carried out is necessary for a thorough understanding of the subject under examination.

Three Aspects of Intellectual Property Rights Work

According to a Chinese IPR scholar, like most other countries in the world, intellectual property rights work in China consists of three major aspects: IPR creation,

University Press. Although focusing on ancient China, lots of Needham's insights remain inspiring for researchers of contemporary Chinese science and technology;

¹⁴⁶ Interview, Beijing, 10/18/2007;

IPR application, and IPR protection.¹⁴⁷ (See table below) The operation of these three major realms is governed by their own logics, but they are closely related to each other and exert impact upon each other via numerous channels.

Western scholars usually neglect the importance of creation and application of intellectual property rights in China, but these two aspects constitute the very foundation of a country's IPR policy and should not be undervalued. A Jiangsu-based IPR official cited a piece of informal evidence of this during my interview with him: there are several vice bureau chiefs within the Jiangsu Provincial Patent Bureau that he used to work with; when the names of these bureau chiefs appear on the internally circulated newsletter, the name of the vice bureau chief in charge of patent industry *always* comes before the vice bureau chief in charge of patent protection. Due to the lack of institutionalization in Chinese politics, the order in which officials' names appear is an important indicator of policy priority; in the case of the Jiangsu Patent Bureau the order in which the vice bureau chiefs' names appear on the newsletter speaks for itself.¹⁴⁸

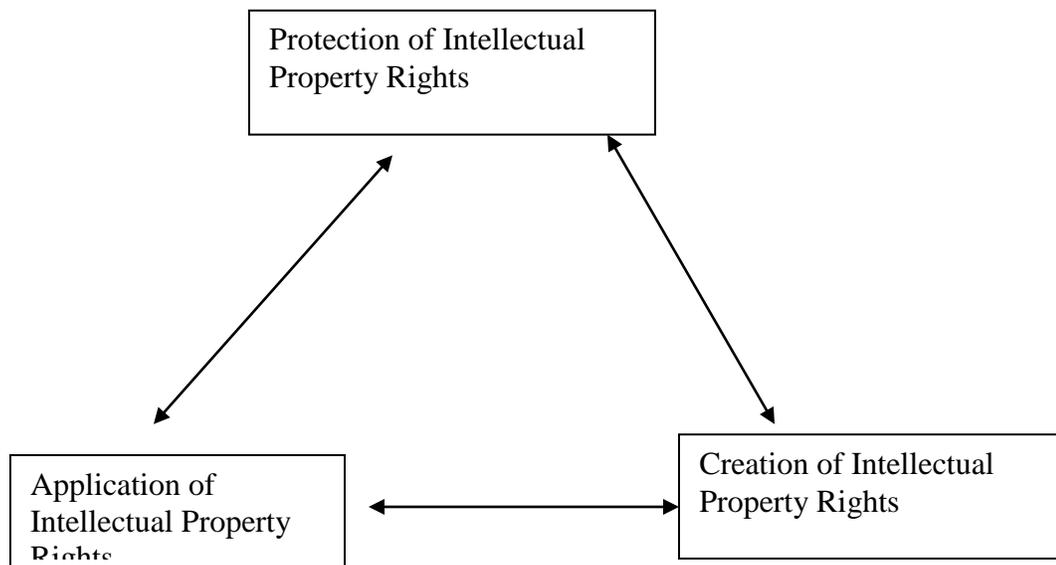
As a metaphor by an Anhui-based Chinese IPR official goes, the IPR legislative and bureaucratic frameworks are just like grass if one compares the operation of Chinese IPR policy to a piece of grassland; although the most visible part, the examination of grass in itself is not enough for a complete understanding of the grassland. For him, if the economic rationale behind IPR infringement remains unaffected, the efforts to repair China's institutional deficiency can hardly yield any

¹⁴⁷ Interview with an IPR scholar, Hefei, Anhui, 08/06/2007;

¹⁴⁸ Interview with an IPR official, Nanjing, Jiangsu, 03/07/2008;

meaningful results.¹⁴⁹ An IPR scholar picked up the metaphor cited by that IPR official and further explained the relationship between the three aspects of IPR work. In his words, if one compares IPR work to a piece of grassland, the creation of IPR is the land out of which the grass grows; the application of IPR can be compared to the supply of nutrition from natural and artificial sources to increase the fertility of the soil; IPR protection can be compared to all the efforts to remove harmful weeds from the grassland and maintain the grass' healthy being.¹⁵⁰

Table 4. 1: Triangular Relationship of Three Aspects of Intellectual Property Rights Work in China



Source: Interview with an IPR Scholar, Hefei, Anhui, 08/06/2007

¹⁴⁹ The first time I heard this metaphor was during an interview with an IPR official, Hefei, Anhui, 06/26/2007. Many other interviewees used the similar metaphor to describe the significance of societal aspect of Chinese IPR work during my field study.

¹⁵⁰ The first time I heard this metaphor was during the interview with the above-mentioned IPR scholar in Anhui. There were too many interviewees from various backgrounds citing this metaphor during my field work for me to name. I would prefer not to identify the exact source of this metaphor.

While IPR protection is mainly the task of Chinese IPR enforcement bureaucracies, IPR creation and application are mainly the task of the private sector, primarily enterprises. It is also important to bear in mind that the activities of the private sector are heavily regulated and influenced by the Chinese state.

Ideally, in the triangular relationship delineated above, each of these three components generates operation rigor and provides motivation for the others. However, this has not been achieved in reality. The following sections will demonstrate the mechanism that prevents the formation of a productive relationship between three aspects of IPR work in China.

The Obtaining of Patents

This section focuses on the obtaining of patent. In this section, I trace the process of China's reform to its science and technology sector since the late 1970s, when the country started its market reform. This section demonstrates that the legacy of a planned economy still exerts a strong impact on China's innovation system after thirty years of market reform; coupled with the imperfections in China's market reform, the quality of the patents created by China's domestic enterprises leaves much to be desired despite the rapid increase in quantity.

Legacy of A Planned Economy:

China established a Soviet model to organize its science and technology activities since the establishment of the People's Republic in 1949.¹⁵¹ In the early 1950s, China established a science and technology system organized into three layers: the top

¹⁵¹ For the early stage of the development of China's science and technology, see Dangdai Zhongguo Congshu Bianjibu, D. Z. C. (1992). Science and Technology in Contemporary China (当代中国的科技事业). Beijing, China Social Press (中国社会出版社).

tier of the country's S&T system was composed of dozens of national key labs under the Chinese Academy of Science (CAS) and the country's top research universities. They were entrusted with the country's basic scientific research as well as applied research in some strategic, large scale and long-term projects. The second tier consisted of about 100 heavy industrial and military-industrial research labs under various industrial ministries. The third tier comprised thousands of research institutes under various provincial and city governments.¹⁵² It is important to note that even the distinction between the three layers of China's science and technology hierarchy was not absolute. That is, as part of the country's planned economy setup, research institutes at the lower tiers of the country's S&T system could be merged into their counterparts at the top tier if the country's S&T administrative body deemed it necessary.

Such a system was very efficient in building the country's heavy industrial infrastructure and military production capability. Under this system, China was able to mobilize its very limited resources into strategic industries during the early years of the People's Republic.¹⁵³ The astoundingly quick pace that China took to build its strategic military forces in the 1960s and 1970s was vivid evidence for the efficiency of this system: it took China 8 years to build its first atomic bomb (1956-1964), two and a half years to proceed from the atomic bomb to the hydrogen bomb (1964-1967), and 12 years

¹⁵² For a discussion of three layers of Chinese S&T system, see Saich, T. (1988). Reform of China's Science and Technology Organization System. Science and Technology in Post-Mao China. D. F. Simon and M. Goldman. Cambridge, MA, Harvard University Press.

¹⁵³ For an excellent discussion of the development of Chinese military and strategic technology, see Feigenbaum, E. A. (2003). China's Techno-Warriors: National Security and Strategic Competition from the Nuclear to the Information Age. Stanford, CA, Stanford University Press.

to launch its first man-made satellite (1958 -1970).¹⁵⁴ These technological achievements closely followed the steps of China's other four fellow permanent members in the UN Security Council: the US, Soviet Union, Britain and France. For a country struck by poverty, war, and revolution for the first half of the 20th century, those achievements were astonishing for foreign-based observers.

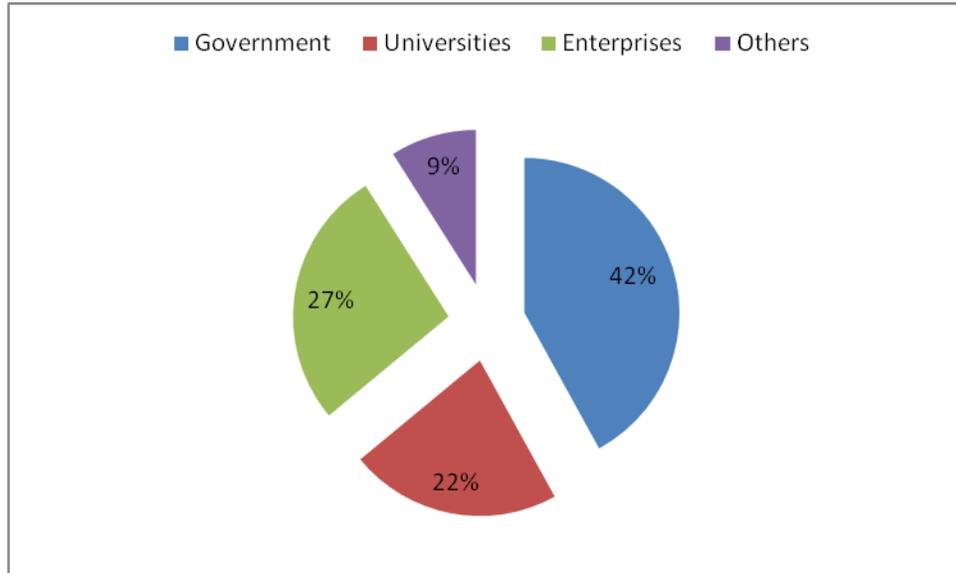
However, such a system had serious deficiencies: First, like a giant with a strong upper body but frail legs, most of China's R&D budget and high end talents were concentrated in the country's national key labs, military research institutes and research universities while civilian industrial enterprises were largely isolated from the ivory tower at the very top of the country's science and technology hierarchy. As of early 1980s, China had over 9,300 research institutes nationwide, but the majority of them (5,700) were *not* directly linked to industrial enterprises. By comparison, over 90 percent of Japan's R&D units were directly linked to companies.¹⁵⁵ Even after years of reform of the Chinese science and technology system, such a situation still persisted until the early 1990s. Compared with developed countries such as the US and newly industrialized countries such as Korea, China's R&D human capital was still disproportionately concentrated in the government-run research institutes and research universities, but not industrial enterprises. (See table below).

Table 4. 2: Distribution of R&D Talents by Sectors:

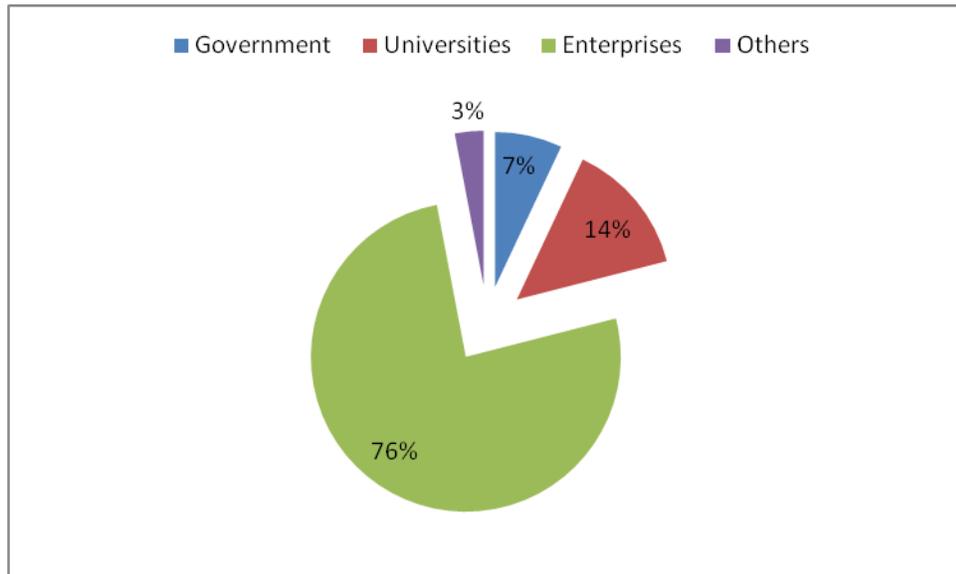
¹⁵⁴ Among the five permanent members of the UN Security Council, the US took 7 years to proceed from atomic bomb to hydrogen bomb, the Soviet Union 4 years, and the UK 4 years and a half. China's first hydrogen bomb was tested 2 months earlier than France.

¹⁵⁵ Ma Lili: The Concept of China's Science Research Reform: An Interview with Wu Mingyu, Vice-Minister of the State Science and Technology Commission, from Huashengbao(Voice of China), April 10th, 1985, P.31;

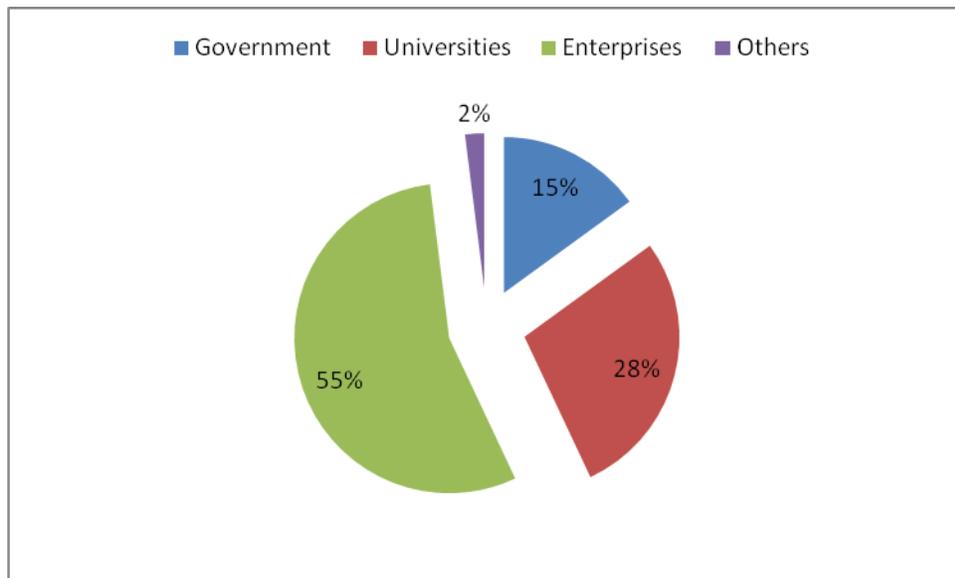
A Comparison between China, the US, and Korea



Distribution of R&D Talents by Sectors: China (1993)



Distribution of R&D Talents by Sectors: USA(1988)



Distribution of R&D Talents by Sectors: Korea (1990)

Source : State Bureau of (Statistics(国家统计局) 1995)

Ministry of Science and (Technology(科学技术部) 1994)

Second, even though the industrial research institutes at the second and third layers of the country's science and technology hierarchy were established to serve the needs of industrial production, in practice they were accessories to the administrative framework; there existed no horizontal link between those research institutes and industrial enterprises. Under the authority of their individual industrial ministries, any contact between research labs and enterprises should first pass through administrative organs at their top. The research tasks by those institutes were assigned from their respective governing ministries in a top-down manner rather than generated by market needs.¹⁵⁶ As such, a lot of science and technology products produced by those research institutes failed

¹⁵⁶ For a thorough analysis of the relationship between industrial research institutes and their governing ministries, see Gu, S. (1999). China's Industrial Technology : Market Reform and Organisational Change London ; New York Routledge PP 12-17; Also see Segal, A. (2003). Digital Dragon: High-Technology Enterprises in China. Ithaca, Cornell University Press. PP5-15;

to be transferred into market profits. Even after years of market reform, such problems still exist. As of 2005, only 15% of the science and technology products were transferred into market use while the transfer rate in developed countries reaches 60% to 80%.¹⁵⁷

Third, because of the planned economy nature of research and development, enterprises were nothing more than “production units” and lacked the incentive to innovate. As innovation is frequently associated with high investment and high risk, the Chinese enterprises’ top priority was to meet the production quota assigned from the government.¹⁵⁸ Eventually Chinese enterprises lacked both the resources and incentive to innovate under the planned economy.¹⁵⁹

During the pre-reform period, the Chinese government was not unaware of the significance of science and technology in the country’s modernization campaign. However, China’s achievement in heavy industry and military technology was not translated into civilian use until the reform and opening policy was launched in late 1970s. As discussed in the next part, even after years of market oriented reform, legacies from a planned economy still maintain their influence on the country’s innovation efforts.

Four Phases of Market Reform (1978-2008)

With the introduction of reform and opening policy in 1978, the Chinese

¹⁵⁷ Wang, X. 王. and H. Zhao(赵弘) (2005). Improve Innovation Ability of Privately-Owned New Technology Enterprises: Blue Book of Development of Zhongguancun (提升民营科技企业创兴力:中关村发展蓝皮书). Beijing, Social Sciences Academic Press(社会科学文献出版社) P 40;

¹⁵⁸ There is enormous scholarship on innovation and its impact on a country’s economy. For a pioneering study of innovation theory, see Shumpeter, J. (1934). The Theory of Economic Development. Cambridge MA, Harvard University Press.

¹⁵⁹ For a quantitative analysis of how Chinese enterprises’ innovation incentive got stifled under planned economy, see, for example, Hu, A., G. Z. (2001). "Ownership , Government R&D,Private R&D , and Productivity in Chinese Industry.", Journal of Comparative Economics 29(1): 136-157.

government started to be increasingly aware of the weaknesses of the central planned model in governing the country's science and technology system. Starting in the late 1970s, China engaged in a series of measures to introduce market mechanisms into the country's overly rigid science and technology system. However, the establishment of a market-oriented research and development (R&D) system is as daunting a task as breaking the Soviet model. Even now, China is still struggling with the exploration of new reform measures to break the institutional and organizational bottleneck for technological innovation.

In 1978, under the guidance of then Chinese top leader Deng Xiaoping, China promulgated the National Guideline for the Development and Design of Science and Technology (1978-1985), later known as the 8 year Guideline.¹⁶⁰ During the implementation of the 8 Year Guideline, China focused more on the restoration of the science and technology system destroyed by the decade long Cultural Revolution (1966-1976) than on introducing market mechanisms to the country's R&D activities. However, research institutes in some localities engaged in pioneering efforts to build horizontal ties with newly emerged private enterprises. Those enterprises began to invite technology talents from research institutes to help with their technological difficulties during the latter's spare time such as weekends. Later those technology talents were known as "weekend engineers". Not all the research institutes welcomed this kind of move in the beginning. In fact, some of them even scoffed at those "weekend engineers" as money driven and criticized them as not focused enough on their own research. But bold efforts

¹⁶⁰ Full text of the 8 Year Guideline can be accessed online at http://www.imicams.ac.cn/webpages/policy/files/gh_1978.pdf, last accessed June 24, 2009; Also see People's Daily, 03/29/1978, P1;

by petty entrepreneurs and “weekend engineers” later grew into an unstoppable trend to break the barrier between research institutes and industrial enterprises.¹⁶¹

In 1985, the Chinese government promulgated the Decision on the Reform of Science and Technology System after reportedly 11 times of revision. That decision, known as the 1985 Decision, marked the beginning of a series of bold measures to adjust Chinese science and technology system to market needs.¹⁶² The key components of the 1985 Decision were twofold: the first was to diminish government grants to research institutes so as to put pressure on the latter to turn to the market; the second was to create a technology market for transactions between research institutes and industrial enterprises.¹⁶³ In 1988, the State Science and Technology Commission launched the Torch Program, aiming at further integrating research institutes, including research talents, technological know-how and some material assets, into commercial production.¹⁶⁴ New business organizations, known as the New Technology Enterprises (NTE), were spun off from the research institutes. In 1988, the State Council approved the establishment of the Zhongguancun Science Park, located in Northwestern Beijing, where the country’s top research institutes and research universities were clustered.¹⁶⁵ From then on, Chinese research talents’ creativity was greatly released from the rigid control by the planned economy model. Science and technology became an important contributor to

¹⁶¹ Interview with a former “Weekend Engineer”, Hefei, Anhui, 07/07/2007;

¹⁶² Xinhua News Agency: Chinese Communist Party Central Committee’s Decision on the Reform of the Science and Technology Management System, March 19th, 1985; Full text of the 1985 Decision is also available at People’s Daily, 03-20-1985, P 1;

¹⁶³ Full text of the 1985 Decision is available on People’s Daily, 03-20-1985, Page 1;

¹⁶⁴ Chen, Z. 陈. (08-02-1988). : Torch Program Carried Out to Develop New Technology (发展高技术、新技术产业 “火炬计划” 已成雏型) . People’ s Daily.: Page 1.;

¹⁶⁵ Shi, B. a. H., Wei(施宝华;黄威) (08-07-1988). New Technology Experimental Zone Set Up in Zhongguancun, Beijing (:北京中关村已正式成立新技术产业开发试验区), . People’ s Daily: Page 3.

China's economic development. By the early 1990s, China established 53 high-tech parks at the national level, located in 28 provinces. In 1992, 5,569 NTE's were registered in these parks, producing products and services worth 231 billion RMB and spending 15.2 billion RMB on R&D.(State Bureau of Statistics(国家统计局) 1993) (P 307)

The efforts to reform China's S&T system did not stop there. Starting in the mid and late 1990s, market oriented reform moved towards the top layer of China's science and technology hierarchy. In 1999, China promulgated the Decision to Strengthen Technological Innovation Work and Industrialize High Technology, known as the 1999 decision.¹⁶⁶ Under the 1999 Decision, 242 national level research institutes were privatized, thereby becoming market actors.¹⁶⁷ From then on, the Chinese government attempted to concentrate its financial resources on consistently supporting science and technology forces in some strategic and basic research areas. At the same time, the majority of Chinese state-run research institutes were guided to merge with industrial enterprises and directly faced market competition. In the words of a scholar on Chinese science and technology policy, this strategy can be described as "anchoring one end and freeing up the other"(*wenzhu yitou, fangkai yipian*)¹⁶⁸

In light of the country's entry into the WTO in 2001, the Chinese economy was confronted with a new round of challenges: Chinese domestic enterprises were faced with more intense competition from foreign businesses with the country's further opening to

¹⁶⁶ Full text of the 1999 Decision can be accessed online at <http://www.chinawater.net.cn/CWSNews/990820.html>, last accessed June 26, 2009;

¹⁶⁷ See, for example, Hu, L. 胡. and B. 成. Cheng (2005). "Chinese Government Run Research Institutes' Twenty Years of Sea Change(中国政府研究机构二十年巨变) ." <http://www.sts.org.cn/fxyj/zcfx/documents/20050826.htm>, last accessed June 26, 2009.

¹⁶⁸ Interview with an IPR scholar, Nanjing, Jiangsu, 03/31/2008,

the outside; the country's natural resources approached the limit after two decades of exponential economic growth based on the abuse of the country's natural environment.¹⁶⁹ In the early 21st century, Chinese decision-makers have realized that China has to put a greater emphasis on intellectual property rights if the country is to maintain its sustainable economic growth. In early 2006, China promulgated the State Middle and Long Term Science and Technology Development Guidelines (2006-2020), known as the 2006 Guidelines.¹⁷⁰ In 2008, China raised intellectual property rights to the level of national strategy and adopted the Outline of the National Intellectual Property Rights Strategy, aiming at promoting innovation and the use of new technology.¹⁷¹ Both the 2006 Guideline and the 2008 Guideline set the aim to establish a full-fledged market-oriented national innovation system by 2020 in China. Under this system, Chinese enterprises shall be the main body of innovation activities. The adoption of the 2006 Guideline and the 2008 Guideline marked the beginning of a new phase in market-oriented reform in China's science and technology system.

Problems with the Market Oriented Reform and the Negative Impact on China's Innovation Efforts

It is generally agreed that China's science and technology reform met relatively small resistance during the time between 1985 and 1996(Kou 2008). However, since the mid-1990s, the smooth progress of China's S&T reform has slowed down. Despite the Chinese government's repeated call to enhance China's indigenous innovation activity

¹⁶⁹ For a discussion of challenges that China faces during the knowledge economy at the turn of the new century, see Dahlman, C. and J.-E. Aubert (2001). *China and the Knowledge Economy: Seizing the 21st Century*. Washington D.C, World Bank Institute.

¹⁷⁰ Full text of the 2006 Guideline is available on People's Daily, 02/10/2006, P.1;

¹⁷¹ Full text of the 2008 IPR National Strategy is available on People's Daily, 06/11/2008, P 15;

and turn science and technology into the key engine for China's modernization, research reports by authoritative international institutions show that the country remains an imitator or adaptor of foreign technologies (Zeng and Wang 2007). In fact, after the adoption of the 2006 Guideline, some scholars expressed doubts as to whether the ambitious goal of building an innovative country by 2020 can be achieved on time.¹⁷² Some IPR officials in China share similar doubts as those scholars.¹⁷³

The officials and scholars attribute their pessimism to both the influence of remnants of the planned economy model and the immaturity of market mechanisms. Or in the words of an IPR scholar, "what should have been anchored was not really anchored; what should be freed up was not really freed up."¹⁷⁴ (*gaiwende meiwenzhu, gaifangde meifangkai*)

Specifically, the reforms discussed earlier that turned the research institutes into new technology enterprises were carried out in a top down manner. A natural question then is whether this kind of approach can really yield the desired outcome. As analyzed by Cao (Cao 2002), the Chinese S&T community was not immune from the strong commercial values prevalent during the reform period. A quality research practice consistent with internationally defined scientific norms has not been fully institutionalized. A lot of the basic research programs turned out to be transferred into mission-oriented money making projects that emphasized quick returns and short term profits. Thus many Chinese scientists engaging in basic research were not patient enough to focus on high quality research that could lead to breakthroughs in technological

¹⁷² Phone interview with an IPR scholar based in Nanjing from Shanghai, 06/19/2008;

¹⁷³ Interview with an IPR official, 07/09/2008, Shanghai;

¹⁷⁴ Ibid;

innovation. In fact, the past decade has even witnessed a decline in first class basic research achievement in China. During the first 9 years of the new century, on 6 occasions (2000, 2001, 2004, 2005, 2007, 2008) there were no winners of the first class prize in China's annual Natural Science Award, the top award for cutting edge basic research made in China.¹⁷⁵ According to the World Competitiveness Yearbook published in Lausanne based International Institute for Management Development, known as the Lausanne Report, since 2000 China's competitiveness in basic research has stayed in the range between 25 and 28 out of the 181 countries under study. In fact, China was already ranked No. 27 and No. 28 respectively in 1995 and 1996 by the Lausanne Report.¹⁷⁶ Although the ranking as recorded by the Lausanne Report is mainly for reference purposes, the above mentioned data indicate that China's basic research competitiveness still remains in the middle range worldwide and has not made progress commensurate with China's rapid GDP growth during the past decade.

While China's basic research is negatively influenced by the commercial values incurred during the country's market reform, market mechanisms fail to work in the realm of applied research. Despite the introduction of market mechanisms, the government sector still controls a dominant proportion of research funding. That drives China's R&D personnel to spend a lot of time and energy lobbying the administrative staff responsible for the distribution of the country's research funding. Scholars and practitioners contend that Chinese R&D activities are still ruled by man rather than ruled

¹⁷⁵ Information about awarding China's annual Natural Science Award can be accessed online at <http://www.nosta.gov.cn>;

¹⁷⁶ World Competitiveness Yearbook can be accessed online at <http://www.imd.ch/research/publications/wcy/index.cfm>, last accessed July 15th, 2009;

by laws governing scientific research.(Huang and Jiang 2007) In an article published in *Nature*, the London-based top journal on science and technology, several leading Chinese scientists called for the Chinese Ministry of Science and Technology (MOST) to relegate its unwieldy power over the distribution of research funding to a foundation independent of government influence so that “China’s scientific research can be governed by real scientists.”¹⁷⁷ However, this kind of appeal was too offensive to China’s S&T bureaucrats. The specific issue of *Nature* that published the aforementioned articles was not even allowed to be circulated in China.¹⁷⁸

The combination of the legacy from a planned economy and the imperfections in market mechanisms results in the low efficiency of China’s R&D activities, which inevitably negatively impacts patent creation in the country. On the one hand, China continues to train R&D professionals through the country’s increasingly sophisticated education system and continues to invest heavily in the country’s science and technology sector. As of 2007, China employed 35 million R&D professionals in its science and technology sector, taking the first place in the world. Those 35 million R&D professionals are employed by 28,000 R&D entities at different levels.¹⁷⁹ In 2007, China spent 366 billion RMB (50 Billion U.S. Dollars) on research and development (R&D),

¹⁷⁷ A less blunt version of that article was published in Chinese two months later. See Rao, Y., L. Bai, et al. (2005). "The Fundamental Change Necessary for Chinese Science and Technology: (中国科技需要的根本转变：建立竞争优胜机制)" *World Science (世界科学)* (1): 3-4.

¹⁷⁸ See Editorial Entitled Diversionsary tactics published on *Nature* 436, 152 (14 July 2005)

¹⁷⁹ Xu, Fen (徐玢) (2007-10-10). Quantity of Chinese Science and Technology Human Capital Takes No. 1 in the World(我国科技人力资源总量居世界首位) . Science and Technology Daily(科技日报). Beijing.

ranked No. 4 in the world, only behind the U.S., Japan, and Germany. This number accounts for 1.49% of China's total GDP; although this percentage is lower than the 2% R&D/GDP ratio of most developed countries in the world, it is the highest among developing countries.¹⁸⁰ In 2007, China's patent applications have increased by an annual rate of 32.9%, far exceeding the average rate of 4.7% at the worldwide level and one of the fastest in the world. In 2007, the total number of patent filing in China exceeded 3 million, ranking No. 3 in the world, only behind Japan (No. 1) and the US (No. 2).¹⁸¹ It is envisioned that if China's patent application keeps its growing momentum, in 2012 China is likely to exceed Japan and the US, becoming the world's No. 1 country in patent creation.¹⁸²

On the other hand, however, China remains a "big but not powerful country" on the arena of patent affairs worldwide. A closer examination of the quality of these patents may reveal some hard truths disguised by the large quantity of patent applications. First, due to the weaknesses of China's S&T system as analyzed above, a dominant majority of patents in China lack originality. Under Article 2 of *Rules for Implementation of the Patent Law of the People's Republic of China*,¹⁸³ first promulgated in 1985 and most recently revised in 2001, three types of industrial innovation can be granted a patent in China: invention, utility model, and industrial design. Specifically, an invention patent

¹⁸⁰ In 2007, Israel invested 4% of its GDP in research and development activities, the highest in the world. These statistical data can be accessed online at <http://www.sts.org.cn/nwdt/gndt/document/09011902.htm>, last accessed June 20th, 2009;

¹⁸¹ World Intellectual Property Organization, *Statistics on Worldwide Patent Activity, (2007 Edition)*, full text available online at http://www.wipo.int/ipstats/en/statistics/patents/patent_report_2007.html#P211_16003, last accessed July 5th, 2009;

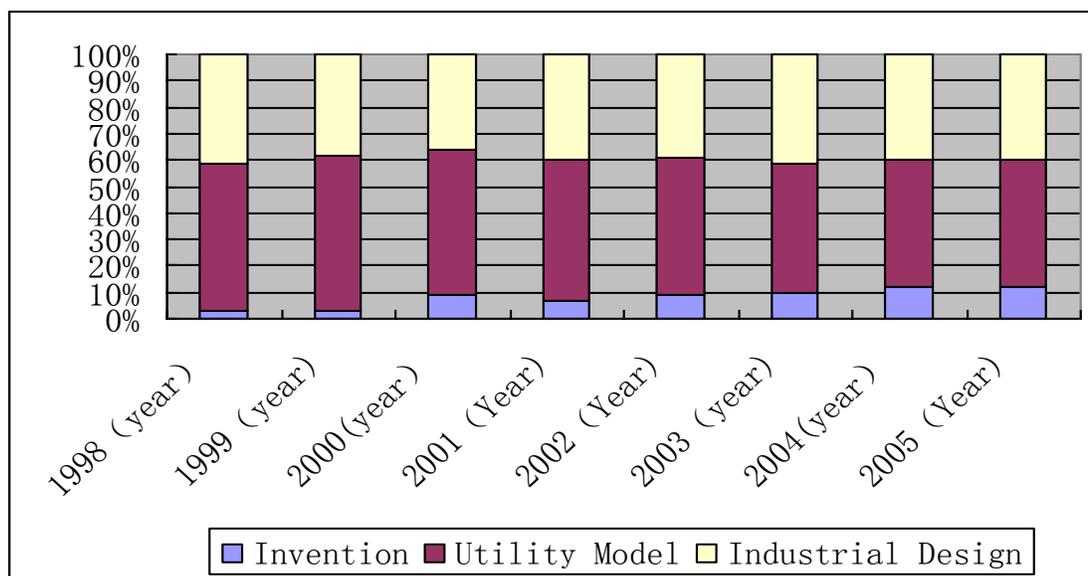
¹⁸² *Ibid*;

¹⁸³ Full text of these rules can be accessed online at <http://www.china.com.cn/chinese/PI-c/258266.htm>, last accessed June 17, 2009;

means a new technical solution to a product, process or its improvement; the utility model, popularly known as “incremental invention” or “minor patent”, means a new technical solution to the shape or configuration or their combination of a product, which is industrially applicable; industrial design means a new design to the shape or pattern of a product, their combination or combination of color therewith, which is aesthetic and industrially applicable. Judging from the definition of these three types of patents, the invention patent is the most technologically sophisticated while industrial design is the least sophisticated; the utility model comes in between the two of them.

One cannot dismiss the utility model and industrial design as completely worthless, but the quantity and quality of invention patent in a country’s high-tech industries is a stronger indicator of a country’s technological competitiveness. As indicated by the table below, for a considerable time, invention patents only consist of less than 10% of domestic patents while the majority of Chinese domestic patents belong to the utility model and industrial design.

Table 4.3: Distribution of Chinese Domestic Patent Grants (1998-2005)

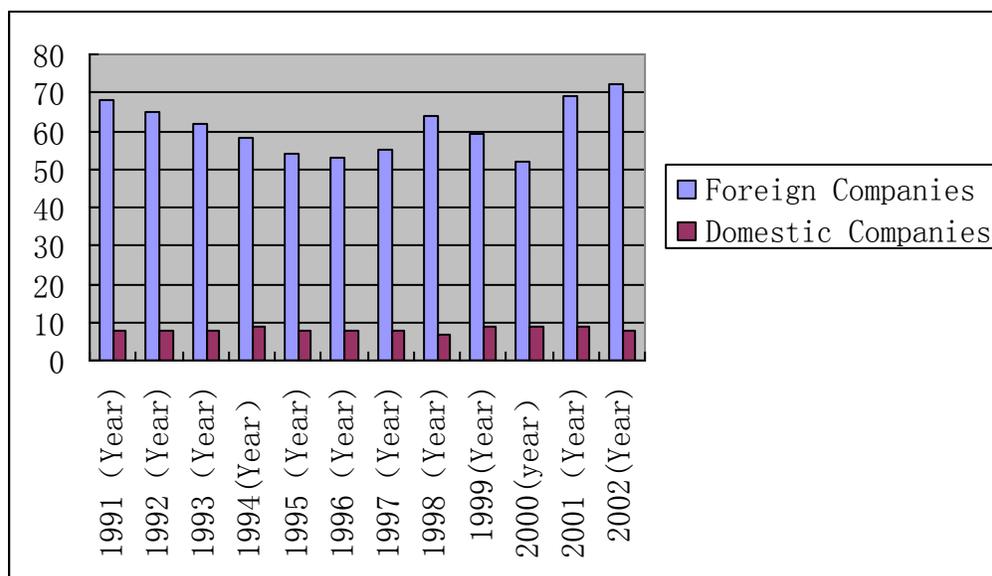


Source : China Intellectual Property Yearbook (2000-2005)

Moreover, as indicated by table 4.4, foreign companies in China constitute the majority of invention patent holders. Therefore, it can be safely concluded that Chinese domestic enterprises are not active actors in China’s innovation activity. Even China’s leading economists do not deny that Chinese economy’s rapid growth relies more on cheap labor and mobilization of natural resources rather than scientific research and technological innovation.¹⁸⁴

**Table 4. 4: Distribution of Invention Patents Granted in China
By Patent Holders (percent, 1991-2002)**

¹⁸⁴ See, for example, Wu, J. 吴. (2006). *The Choice of China's Growth Model(中国增长方式抉择)*. Shanghai, Yuandong Publishers(远东出版社) .



Source: National Bureau of Statistics and Ministry of Science and Technology:

China Statistical Yearbook of Science and Technology (Beijing, China Statistical Press, 2003)

In sum, the legacies of China’s planned economy and the country’s immature market economy hinder the creation of high quality patents. Therefore, Chinese patent policy does not grow from a piece of fertile land.

Application of Patents

High quality innovation is but the first step. Equally important, if not more important, is to turn these patents into market profits. This section demonstrates that, while, as discussed in the previous section, patent creation is hindered by the combination of legacy of a planned economy and the immaturity of the market economy in China, there are factors that keep the already limited Chinese domestic patents from turning into market use. Most important of these constraints is China’s underdeveloped venture capital system. I also demonstrate that because the majority of Chinese domestic

enterprises are not yet the main body of technological innovation, the domestic constituency for patent protection is still weak despite the calls from domestic and foreign IPR holders.

The Unfriendly Environment for Technological Innovation in China

Since the high returns of the high tech industry inevitably involve high risks, under a market economy high-tech firms have to rely on a sound financial market to raise funds to turn patents into market profits. However, the financial environment in China is still not so friendly for technological innovation. This section will discuss the immaturity of China's venture capital system, the key factor for the growth of China's high tech enterprises.

In the early 1980s, some Chinese scholars educated overseas called for Chinese top decision makers' to attend to the role of venture capital in the development of high tech industry.¹⁸⁵ In 1985, China New Technology Venture Capital Company, Inc. (*Zhongguo Xinjishu Chuangye Touzi Gongsi*, 中国新技术创业投资公司), the first venture capital company in China, was established in Beijing as part of a broader scheme of China's Science and Technology Reform.¹⁸⁶ In 1996, the Chinese National People's Congress adopted the Law on the Promotion of Transferring Scientific Research Products(促进科技成果转化法)¹⁸⁷, explicitly emphasizing the importance of venture

¹⁸⁵ The leading figure among these scholars was Cheng Siwei, formerly Vice Chair of Chinese National People's Congress. For his analysis of development of venture capital in China, see Cheng, S. 成. (2008). Cheng Siwei On Venture Capital in China(成思危论风险投资). Beijing, Chinese Renmin University Press.

¹⁸⁶ See, China Venture Capital Research Institute eds(2002): *China Venture Capital Yearbook*, ;

¹⁸⁷ Full text of this law is available on *Gazette of State Council of People's Republic of China(中华人民共和国国务院公报)*, Issue 16, 1996;

capital in transferring scientific invention and technological innovation by universities and research institutes into market profits. In 1998, headed by Cheng Siwei, one of the first Chinese scholars who studied business administration in the U.S. in the early 1980s, a group of Chinese scholars made the first proposal to the 9th Chinese People's Political Consultative Conference (CPPCC), China's top consultative body, to introduce a growth enterprise stock market for small and medium high tech enterprises in China. ¹⁸⁸This market was later popularly known in China as the "second board market", as opposed to the "main board market", mostly comprised of large and medium sized state owned enterprises. This proposal gained wide acclaim in the policy making and business circles in China and was later known as the "No. 1 Proposal in 1998".

The No. 1 Proposal in 1998 triggered the rapid development of venture capital companies in China. By the end of 1999, about 200 venture capital investment companies were set up in China, possessing a total 20 billion RMB of registered capital. In less than five years, the total registered capital of the Chinese domestic venture capital companies doubled to over 50 billion RMB (about 7 billion US Dollars) by the end of 2003.¹⁸⁹ At the same time, the rapidly growing Chinese market attracted the interests of overseas venture capital companies. Since China's entry into WTO in 2001, leading venture capital companies from such countries as the US, Japan, and Singapore started to forge closer working relationships with Chinese high tech companies. In 2006 China attracted venture

¹⁸⁸Xue, F. a. R. J. 薛. 任. (03/04/1998). No. 1 Proposal in 1998: Economy Holds Tight the Hand of Science and Technology, (政协一号提案: 经济握紧科技手). People's Daily P 3.

¹⁸⁹ See *Financial Times*(*金融时报*), 09/12/ 2005, P. A01;

capital amounting to 1.7 billion US dollars in total, second only to the US.¹⁹⁰

The rapid development of China's venture capital also comes with problems that cannot be ignored. In fact, these problems in significant ways handicap the transferring of patents into market profits and thus the further growth of Chinese high-tech companies. Specifically, compared with their counterparts in developed countries, the weaknesses of China's burgeoning venture capital exist in terms of both quantity and quality.

First, unlike developed countries such as the U.S. and Japan, whose venture capital enterprises emerged in the 1940s and 1970s respectively, Chinese domestic venture capital emerged only about 20 years ago. As of the early 21st century, the total volume of venture capital in the U.S. and Japan reached 50 billion and 15.4 billion US dollars respectively, bigger than the less than 10 billion US dollars in China.¹⁹¹ The relatively small size of Chinese venture capital can provide less economic support for Chinese start-up high tech enterprises than their counterparts in the developed countries.

Second, the challenges to China's burgeoning venture capital not only come from its relatively small size compared with developed countries, but from the way in which Chinese venture capital is managed. Different from a mature market economy, the majority of Chinese venture capital companies are backed by the government. As of 2003, 70% of Chinese domestic venture capital investment came from government-backed companies or government-backed banks. However, in developed countries during

¹⁹⁰ Wu, J. 吴. (08-24-2007). China Becomes the Second Largest Target Country to Venture Capital in the World (中国成为世界第二大风险投资目标国). Securities Times(证券时报): P. A04.

¹⁹¹ Ibid;

the same period, on average only 8% of venture capital investment were sponsored by government-backed companies.¹⁹² Although overseas venture capital companies demonstrate strong interests in the Chinese market, they cannot locate the right high tech companies as the target of their venture capital due to their unfamiliarity with the Chinese market. As such, a dilemma confronts Chinese high tech enterprises: foreign venture capital companies are well financed and well experienced with internationally popular investment mechanisms, but they do not understand the Chinese market very well; Chinese domestic venture capital companies are familiar with the Chinese market, but most of them still operate under the planned economy mentality. Therefore, a lot of truly innovative technologies have failed to be turned into long term profitable enterprises.

Last but not least, the legal system that supervises the use of venture capital in China is still weak. Unlike their counterparts in the developed countries, Chinese venture capital companies are still inexperienced in appraising the value of intellectual property, a form of intangible property. While in the U.S. there are 15 federal laws governing the operation of venture capital, the primary legislation governing venture capital operation in China, the Venture Capital Management Law, is still under discussion although scholars called for the adoption of this law almost a decade ago.¹⁹³ Due to the immaturity of the legal environment and the lack of experienced professional talents, Chinese venture capital companies either overestimate or underestimate the value of patents with

¹⁹² Gu, S. and Z. Qingfu (2003). "Constraints on Chinese Venture Capital and Strategic Measures to Deal with Them(中国风险投资制约因素及战略对策)." China Soft Science(中国软科学) (No.11): 6-12.

¹⁹³ For related media report, see Tian, Li(田): China Should Adopt its Own Venture Capital Management Law As Soon As Possible, Cheng Siwei Says(成思危: 《风险投资法》应该尽快制定, From People's Daily (Overseas Edition), 04/12/2003, Page 5;

which the start up high tech enterprises apply for the support of venture capital. In the former case, the venture capital companies invest more than necessary into the start up enterprises; in the latter case, the high-tech enterprises cannot get sufficient support from the venture capital companies. Both instances hinder the healthy development of China's domestic high tech enterprises. ((Cheng, Yunwei (程允渭) 08-14-2007))¹⁹⁴

As a result, although statistically Chinese high-tech projects report exponential growth of gross production, a significant proportion of the growth does not come from technology innovation. Instead of supporting the growth of small and medium sized high tech companies, a significant proportion of Chinese venture capital went to companies with strong government connections or even real estate enterprises, where the returns are higher and quicker. According to Zhang Huaben, a Deputy of Chinese People's Political Consultative Conference (CPPCC), in 2007 the small and medium sized high tech enterprises in China contributed 66% of invention patents and developed 82% of new products, but they only received 16% of bank loans supporting technological innovation.¹⁹⁵ Although accurate statistical data are not available to tell how much venture capital is wasted on projects unrelated to technological innovation, it is known by many that the above mentioned phenomenon has become the "hidden rule" of the practice by government officials and business people involved in China's high-tech

¹⁹⁴ Similar problems exist in other realms such as trademark, see, for example, Yu, Meng(于梦) (11-09-2007). Lack of Assessment Mechanism Constitutes the Bottleneck for Trademark Related Mortgage(评估体制成为商标抵押贷款瓶颈) . China Intellectual Property News (中国知识产权报). Beijing: P6.

¹⁹⁵Zhang, H. (03-15-2007). Breaking the Bottleneck of Private Enterprises Financial Difficulty is Vital to the Successful Implementation of Building an Innovative Country (解决中小企业融资难问题关乎创新国家战略的成败) Tuanjie Daily(团结报): Page 3.

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development projects. Chinese official media seldom covers this, but some bold journalists manage to bring the dark side of the story to light.¹⁹⁶

The weak support from the financial system is not the only constraint for the Chinese high tech enterprises to turn patents into practical application, but it is one of the key constraints for Chinese enterprises to innovate. Even China's top science and technology officials do not deny this phenomenon. According to Wan Gang, Minister of Science and Technology, Chinese enterprises are far from being the major proponents of innovation activities in the country.¹⁹⁷ Specifically, Wan Gang attributes the following factors to the situation under analysis: an unwieldy proportion of Chinese enterprises lack incentives to invest in innovation; research and development resources in research institutes and enterprises remain undermobilized; the efficiency of investment in science and technology development remains low; the integration between R&D and application for industrial use remains loose.

As the comment of a leading Chinese economist, Gu Shengzu, who also serves as a Standing Member of Chinese National People's Congress, goes, "Due to the high risk involved in the research and development process and the lack of support network to cushion the risks, many Chinese start up high tech enterprises cannot afford to innovate

¹⁹⁶ For a case study of how some of China's high-tech park projects get distorted, see Zhang, J. 张. and J. Jianbo(焦健波) (2007). "A Distorted High-Tech Park Project(走样的高新区) " Democracy and Rule of Law(民主与法制) (17): P.4-6.

¹⁹⁷ Wan made comments of similar content on several different occasions. One of the recent ones was made in his report to the National People's Congress Standing Committee on August 26, 2007. See, for example, Zhang, N. 张. (08-27-2007). Chinese Enterprises are not Yet the Major Proponents of the Country's Innovation Activities, Chinese Top Science and Technology Administrator Says(万钢: 中国企业还没有成为创新主体) . Science and Technology Daily(科技日报) .

and dare not innovate. If these problems remain unresolved, eventually the consequence is that they do not want to innovate.”¹⁹⁸

Business and Government Actors on the Stage of Patent in China: Who are the Winners? Who are the Losers?

In business competition, the patent is a very powerful weapon. It serves as both a shield and a spear: it serves the purpose of a shield in that a patent rewards and protects the result of technological innovation; it serves the purpose of a spear in that a patent helps to open new markets for the company’s products. In China’s business arena, different sets of business actors possess different levels of patent arsenal. They differ from each other not only in terms of the size of their patent arsenal, but also in terms of the strategy that they use their patent arsenal to compete. This in turn determines their different attitudes towards patents. Specifically, there are three sets of business actors on the stage: foreign companies investing in China, state-owned enterprises, and domestic private enterprises.

Foreign companies’ attitude towards patents is pretty straightforward. Most foreign companies investing in China originate from developed countries, whose economy has progressed from the industrial age to the information age. Therefore, intellectual property rights constitute the key aspect of their competitiveness. However, as the China branches of their parent companies, the major aspects of their R&D activities-i.e., the creation and application of IPR- happen outside China’s soil. Therefore, the most important aspects of IPR work for foreign companies in China are not the

¹⁹⁸ Zhang, X. 张. (03-11-2007). High Tech Enterprises Cannot Die of Lack of Financial Support(创新型企业不能死在缺钱上) . Science and Technology Daily(科技日报) . Beijing: Page 1.

creation and application of IPR. Instead, they mostly care about the protection of their IPR in China and eventually how they maximize their share in the Chinese market. Although foreign companies have to go through the same procedures to apply for patents as their Chinese counterparts, they are much more experienced in utilizing patents to maximize their market profits in China. Not surprisingly, their business activities arouse discontent among China's economic nationalists.

State-owned enterprises constitute the economic foundation of China's socialist system. Starting in the 1980s, China introduced a series of liberalization policies to the country's state owned enterprises. Under the liberalization policies, the majority of state owned enterprises turned into market entities. However, it remains a government policy that state-owned enterprises shall still control the life line of the Chinese economy.¹⁹⁹ Specifically, according to Li Rongrong, Director of Chinese State Commission of Management of State-owned Assets, state-owned enterprises shall assume "absolute control" over core realms related to the country's economic security. These realms include the production of military industry equipment, electricity supply, petrol and energy, telecommunication services, coal and metal mining, transportation, and machine building.²⁰⁰ Under this policy, the profits of state-owned enterprises stem more from their monopoly over certain industry rather than technological innovation. Therefore, the

¹⁹⁹ For a most recent official discussion of this policy, see State Commission of Management of State-Owned Assets (国有资产管理委员会), S. C. o. M. o. S.-O. (2007-2008). Guideline Opinion on the Promotion of Readjustment of Management of State-owned Assets and Reorganization of State owned Enterprises (关于推进国有资本调整和国有企业重组的指导意见) China Reform Yearbook(中国改革年鉴), . Beijing: PP525-528.

²⁰⁰ Xinhua News Agency, Interview with Li Rongrong, Dec. 18th, 2006. Full text of the interview can be accessed online at http://www.gov.cn/ztl/2006-12/18/content_472256.htm, last accessed July 30th, 2009;;

majority of Chinese state-owned enterprises are not interested in intellectual property rights. Among the top 10 Chinese domestic companies granted invention patents, only 1 of them (China Petroleum Co. Ltd) is state-owned. (See table below) According to Tian Lipu, Director of Chinese State Intellectual Property Office, as of 2005, 96% of Chinese state-owned enterprises have never applied for patents.²⁰¹ During my field work, a legal representative from a state-owned company even asked me why such an “insignificant” topic as intellectual property rights deserved the efforts to write a dissertation.²⁰²

Less straightforward is the attitude of domestic private companies. On one hand, China has nurtured a considerable number of private companies during the countries’ three decades of economic reform. As of 2006, there were 42 million private companies in China, accounting for 97% of Chinese domestic companies in total. Those 42 million private companies contribute about 60% of China’s GDP.²⁰³ Among the 42 million private companies, about 142,000 of them are start-up high tech enterprises. Out of the 103 “experimental innovative enterprises” designated by Chinese Ministry of Science and Technology, 77 of them were private enterprises.²⁰⁴ As discussed earlier, the private high tech enterprises are the most responsive actors to market forces and actively engage in innovation activities. As indicated by table 5 below, 9 out of the top 10

²⁰¹ Tian Lipu’ Speech on the 2006 Working Conference of Directors of Provincial Intellectual Property Offices, 03-22-2006. Full text available online at http://www.sipo.gov.cn/sipo2008/ztzl/ndcs/qgzh/2006/200804/t20080411_373058.html, last accessed August 20, 2009;

²⁰² (Aborted) interview with a state-owned enterprise employee, 08/31/2007, Anhui;

²⁰³ China Statistics Yearbook, 2006;

²⁰⁴ General Office of Ministry of Science and Technology(科技部办公厅), (2005). Statistical Data of Science and Technology Activities of Private Enterprises in 2004,(2004年民营科技企业活动统计结果) . China Small and Medium Sized Companies Development Yearbook 2004(中国中小企业发展年鉴), : PP351-353.

domestic companies granted invention patents in 2008 are private high tech companies. These companies are quickly catching up with their foreign counterparts and become increasingly important and skillful players on the patent arena.

Table 4. 5 Top 10 Chinese Domestic Companies Granted Invention Patents in 2008

	Company name	Number of Invention Patents
1	Huawei Technology Co. Ltd	2851
2	Youda Technology Co. Ltd(Shenzhen)	695
3	Lejin Electotronics Co. Ltd.(Tianjin)	669
4	Hongfujin Precision Machinery Co. Ltd. (Shenzhen)	578
5	Zhongxin Communication Co. Ltd	451
6	China Petroleum Co. Ltd.	376
7	Lejin China Co. Ltd	336
8	Weisheng Electronics Co. Ltd	288
9	TMC(China) Co. Ltd.	261
10	Yingyeda Co. Ltd.	210

Source: State Intellectual Property Office Statistical Bulletin

(国家知识产权局专利统计简报), No. 3, 2009, 02-25-2009

However, the above discussed elite private companies are only the minority of Chinese private companies. The majority of Chinese private companies still rely on cheap labor, low wage, and heavy input of natural resources rather than innovation as the core component of their competitiveness. It is unfair to say that they are ignorant of the importance of patents, but heavy investment into R&D and skillful application of patents in business competition are still a luxury for many private enterprises in the early stage of their development. In 2007, the Chinese private enterprises only accounted for 8 percent of the country's total investment in research and development, with the majority of research and development funds channeled to the state-owned enterprises. Therefore, the Chinese private enterprises' innovation activity is haunted by an embarrassing dilemma: as the most responsive actors to market needs, they have the incentives to innovate, but

they do not have sufficient financial aid from the state and have to rely on themselves to engage in research and development projects. The Chinese state-owned enterprises worry much less about the funding for innovation, but they are not as enthusiastic about innovation. Due to the lack of a transparent supervision system, much of the state subsidy for innovation channeled to the state-owned enterprises was wasted.²⁰⁵ Although the incentives for the Chinese private enterprises to engage in innovation activities are predominantly economic, they have to face the harsh reality that they are more politically inferior than their state-owned counterparts.

There has not yet been any nationwide survey of Chinese private companies' attitudes towards IPR. However, some regional level data can tell the story: according to an investigation done by East China's Nanjing Customs House, Jiangsu Province in 2005, out of the 200 private export oriented enterprises under examination, only 26 of them regard IPR as very important to their competitiveness, 17 of them establish a special department to deal with IPR disputes arising during their business activities.²⁰⁶ In 2007, out of 190,000 manufacturing enterprises in East China's Zhejiang Province, only 6% of the elite private enterprises have been granted invention patents.²⁰⁷ Enterprises in both Jiangsu and Zhejiang, two affluent coastal provinces, are important engines for China's export machine. The level of IPR awareness in these two provinces is a useful prism for

²⁰⁵ For a most recent discussion on how the research funds are wasted under the Chinese science and technology system, see Shi, Y. and Y. Rao (September 2010). "China's Research Culture." Science **329**(No. 5996): Page 1128.

²⁰⁶ Chen, Y. and. Wu. D. 陈. 吴. (04-27-2005). Why Are Many Export Business Giants at the same time Dwarf in IPR Awareness(为何进出口大户多为知识产权矮子 “) . Jiangsu Legal Daily(江苏法制报): Page 1.;

²⁰⁷ Zhong, H. 钟. (05-27-2007). Level of Patent Awareness Very Low among Zhejiang' s Private Enterprises(浙江民企专利意识淡薄). Wenhui Daily(文汇报): P12.;

understanding the nationwide situation.

Foreign companies complain that they fall victim to IPR infringement, often done by Chinese private companies. However, in the long run, the Chinese private companies are not winners, either. Due to an unfriendly environment for innovation discussed earlier, many Chinese private enterprises lack their own patents and are content with imitating the others. That stifles their creativity. In the short term, they may grow quickly in both company size and market share by copying the others, but they also bring attention from their competitors. When their competitors deem those private companies' growth as hurting their interests, a patent law suit will be brought forth.²⁰⁸ Due to their weaker position in the competition, the Chinese private enterprises are often at a disadvantage in the lawsuits. Some of them are totally unprepared and even do not know the seriousness of the problem until a lawsuit is brought against them.²⁰⁹ When they lose the patent lawsuits, they have to pay a high patent fee to the winning side. More importantly, their creativity gets rusty by relying on the duplication of others' technology and they lose the room for the companies' further growth.

During the current transitional period of Chinese economy, a lot of private enterprises reap business benefits from their innovation efforts and earnestly seek to bring the violators of their IPR to justice when their interests are hurt by IPR infringement; at the same time, however, they more or less depend on copying their more technologically advanced counterparts during the early stage. As the comment of an IPR attorney goes,

²⁰⁸ See, for example, Hui(李启章, 吴辉), Li. Q.and H. Wu. (2005). "Chinese Companies' Painful Experience of Living with Patents: Analysis of Several Representative Patent Disputes(中国企业的专利化生存-对部分专利纠纷典型案例的分析)." Intellectual Property Rights(知识产权) (Issue90): PP40-45;

²⁰⁹ Interview with an IPR official, Nanjing, Jiangsu, 04/29/2008;

“Be it foreign companies, state-owned companies, or private companies; be it established business monster or start up imps, everybody claims to be losers in the IPR game to win sympathy, but nobody in China can claim their hands to be completely clean on the issue of IPR. They can be winners on some occasion, but they are losers under other circumstances.”²¹⁰ Therefore, many Chinese private companies adopt an ambivalent attitude towards IPR: they love it because they have more or less benefited from technological innovation; they hate it not only because of the heavy cost involved in technological innovation, but also because their disadvantageous position in IPR competition compared with their foreign counterparts.

As such, according to an IPR official in Shanghai, the Chinese government is often sandwiched between the criticism from both foreign and domestic IPR holders. Both foreign and domestic IPR holders are dissatisfied with them: as expected, foreign IPR holders complain that Chinese bureaucracies only provide lip service to them and do not offer enough protection of their IPR. Domestic IPR holders complain that Chinese IPR bureaucracy ends up protecting foreign IPR holders’ interests more than the interests of Chinese domestic business. As a Chinese domestic IPR holder’s comment goes: “In theory, we receive equal IPR protection from the Chinese government as our foreign counterparts. However, we are much later comers to the race. Are we really equal players on the stage?”²¹¹

As discussed earlier, the Chinese government does not protect intellectual property rights for their own sake. Rather, the Chinese government’s ultimate goal of IPR

²¹⁰ Interview with an IPR attorney, Beijing, 09/27/2007;

²¹¹ Interview with a Chinese IPR holder, 07/16/2007;

work is to build up its own IPR industry. IPR protection is not an end in itself. This is evident from the comment made by Tian Lipu, Director of Chinese State Intellectual Property Office, after the adoption of 2008 Intellectual Property Rights Work Guideline. During an interview with *Beijing Review*, a government run magazine published in English, Tian said, “The 2008 Outline is more than IPR protection. *More importantly, it emphasizes IPR creation, which is to encourage innovation, invention, and creativity throughout the country.*”²¹²(Emphasis added by the author)

However, one of the most important obstacles on the Chinese government’s IPR policy agenda is the weak support from the country’s domestic business constituency. As analyzed earlier, the obstacles originate in large part from the country’s political and economic system: how can one expect a country’s societal actors to be innovative if the country’s political system does not encourage or even stifles individual creativity?

The building of an innovative country requires bold and sometimes painful reforms, if not a thorough overhaul, of China’s political and economic system. The overhaul is so thorough that some of the very basic foundations of China’s communist system will be inevitably touched upon. According to a senior official, who was a prestigious scientist in China before joining government service, the insightful people among the country’s decision making circle are already aware of that, but so far none of them is bold enough to lay out concrete steps to carry out these reforms- because they are

²¹² As quoted in Li, L. (2009). "Intellectual Property Gets A Boost: China Turns IPR Protection Into a National Strategy for Economic Growth." *Beijing Review* 52(17): Full text available online at http://www.bjreview.com/print/txt/2009-2004/2028/content_193094.htm. Last accessed June 29, 2009;

also aware that these reforms will become part of a fundamental social change in China that is likely to endanger the rule of the Community Party.²¹³

Conclusion

In his multi volume *Science and Technology in Ancient China*, Joseph Needham raises a thought-provoking question later called the Needham Question: Given China's economic, military and technical head start in ancient times, why did modern science and technology originate from Europe, not China? Why did China fall behind in the modern era?²¹⁴ During my field work the so-called Needham Question was frequently raised by my interviewees. Also frequently raised was another question related to the one raised by Needham: can China catch up? Or how should China act if the country wants to catch up? In fact, this question has been raised, discussed and debated by generations of Chinese political and intellectual elites from the late 19th century, when China was forced to open its door by the Western colonial powers, up to the early 21st century. From the late 19th century on, Chinese elites have appealed to strengthen the country by learning from the advanced science and technology of the Western countries.²¹⁵ However, the following questions have plagued and will continue to plague generations of Chinese elites: can science and technology as part of the Western means (*ti*) be transplanted to the Chinese body (*yong*) without changing the latter? If the Chinese body(*Zhongti*) wants to remain

²¹³ Interview, Beijing, 11/22/2007;

²¹⁴ For a preliminary discussion of the Needham paradox, see, for example, Needham, J., and S. I. Habib, et al. (1999). Situating the history of science : dialogues with Joseph Needham. New Delhi ; New York Oxford University Press

²¹⁵ A representative work by Chinese political elite on the relationship between Chinese body(*Zhongti*中体) and Western Means(*Xiyong*西用) in the late 19th century is Zhang, Z. (1900). China' s only hope : an appeal(劝学篇). New York, Revell Books.

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unchanged, is it possible for the Western means(*xiyong*) to be successfully transplanted? Is it possible for a hybrid model between the Chinese body (*zhongti*) and Western means(*xiyong*) to be achieved? What is this hybrid model going to be like? Thus far, nobody provides a satisfactory answer.

It is certainly not the task of this chapter to answer such an enormous question. In fact, in the early 1920s, the first generation of Chinese Communists had realized that in order for “Mr. Science” to take roots in China, “Mr. Democracy” would have to come together.²¹⁶ However, 90 years after this theme was raised and 60 years after the Communist Party took over China, nowadays “Mr. Science” and “Mr. Democracy” are still struggling on the Chinese soil. In that sense, China’s disputes with the Western countries over patent affairs are going to continue well into the future- because these disputes are not over the issue of patents, *per se*; it is part of China’s own zigzag journey to seek a development model that suits itself and the need to coexist well with the rest of the world.

Chapter 5. Power, Ideology and Economic Interests:

²¹⁶ Studies on China’s enlightenment movement in early 1920s are too abundant to name, for a representative analysis, see Shwarca, V. (1990). The Chinese Enlightenment: Intellectuals and the Legacy of the May Fourth Movement of 1919. Ann Arbor, University of Michigan Press.

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The Operation of Copyright Policy in China

Introduction : Unexpected Finding with a Copyright Official

During my field work in Beijing in 2007, I planned to ask a copyright official at the Cultural Market Management Office of the Chinese Ministry of Culture (MOC) about the reasons for the rampancy of copyright infringement activities in China. Since that official worked for a primary organ responsible for conducting anti-piracy raids, I thought that he was probably the best source of information for me. To my surprise, he suggested that it is not a good idea to only interview him for a complete understanding of Chinese copyright policy. Instead, I should begin with the officials from the neighboring divisions in the MOC, in particular the Cultural and Copyright Industries Division, the primary organ overseeing the industries depending on copyright as their core competitiveness such as publishing industry and entertainment industry. However, my interview with the officials at the Cultural and Copyright Industries Division led to another surprise. The officials there suggested that, even before I conduct the research with the officials in the MOC, I should first interview officials from the Chinese Communist Party Central Propaganda Department, which seemed to be unrelated to Chinese copyright policy, in order for a full comprehension of Chinese copyright policy.

The logic behind that copyright official's suggestion was clear: although anti-piracy campaigns are the most salient part of Chinese copyright policy, it is the development of cultural and copyright industries that constitutes the foundation of China's cultural market, where cultural products such as books and movies are traded for profits; without a thorough understanding of how the cultural market operates, it is hard

to comprehend the working of cultural market management activities such as anti-piracy campaigns. Moreover, while it is important to interview the MOC officials to know the operation of Chinese copyright policy, both the anti-piracy campaign and the development of copyright industry fall under the guidance of Chinese propaganda policy. That official's suggestion exposed to me a lesser known aspect of Chinese copyright policy. That is, instead of being treated in an isolated manner, Chinese copyright policy should be understood as growing from the general body of Chinese ideology and propaganda work. In his words, "in order to understand how the child grows up in a specific way, you should first know how the parents raise the child."²¹⁷

Several months before I interviewed those Chinese copyright officials, the U.S. brought China to the WTO dispute settlement body, requesting consultation on four major matters of the latter's IPR policy.²¹⁸ A key aspect of the complaint was that under the Chinese copyright legislation copyright works that are prohibited to circulate does not enjoy the minimum standards of protection specially granted by the Universal Copyright Convention, also known as the Berne Convention in respect of those works.²¹⁹

The China-U.S. IPR dispute in 2007 reinforced the Chinese copyright official's claim that the implementation of Chinese copyright policy is not only impacted by the economic and legal factors, but also heavily impacted by the country's ideology and

²¹⁷ Interview with a copyright official, Beijing, 12/06/2007;

²¹⁸ See, for example, Bill Savadove, *US and China teeter on edge of trade war; Clash over intellectual property rights and limits on market access loom, say analysts*, from *South China Morning Post*, 04/11/2007, Page 4;

²¹⁹ In January 2009, the WTO ruled that China lost the dispute. For further information about the WTO ruling over the U.S.-China IPR disputes in 2007, see the WTO Dispute Settlement Body (DSB) report No. WT/DS362/R, available online at http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS362%FCR%2A+and+not+RW%2A%29&language=1, last accessed 05/16/2011;

propaganda policy. In this chapter, I argue that, in implementing Chinese copyright policy, the Chinese government holds multiple policy goals on its agenda: maintaining ideological order, pursuing commercial benefits, and protecting copyright. Despite the reform of China's ideology and propaganda system, the Chinese government's top priority remains maintaining order in the ideological realm, promoting information that the Party deems right and cracking down on information that the Party believes to be wrong. When necessary, it can override the other two goals. Those constraints slow down the development of the already weak Chinese domestic copyright industry, which rely on copyright as their core competitiveness, in particular, the publishing industry, which include books, magazines, and newspapers, and the entertainment industry, which includes movie, music, TV and radio.²²⁰

Therefore, the Chinese copyright industry does not realize its full potential to contribute to China's economic development. As such, a vicious chain comes into shape: out-of-date ideological and cultural policy hinders the growth of the copyright industry; underdevelopment of the Chinese copyright industry results in low level of sympathy for IPR among Chinese mass consumers; Chinese consumer's low level of sympathy for IPR in turn adds the difficulty to protect copyright.

I also demonstrate that rather than corporate actors, the players on the stage of Chinese copyright policy should also include the Chinese public, many of whom are either the sellers or the consumers of pirated goods. All the actors in Chinese copyright policy, from copyright officials, to domestic and foreign copyright business community,

²²⁰ Although the software industry is generally regarded as part of copyright industry, it will not be emphasized in the analysis of this chapter as most software copyright is related to industrial use rather than literature and artistic creation.

to street peddlers and mass consumers, have their own roles in influencing the operation of China's copyright policy. Other than cheap price, pirated copyright products also enjoy a more flexible distribution system than legal ones, which makes them better able to meet the demands of Chinese consumers. Interestingly, if not ironically, the Chinese propaganda state's over-rigid control of the copyright industry creates space for the growth of underground market of illegal copyright products.

The first section of this chapter discusses the reform of the Chinese propaganda state since the late 1970s to provide a policy backdrop for the development of the Chinese copyright industry. The second section discusses the achievements and weaknesses of the Chinese copyright industry in recent decades. The third section examines the functioning of underground market in which pirated copyright products are produced and distributed and its relationship with the legal market for copyright products. I conclude by situating this chapter within the larger scenario of the entire dissertation project, arguing that China's partial compliance with the international copyright norms in an important way reflects the coexistence between a burgeoning market economy and one of the world's few existing communist political systems.

Reforming the Chinese Propaganda System:

The Policy Backdrop of Chinese Copyright Industry

In this section, I argue that the introduction of market mechanisms has significantly shaped the reform of the Chinese propaganda policy in the past three decades. However, after three decades of market reform, ideology from the old times still

maintains its influence on the operation of Chinese cultural affairs, which constitutes a major hindrance for the further growth of Chinese copyright industry.

The Chinese Propaganda Policy during the Pre-reform Period

As one of the most important functional organs of the Chinese Communist Party, the Propaganda Department weathered years of reform and continued to exert its influence in the early 21st century. During its more than 60 years of existence since 1949, the basic missions of the Propaganda Department's remain unchanged despite the challenges posed by economic reform: the first aspect is to disseminate and ingrain information that the Party deems right; the second aspect is to crack down on information that the Party believes to be wrong and prevent it from reaching the populace.²²¹

Although no country can claim that their cultural realm is completely free from government influence, during the post-Cold War era China is one of the very few remaining communist countries where the government firmly and directly controls the country's ideological realm.

The organizing principle of the Chinese propaganda system mirrors that of the Soviet Union.²²² The primary responsibility of the Chinese Central Propaganda Department is to oversee the production and transmission of ideas in China and steer it on the track that the Communist Party deems appropriate. Before China introduced economic reform in 1978, China's propaganda system was administered in a hierarchical

²²¹ For a most recent elaboration of Chinese leadership's thinking on propaganda work, see Chinese President, Hu Jintao's speech on the 2009 National Propaganda and Thought Work Conference, 01/22/2009, available online at <http://www.hcwang.cn/sub/09kxfzg/2009-04-02/160704074712.shtml>, last accessed 10/17/2009;

²²² For a discussion of the Soviet propaganda state, see Kenez 1985 Kenez, P. (1985). The Birth of the Propaganda state : Soviet Methods of Mass Mobilization, 1917-1929. Cambridge, New York, Cambridge University Press.

way, with societal actors totally excluded from its operation. The production of cultural products was organized in a planned economy manner. The Communist Party determined the leading personnel of the cultural units and decided the content of what was published and broadcasted. Instead of being treated as independent market entities, cultural institutions were accessories to different layers of government branches. Instead of marketing their cultural products such as movies, plays, and literature works for economic gains, Chinese cultural institutions relied on subsidies from the government to survive. Instead of being treated as an independent social class, writers, journalists, movie and TV program makers were “state cadres” receiving monthly salary from the government payroll. Expression of any unorthodox thoughts would invite harsh retribution from the government.

Such policy stifled the development of Chinese copyright industry. During the peak time of hard-line Communist ideology in the late 1960s and early 1970s, the entire cinema system in China was only allowed to perform eight “revolutionary exemplary movies”(yangbanxi) endorsed by Mao Zedong’s wife, Jiang Qing, who was then a Party Politburo member responsible for ideological work.²²³ Not only were producers of cultural products such as writers, actors, and movie-makers deprived of the freedom to create literature and artistic works at their own right, but the Chinese audience was forced to accept whatever cultural products that the Party state supplied. When market reform

²²³ For a collection of Jiang Qing’s speeches on ideological work, see Comrade Jiang Qing on Literature and Artistic Work (江青同志论文艺), Reprinted by Center for Chinese Research Materials, Association of Research Libraries, [1975]; For a narrative of leftist ideology’s influence on pre-reform Chinese literature and artistic works production by a Mainland China-based scholar, see Chen, T. 陈. (2003). Does the Heaven Known Human Beings' Sicknesses: Narrative of Post 1949 Chinese Literature and Artistic Circle(人有病，天知否：1949年后中国文坛纪实). Beijing, People's Literature Press(人民文学出版社).

started in China in 1978, throughout the country there were 125 radio and TV stations, 105 publishing houses publishing 14,987 titles, 930 periodicals, 186 newspapers. There is no accurate statistical data about Chinese movie production in 1978. However, in 1979 throughout China there were only 11 movie studios producing 52 movies.²²⁴ For a country of 1 billion people, such a low level of cultural production fell far short of meeting the needs of the Chinese people's cultural life.

The rigid control of the Chinese propaganda system did not start to be eroded until the introduction of market reform in the late 1970s. As will be discussed in the subsequent section, the competition between the efforts to introduce market mechanism and the adherence to the orthodox communist ideology has been an important thread flowing through the entire process of reforming the Chinese propaganda policy. The attempt to control the production of literature and artistic goods remains strong despite years of market reform. Chinese government's control over the production and distribution of copyright goods is a major hindrance to the healthy development of Chinese copyright industry.

Reforming the Chinese Propaganda State: 1978 to 2009

When China started its market reform in 1978, economic liberalization created some cracks in the fortress of the Chinese propaganda system. Those cracks developed into bigger trends of liberalization as the country moved along the path of institutional reform. During the past three decades, the Chinese propaganda system went through three major phases of reform: the period of early development (1978-1992); the period of

²²⁴ The data are drawn from China Statistical Yearbook,(2002) , China Radio and TV Yearbook (1984, 1998), and the website of Chinese State Bureau of Statistics:

further development (1992-2000), and the period of deepening reform (2001 to present). The reform of the Chinese propaganda system constitutes the policy backdrop of the development of Chinese copyright industry.

Phase I (1978-1992): Warm Face vs. Cold Feet

According to a Beijing-based scholar on the Chinese publishing industry, the early development period (1978-1992) can be described as a “warm face at the local level got stuck onto senior leader’s cold feet, eventually the cold feet became warmer.”²²⁵ Unlike the reforms introduced in economic sectors such as agriculture and industry, reform in the Chinese propaganda policy did not become a full fledged reform project until the early 1990s. In the realm of cultural affairs, reform at the early stage started with some policy changes by grassroots practitioners. In 1978, managers of the Chinese Communist Party-run newspaper, *People’s Daily*, and seven other Beijing-based newspapers asked for the government’s permission to be turned into “administrative units with enterprise management”(shiyew danwei, qiye guanli).²²⁶ On Dec. 30th, 1979, state-owned Chinese Central Television (CCTV) started to accept application for broadcasting commercial advertisement for foreign companies investing in China.²²⁷ In March 1980, the first music café in mainland China started its operation in the Oriental Hotel in the city of Guangzhou, the capital of South China’s Guangdong Province.²²⁸ In September

²²⁵ Interview with an IPR scholar, Beijing, 12/01/2007;

²²⁶ Tu 1999 Tu, Z. 屠. (1999). Management of Newspaper In Contemporary China(当代报业经营管理). Wuhan, Central China Polytechnic University(华中理工大学出版社) . P 29;

²²⁷ *People’s Daily*, 12-31-1979, P.3;

²²⁸ Hao, J. 郝. (09-28-2009). Chinese Cultural Industries in the Past 60

Years:(文化产业60年:回望崛起之路) . Xinhua News Agency. http://news.xinhuanet.com/politics/2009-09/28/content_12119502.htm, last accessed 10/11/2009.

1980, Zhao Dan, one of China's leading movie actors, drafted an article entitled *Literature and Artistic Work Will Turn Hopeless If Too Tightly Controlled* (*Guande Taijuti, Wenyi Meixiwang*), sharply criticizing the Chinese government's rigid grip on movie production. After Zhao Dan died of cancer one month later, his article was released to the public, igniting hot discussion over the prospect of reforming Chinese ideological and propaganda policy, which had long been a taboo in Chinese politics. The fact that Zhao Dan had been a supporter of the Chinese Communist Party since the 1930s made his article even more important among China's literary and artistic elites.²²⁹

However, enthusiasm at the grassroots level failed to reverberate at the level of China's top political leaders at that time. In response to grassroots calls for loosening the Party's grip over cultural affairs, Deng Liqun, then Director of Central Propaganda Department, insisted that literature and artistic work should be guided by Communist thoughts.²³⁰ He launched an "anti-spiritual pollution campaign" in the early 1980s to fight against what he deemed "bourgeois thoughts" in China's literature and artistic circle.²³¹ Even reformists in China's top decision-making circle considered cultural reform as a lesser priority and preferred to focus on economic affairs instead. At some point, Deng Xiaoping, the initiator of China's economic reform, even supported the "anti-spiritual pollution campaign". According to him, "We do not emphasize that literature and artistic work should follow political needs as strongly as the past. However, that does not mean

²²⁹ Zhao Dan's article can be accessed online at <http://www.ilf.cn/Mate/3932.html>, last accessed 10/10/2009;

²³⁰ People's Daily, 04/18/1982, P. 4;

²³¹ People's Daily, 09/25/1983, P. 1;

literature and artistic work can be really separated from politics. In fact, it should serve the needs of the people and the Party.”²³²

The mixture between “warm face” at the local level and “cold feet” at the top level made the early efforts to reform the Chinese propaganda policy a lukewarm endeavor. On one hand, the government’s control on China’s cultural life was so stringent that in some cities even dancing ballrooms were closed down at Chinese government’s request.²³³ On the other hand, cultural activities outside the official reign organized by the Chinese masses developed like wild fire: quenched in one place, it would flame in many other places beyond the government’s reach. The government simply could not hold their grip on all the cultural activities.²³⁴

Eventually, Chinese senior leaders had to face the reality. In January 1988, Chinese Minister of Culture, Wang Meng, agreed that reform of the Chinese cultural sector was inevitable.²³⁵ Later that year, the Ministry of Culture (MOC) and the Administration for Industry and Commerce (AIC) jointly issued the *Notice on Improving the Management of Cultural Market*. That document was the first one issued by central-level government branches, explicitly discussing the notion of “cultural market” in an official document.²³⁶ In August 1988, literature and artistic elites from more than 20 provinces in China convened the first nationwide symposium on developing the cultural

²³² Deng Xiaoping, *Selected Works of Deng Xiaoping*, Vol. 2, P 255-256;

²³³ See, for example, Gu 01/25/1988 Gu, T. (01-25-1988 ;). Closing Down Dancing Ballrooms and Closing Cultural Life(封闭舞厅与封闭文化)*People’s Daily* : P. 8.

²³⁴ Interview with a former cultural affairs official, Hefei, Anhui, 06/29/2007;

²³⁵ *Wang Meng on Culture and Artistic Work in the New Year*, *People’s Daily*, 01/01/1988, P. 2;

²³⁶ Full text of this notice can be accessed online at http://www.law-lib.com/law/law_view.asp?id=48020, last accessed 10/17/2009;

industry.²³⁷ In November 1988, Vice Minister of Culture, Gao Zhanxiang, published an article entitled *Some Thoughts on Establishing Management Framework of Our Cultural Industry* in government-run *China Cultural News*(中国文化报), calling for the introduction of market mechanism into the management of cultural affairs and discarding the planned economy model.²³⁸

Those bold moves came to a stop after the 1989 crackdown of the Tiananmen Democracy Movement. After the crackdown, reform-minded senior officials were purged from the decision-making circle. As one of the advocates of Chinese cultural reform, Wang Meng, the former Minister of Culture, resigned due to “health reasons” three months after the Tiananmen incident.²³⁹ At the local level, many journalists and press editors either were dismissed from their positions or even immigrated overseas to flee from the painful “self-examination under the Party principle.” The newly appointed Minister of Culture, He Jingzhi, accused members of the literature and artistic circles as “being heavily affected by bourgeois liberalization thoughts” and reiterated that literature and artistic work should be the “mouthpiece of the Party and the people.”²⁴⁰ The reform introduced to the Chinese propaganda policy came to a temporary halt.

Phase II (1992-2000): Co-opting Market Forces under the Authoritarian Political System

The revival of China’s cultural reform came after Deng Xiaoping’s visit to the Southern Provinces of Hubei, Shanghai, and Guangdong in the spring of 1992. During

²³⁷ Liao Wang Journal Reporting Team: A Comprehensive Discussion on Managing the Cultural Market(文化市场理论研究综述), from Liao Wang Journal(瞭望周刊), No.38, 1988, PP 21-23;

²³⁸ Gao’s article was published in two parts on the Nov. 2nd and Nov. 6th issues of China Cultural News.

²³⁹ People’s Daily, 09/05/1989, P. 1;

²⁴⁰ For part of He Jingzhi’s speech, see, for example, Xinhua News Agency, Symposium on Deng Xiaoping’s Thoughts on Literature and Artistic Work, People’s Daily, 12/23/1989, P 1;

the visit, Deng called for acceleration of reform and opening.²⁴¹ Following Deng's call, in June 1992, the Chinese State Council issued *Decision on Accelerating the Development of Tertiary Industry*. In that Decision, the development of cultural industry was once again mentioned.²⁴² State Council Secretary General, Luo Gan, edited a book entitled *A Significant Strategic Move (zhongda de zhanlue juece)* one month later. (Luo 1992) In that book, policy consultants with the Chinese State Council further proposed to revive cultural reform in China. That proposal was widely believed to be the sign of restarting cultural reform in China. In fact, this time the revival happened at a higher level: from the ministerial level in the 1980s to the State Council level in the early 1990s.

Compared with the 1980s, the most significant breakthrough in cultural reform of the 1990s was that market mechanisms eventually received legitimacy in Chinese government discourse, with cultural products recognized as commodities. That breakthrough touched upon some deeper level issues of China's cultural affairs management system.

First, cultural products such as books, movies, and TV programs were recognized as a "special kind of commodity". Not only were they regarded as tools to convey political ideology to the Chinese people, as they have been in the past, but they were also recognized as economic products that can be marketed for economic gains. There had been discussion of commodifying cultural products in the 1980s, but it was not

²⁴¹ See, for example, Chen 1992 Chen, X. 陈. (1992). "When East Wind Breezes, Spring Comes- Comrade Deng Xiaoping's Visit to Shenzhen(东方风来满眼春-邓小平同志在深圳纪实)." last accessed 10/19/2009;;

²⁴² Full text of this decision is available on People's Daily 06/30/1992, P.1;

until early 1990s that the idea gained official recognition from China's senior cultural officials.²⁴³

Second, cultural production units such as publishing houses, TV and radio stations, and movie studios were recognized as market entities. In 1992, for the first time, a senior official from the Chinese General Administration for Press and Publication (GAPP) formally admitted that newspaper organizations should be recognized as enterprises. GAPP further urged the majority of Chinese newspapers, except several central-level Party newspapers, to be transformed into financially independent market entities by 1994.²⁴⁴ In the following months, Chinese senior cultural officials made similar appeals to transform most other sectors of Chinese propaganda, such as movie studios, TV stations, and performing arts troupes into market entities.²⁴⁵ In 1995, several major media and cultural industry units in Shanghai were merged into Shanghai TV and Movie Group Inc. (*Shanghai Yingshijituan*) and New Century Publishing Group Inc. (*Xinshiji Chubanjituan*). In 1999 the first Newspaper Group in Mainland China,

²⁴³ For a narrative of how the Chinese senior cultural officials came to terms on this issue, see Yuan, L. 袁. (1999). "The Process for Books to be Recognized as Commodity and Its Impact(图书确定是商品的过程与作用)." *China Publishing (中国出版)* **No.1**(1999): 59-61.

²⁴⁴ See Liang 1992 Liang, H. 梁. (1992). "Managing Newspaper under Socialist Market Economy (社会主义市场经济条件下的报纸管理)." *China Journalists(中国记者)* **No.12**: 5-6. and Liu (2003), PP 27-29 for the reform of Chinese newspaper management system.

²⁴⁵ For speeches by related Chinese senior officials, see Liu 1993, 1994 Liu, Z. 刘. (1993). "Quicken the Step of Reform, Make Our Movie Industry Prosper(加快改革步伐, 繁荣电影事业)." *Chinese Movie(电影)* (2): 4-6. , Liu, Z. 刘. (1994). "The Emphasis of Cultural Reform in 1994 Will be Laid on the Management of Performing Arts Troupes(今年文化体制将作重大改革 艺术表演团体是改革的重中之重)." *China Theatre*(No.2): P19.; Zhong 1993 Zhong, C. 仲. (1993). "A Philosophical Thinking on Certain Trends in TV and Movie Production(对当前影视创作一种思潮的哲学思考——学习党的十四大政治报告的体会)." *China Television(中国电视)* (No.1): 32-34. Also see, Song (2007) pp393-399 Upgrade Our Publishing Industry to a New Stage Under the Spirit of Chinese Communist Party 14th National Congress(在十四大精神指引下, 把我国出版业推向一个新的发展阶段)

Guangzhou Newspaper Group Inc.(*Guangzhou Baoyejituan*), was established in southern China's Guangdong Province. In 2000, several leading performing arts troupes in Jiangsu Province were merged into Jiangsu Performing Arts Group Inc. (*Jiangsu Yanyi Jituan*).²⁴⁶

Based on those reform measures, the Chinese media and cultural industry experienced dramatic growth in the 1990s: as of 1999, the advertisement revenue of magazines in China reached 890 million RMB(approximately \$ 115 million U.S.), more than 10 times of that in 1990 , which was 86.8 Million RMB (approximately \$15 Million U.S.); as of 2000, Chinese newspaper's advertisement revenue reached 11,230.1 million RMB(approximately \$ 1.3 trillion U.S.), almost 20 times of that in 1990 (677.1 million RMB or approximately \$ 85 Million U.S.). The most rapid growth was in TV/Radio Sector: in 2000 advertisement revenue of Chinese TV/radio stations reached 18.3 billion RMB (about \$ 2.4 million U.S.), more than 30 times of what it was in 1990 (647 million RMB or \$ 80 million U.S.)²⁴⁷

However, there was still plenty of room for further reform during this period of reform. Although market mechanisms were introduced into the operation of Chinese cultural and media industry, private and foreign capital was still kept out of the reforms discussed above until the mid-1990s. In the Chinese publishing industry, for example,

²⁴⁶ Details of these reforms can be found in Fu, C. 傅. and Danna, Song (宋丹娜) (2004). "Origin and Evolution of Chinese Cultural System Reform (我国文化体制的缘起、演进和改革对策)." Journal of Jiangnan University(江汉大学学报) **21**(No.2): PP83-89.

²⁴⁷ China Advertisement Yearbook (1999-2002)

although private book merchants started to emerge in late 1980s,²⁴⁸ they were not allowed to apply for publishing licenses from the General Administration of Press and Publication(GAPP). In fact, GAPP designed rigorous criteria for approving a license to a publishing company. Under those criteria, only specific kinds of state-owned presses could meet those criteria. Therefore, a dilemma came into shape: private copyright owners were much more responsive to market needs, but the government did not allow them to operate; state-sponsored copyright owners had the permission from the government, but they remained docile accessories to the Chinese government and were very awkward in responding to market needs.

Additionally, the government's grip over the production and distribution of cultural products remained strong although much looser compared with the 1980s. In the words of a Shanghai-based IPR scholar, in the 1990s there was no government-organized "anti-spiritual pollution campaign", but the government's "iron fist was wrapped with a layer of gentle velvet".²⁴⁹ While market mechanisms were introduced to the Chinese cultural system in the 1990s, at the same time the government updated its censorship mechanism, already existing in the late 1980s.²⁵⁰ Under that censorship mechanism, many movies or books containing politically controversial content were either banned or forced to make major revisions before being distributed to the audience despite Chinese

²⁴⁸ See, for example, Wu 1995 Wu, H. 吴. (1995). The Magic Cube of Book License: Incremental Suicide of Chinese Publishing Houses(书号魔方:出版者的慢性自杀). Beijing, Huayi Press. Also see Liu(2003), PP 34-36;

²⁴⁹ Interview with an IPR scholar, Shanghai, 07/25/2008;

²⁵⁰ For a discussion of how censorship mechanism worked in Chinese film industry in the 1980s, see Wu, X. (1992). *The Chinese Film Industry Since 1977*. Eugene, University of Oregon. **Ph.d. Dissertation.**

viewers and readers' positive feedback.²⁵¹ In 1996, the Chinese Ministry of Culture (MOC) and Ministry of Radio, Film, and TV (MORFT) jointly issued *Regulation on Examining the Content of Audio-Visual Products*.²⁵² In the same year, MORFT issued *Regulations on Managing Film Industry*.²⁵³ In 1997, Chinese General Administration for Press and Publication (GAPP) issued *Regulations on Managing Publishing Industry*.²⁵⁴ Those regulations further reinforced the already existent censorship system on copyright products.

During the early 21st century, the first limit was not lifted until the introduction of the third phase of reform; the second limit continued to exist, except that it is exercised in a different way.

Phase III(2000-present): Reforming Chinese Propaganda policy under the WTO

Framework

China's accession to the WTO in 2001 marked both a deeper level of integration of Chinese copyright industry into the world market and a new phase of domestic institutional reform. At the turn of the century, the Chinese propaganda system confronted dual challenges from both within and without: domestically, the growth of market mechanism in Chinese cultural industry demanded a further loosening of the

²⁵¹ Representative among those movies/books were Chen Kaige's *Farewell My Concubine*(movie), Zhang Yimou's *To Live*(movie), Tian Zhuangzhuang's *Blue Kite*(Movie), and Yu Qiuyu's *Painful Cultural Journey*(book). For further information, see Wan 1992 Wan, J. (1992). Hollywood and the Changing Political Economy of the Chinese Film Industry in the 1990s. *Political Science*. Eugene, University of Oregon. **MA Thesis**. Also see, Yu, 1999, Yu, Q. 余. (1999). "Yu Qiuyu on Piracy(余秋雨说盗版)." *Shandong Library Journal* (山东图书馆季刊) **No. 1**: PP 68-70. ;

²⁵² Full text of those regulations can be accessed at Gazette of the State Council of the People's Republic of China(中华人民共和国国务院公报), No. 3, 1996,PP 91-96;

²⁵³ Gazette of the State Council of the People's Republic of China(中华人民共和国国务院公报), No. 19, 1996, PP6-14;

²⁵⁴ Gazette of the State Council of the People's Republic of China(中华人民共和国国务院公报), No. 2, 1996, PP7-15;

straightjacket designed by the government; internationally, the flow of foreign copyright products forced the operation of the Chinese copyright industry to adjust to the need for international competition.

In 2000, Chinese leadership foresaw these challenges. In designing the country's economic and social development plan from 2001 to 2005, known as "the 10th 5-year plan", they clearly stated that "our cultural affairs policy should be improved to facilitate quicker development of our country's cultural industry."²⁵⁵

Under that mandate, a series of reforms were introduced at the ministerial level to enhance the competitiveness of the Chinese cultural industry. In 2003, Chinese Ministry of Culture (MOC) issued *Opinions on Supporting and Promoting the Development of Cultural Industry*.²⁵⁶ In 2004, Chinese Ministry of Radio, Film and TV (MORFT) issued *Provisional Regulations on Movie Production, Distribution and Broadcasting* and *Regulations on China-Foreign Joint Movie Production*.²⁵⁷ For the first time private capital was allowed to establish movie studios and overseas capital was allowed to establish joint ventures with domestic movie studios.

Reform measures at the ministerial level received recognition from the Chinese State Council after two years in practice. In 2005, the State Council issued *Decision on Non-State Capital's Accession into Cultural Industry*, further clarifying the scope and accession procedure for private and foreign capital to invest in Chinese copyright

²⁵⁵ Full text of the 10th 5-year plan can be accessed at <http://www1.peopledaily.com.cn/GB/shizheng/16/20010318/419582.html>, last accessed 10/20/2009;

²⁵⁶ Full text can be accessed online at <http://www.gzcm.gov.cn/show.aspx?id=489&cid=56>, last accessed 10/20/2009;

²⁵⁷ Full text can be accessed online respectively at <http://review.jcrb.com/zyw/n79/ca169684.htm> and <http://www.jincaoj.com/fa/23/law23.33.htm>, last accessed 10/20/2009;

industry.²⁵⁸ After lifting the restriction on private and foreign capital's accession into Chinese cultural industry, in 2005 private capital participated in the production of 75 percent of Chinese domestic movies.²⁵⁹ Moreover, in 2005 the first China-Foreign joint venture in book distribution, Liaoning-Bertelsmann Book Distribution Inc., was established in northeast China's Liaoning Province.²⁶⁰

The reform efforts did not stop there. In July 2009, the State Council issued *Promotion Plan for Cultural Industry*,²⁶¹ known as the 2009 Plan, reiterating the necessity to "attract private and foreign capital to related cultural industries, (so that) they can participate in the building up of state-owned cultural enterprises". Moreover, the 2009 Plan expanded the scope of private and foreign capital to other sectors of the cultural industry such as TV, radio, and advertising.

The above-mentioned reform measures ignited another quick development period for the cultural industry. As of 2007, cultural outlets expanded to 2,356 Radio and TV stations, 573 publishing houses that produced 248,283 titles, 9,468 periodicals, 1,938 newspapers, and 36 movie studios that produced 406 movies.²⁶² Compared with other countries in the world, in 2007 China possessed the largest amount of radio and TV stations and published the largest amount of book titles. Moreover, China ranked number five in numbers of periodical, next to the United States, Japan, Britain, and Germany, and

²⁵⁸ Full text of this decision is available online at http://news.xinhuanet.com/newscenter/2005-08/08/content_3325946.htm, last accessed 10-20-2009;

²⁵⁹ See, for example, Xiang (向兵), B. (03-31-2006). Exciting Show Just Kicked Off for Chinese Film Industry(中国电影好戏刚开场). *People's Daily*.

²⁶⁰ *China Press and Publication News*(中国新闻出版报), 05/27/2005, Page 1.

²⁶¹ Full text of this plan can be accessed on *People's Daily*, 09/27/2009, P 3;

²⁶² China State Statistics Bureau: *China Statistical Yearbook 2008*, PP 847-850;

No. 4 in movies produced, next to India, the United States, and Japan(Curtis 2002).(Curtis 2002)²⁶³ By the end of 2008, there were 2.87 million websites registered in China, next only to the United States, and 298 million internet users, highest around the globe.²⁶⁴

Cultural industry institutions grew rapidly, and so did the total volume of their output. For example, by 2005 the total profits of Shanghai TV and Film Group Inc. reached 85.4 million RMB (about 10.5 million US dollars), growing by 40 times in two years compared with the profit level of 2003 (2 million RMB).²⁶⁵ In 2006, the total output of the Chinese copyright industry reached 512.3 million RMB, growing by 17.1 percent compared with 2005.²⁶⁶ This growth rate was twice that of the United States (7 percent) and almost twice that of United Kingdom (9 percent), and the highest among major economies in the world.²⁶⁷

In sum, market mechanisms gradually gained the upper hand in the realm of Chinese propaganda and ideology policy in recent decades. However, the Chinese government still maintains its grip over China's cultural affairs. The reform of the

²⁶³ The data of worldwide ranking are gathered from General Administration of Press and Publication *China Publishing Yearbook, 2008(2008年中国出版年鉴)*, ; Center(中国电影产业研究中心), C. F. I. S. (2008). *China Film Industries Studies Report*. Beijing, China Film Press. P 21;

²⁶⁴ CNNIC(中国互联网信息中心), C. I. N. I. C. (2009). 2008 Statistical Report on the Development of Internet in China(2008中国互联网发展统计报告) . Beijing, <http://www.cnnic.net.cn/index/OE/00/11/index.htm>, last accessed 10/11/2009.

²⁶⁵ Zhou, W. and. Qi. Z. (03-28-2006). *Cultural Reform Makes Great Progress* (我国文化体制改革不断推进成效显著). . *People's Daily*,: page 1.

²⁶⁶ Ding, Wei, *Chinese Cultural Industry Recorded Rapid Growth in the Past 5 Years*(我国文化产业过去五年快速发展), from *Chinese Cultural Affairs News*(中国文化报), 09/28/2007, P1

²⁶⁷ International Intellectual Property Alliance(IIPA), *Copyright Industry in American Economy: 2005 Report*, available online at http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf, last accessed 10/21/2009;

Chinese propaganda system, both its achievements and limitations, constitutes the policy environment for the development of copyright industry in China.

Copyright Industry in China

With the reform of Chinese propaganda system in place, this section examines both the development of a domestic copyright industry and the impact of foreign copyright industry on the Chinese cultural market. I argue that the incomplete reform of Chinese propaganda policy prevents the domestic copyright industry from reaching its full potential. Moreover, the already weak Chinese domestic copyright industry has to compete with its foreign counterparts. Both factors render the Chinese domestic copyright industry a very weak supportive constituency for the copyright norm.

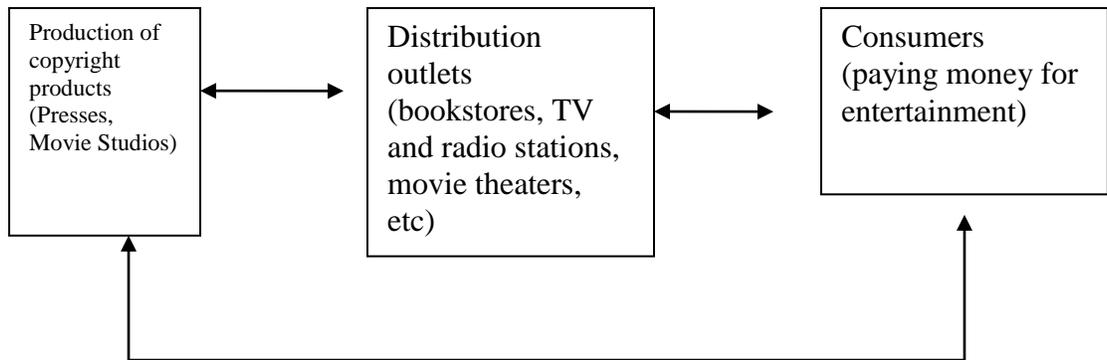
According to a Beijing-based IPR scholar, the competitiveness of a country's copyright industry relies on two aspects: the production of outstanding copyright works and the efficient distribution of copyright works from producers to the consumers. In his words, "if we compare a country's copyright industry to a person. In order for this person to be healthy, he should first possess a clear and energetic mind. He should also possess a vibrant vessel system to ensure the smooth flow of energy." He further pointed out that the clear and energetic mind in his metaphor refers to the production sector of the country's copyright industry and the vibrant vessel system refers to the distribution sector.²⁶⁸

He delineated to me what he deemed a benign circle for the development of copyright industry. Within that benign circle, outstanding copyright products can reach the mass consumers by efficient distribution; income earned from consumers of copyright

²⁶⁸ Interview with a Beijing-based IPR scholar, 12/08/2007;

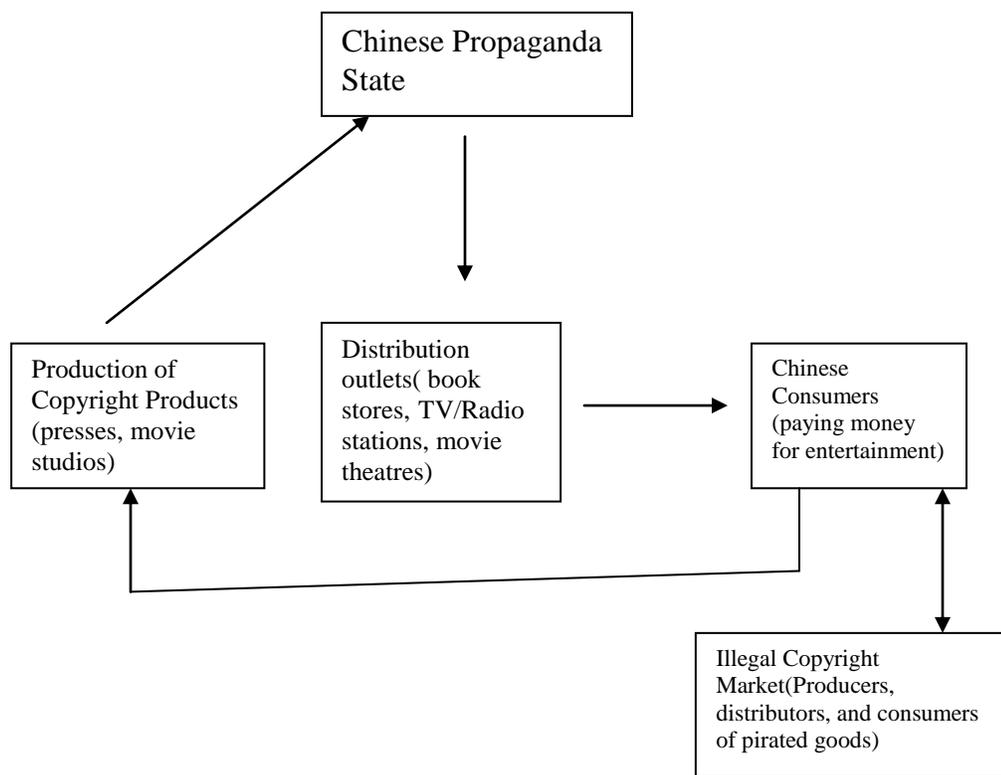
products can in turn provide financial resources to help produce more outstanding copyright products (see table below).

Table 5.1: Benign Circle for the Development of Copyright Industry



According to this IPR scholar, the incomplete reform of China's propaganda policy distorted the benign circle. Specifically, the Chinese propaganda system still maintains the power of final judgment over the content of copyright products. Moreover, the Chinese propaganda system cannot exercise direct control over Chinese consumers, but it can control, or at least attempt to control, the way in which copyright products can reach them. Due to the Chinese propaganda system's rigid control over the distribution channel of copyright works, copyright producers cannot directly distribute the copyright products to the distribution outlets. Therefore, a distorted circle comes into shape in China. As will be discussed in the third section, the government's rigid control over the copyright industry at least partially contributes to the growth and survival of illegal copyright market.

Table 5. 2: Distorted Circle of Copyright Industry Development (Reality in China)



Producing Copyright Products in China: Dancing with Shackles on the Feet

As discussed in the first section of the chapter, market reforms sparked rapid growth in Chinese copyright industries in recent decades. Despite the astonishing growth of the copyright industries in recent years, the propaganda system’s mission remains unchanged. To that end, the propaganda system still maintains its restriction over producing copyright products and their content. Specifically, in the Chinese film industry, for example, foreign investors are permitted to establish joint ventures with state-owned movie studios, but their share cannot exceed 49 percent. Moreover, they are not permitted to establish their own studios. They are not allowed to set up joint ventures with the

domestic privately-owned studios, either.²⁶⁹ In the publishing industry, there are similar restrictions on foreign capital's entry into the Chinese market. After joining the WTO in 2001, China allowed foreign capital to invest in China's press and publishing industry. However, according to the *Notice on Further Regulating Financing Press and Publishing Units* issued by the General Administration for Press and Publication (GAPP) in 2004, foreign companies were only allowed to operate in the distribution sector of the Chinese press and publication industry. The operation of the publishing and editing sector is still strictly limited to Chinese domestic capital.²⁷⁰

Moreover, a censorship mechanism still exists in China although the criteria are less rigid than before. Under the new regulations, instead of exercising censorship power over certain cultural industry units as a whole, the censorship focus shifted to the content of specific cultural products. In the Chinese movie industry, private and foreign capital get the permission to access Chinese movie production, but they still have to acquire a production license before individual movies can be produced. Chinese movie studios are required to submit a 1,000-word synopsis of movie scripts to the Ministry of Radio, TV and Film (MORTF) before the production process starts. For China-foreign jointly produced movies, the full text of the movie script is required.²⁷¹ In the publishing industry, similar restrictions also apply. According to the 26th Article of *Provisions on Managing Press and Publication* issued in 2002, press and publications are forbidden to

²⁶⁹ See, for example, Yu, X. (2003). "Chinese Movie after WTO Accession and Our Commitment: Interview with Liu Jianzhong, Director of Movie Bureau." *China Film Yearbook 2003*: PP 47-49.

²⁷⁰ See *China Publishing Yearbook*, 2005, P 313;

²⁷¹ For the details of Chinese movie censorship mechanism, see Ministry of Radio, TV and Film: Provisional Regulations on Movie Script Project Initiation and Movie Content Examination(电影剧本立项电影片审查暂行规定),(10/08/2003), full text available online at <http://www.china.com.cn/chinese/PI-c/430384.htm>, last accessed 10/21/2009;

contain illegal content “that endangers state security and social stability ,opposes the basic principles of Chinese constitution and other legal regulations, and damages state honor and national interests.” The General Administration for Press and Publication (GAPP) maintains the final decision making power over the interpretation of the 26th Article.²⁷²

In 2007, the WTO dispute settlement body brought under examination the impact of censorship mechanism on China’s copyright regulation. Chinese movie professionals have constantly called for replacing the censorship mechanism with China’s own rating system, drawing from the experience of developed countries.²⁷³ Under the rating system in countries such as the United States, movies’ content is subject to review by a movie producers’ organization (such as Motion Picture Association in the case of the United States) instead of the government.²⁷⁴ However, such a system is still under discussion and has not been established into government regulations in China. While a movie rating system has been in the U.S. since the late 1960s,²⁷⁵ similar regulations are still in their infant stage in China. Under the existing censorship system, it takes an average 45 to 60 days for a movie to get a production license. That system terribly slows down movie production and makes it harder for the investors to get their investment

²⁷² Full text of the Provisions on Managing Press and Publication is available on People’s Daily, 01/15/2002, Page 11;

²⁷³ One of the leading advocates is Chinese movie director, Zhang Yimou. For the content of a TV interview with Zhang Yimou by Chinese Central Television, see http://www.chinadaily.com.cn/zgzx/2009npc/2009-03/05/content_7540265.htm, last accessed 10/20/2009;

²⁷⁴ For a discussion of American movie industry, see, for example, Balio, T. (1985). The American film industry. Madison, University of Wisconsin Press.

²⁷⁵ Movie rating system was established in the U.S. in 1968, see "U.S. Supreme Court GINSBERG v. NEW YORK, 390 U.S. 629 (1968)".

back. Some outstanding movies missed hitting a prime running schedule due to the inefficiency of the censorship mechanism.(Wang 2008)

Censorship mechanisms impact the Chinese publishing industry in similar ways. Due to the restrictions imposed by the Chinese press and publication, the first consideration for the Chinese writers is meeting the requirement of the censorship bureaucracies rather than the demands of the Chinese readers. According to a manager of a Beijing based publishing company, “Everybody keeps talking about protecting copyright, but before we talk about copyright we should first talk about author’s right. In theory, we should respect the authors. But in reality, we are not respected because we have to worry if we are going to offend the Chinese government even before we publish books or write articles. Who is going to respect the copyright norm if the authors themselves are not respected by the government?”²⁷⁶

In recent years, China invested heavily to develop its copyright industry, but money alone is not enough to produce high quality copyright products. Equally important is a relatively free environment for creative expression. In that aspect, the situation in China is still unsatisfactory for copyright owners. As the comment by a Nanjing-based copyright official goes, “Chinese copyright industry is just like a kite, with its string held by the Chinese government. In the past, the latter held the string so tightly that the kite did not even fly. Now the kite can fly much higher, but the string holder worries that the kite would be out of his control and never gives up the string But the point is, how can the kite fly high if the string is held so tightly?”²⁷⁷

²⁷⁶ Interview with the manager of a publishing company, Beijing, 10/29/2007;

²⁷⁷ Interview with a Nanjing-based copyright official, 04/30/2008;

Distribution of Copyright Products in China: Marketing Culture in a Fragmented Market

As discussed earlier, it is but the first step to produce high quality copyright products for the purpose of developing the copyright industry. An equally important aspect is to distribute those products efficiently. However, the following paragraphs demonstrate that while the production of copyright goods is hindered by the Chinese propaganda system, the distribution of those goods is also under its grip.

For a long time propaganda outlets in China were regarded as primary locales for the Chinese Communist Party to construct legitimacy. In 1949, when the communist forces took over China, the Communist Party ordered the troops to reserve a place in the downtown area for the Communist Party-run Xinhua Bookstore in whatever a new city that they took over to sell “revolutionary cultural works”.²⁷⁸ With the Communist Party coming into control in most provinces except Taiwan, a cultural product distribution system was established in China following the steps of Chinese Communist troops. In 1956, all the private bookstores nationwide were merged with the state-owned Xinhua Bookstore. Like other state-owned enterprises in China, Xinhua Bookstores operated as the accessories to different levels of Chinese government rather than as independent market entities. Instead of responding to the needs of readers and operating the cultural market as a market, Chinese cultural products were distributed at state order. In 1981, before the Chinese government initiated the reform of the country’s book distribution system, there were only 8709 state-owned and collectively-owned Xinhua Bookstores nationwide, which means an average of about 100,000 people sharing one bookstore. In

²⁷⁸ Interview with a retired Xinhua bookstore staff, Beijing, 10/15/2007;

the entire city of Beijing, there were only 101 Xinhua Bookstores as of the early 1980s.

²⁷⁹ Such a distribution system could hardly meet the demand of the Chinese readers.

In the Chinese movie industry, a similar distribution system was established in the 1950s: in 1951, China Film Company was established as the only company with the official mandate to distribute movies or movie-related products in China. Under the old distribution system known as “unified purchase and sale”, China Film Company purchased movies from various movie studios and distributed them to the cinemas at the local level. Regardless of the movies’ quality or box office earnings, the level of purchase price settled by the China Film Company remained the same for decades. For example, in 1990, *Ju Dou*, an internationally known award-winning movie about rural Chinese women in the 1930s, recorded 57 million RMB box office earnings. However, the purchase price of *Ju Dou* by the China Film Company was only 700,000 RMB, as settled by the Chinese government, the same as another mediocre Chinese movie that only recorded 1 million RMB box office earnings. Moreover, the majority of a movie’s box office earnings went to the China Film Company rather than the movie studios. Obviously, such a distribution system could not ignite the Chinese movie studios’ incentives to improve their movie technology and produce high quality movies. A vicious circle was thus formed: the monopolized distribution system could not provide sufficient economic resources for movie production; low quality movies could not attract sufficient

²⁷⁹ See, for example, Jiang, D. and Y. Zeng (01/04/1981). There Are Too Few Bookstores in the Cities: What Should We Do? People's Daily. Beijing.

audience; dwindling audience in turn could not generate enough box office earning to upgrade China's theater system.²⁸⁰

The outdated distribution system of copyright products became the target of reform. In 1982, the National Conference on Book Distribution Work urged Xinhua Bookstores at different levels to transform themselves into corporate entities. More importantly, the Chinese government allowed the operation of privately owned bookstores.²⁸¹ After more than thirty years of reform, private bookstores constitute the majority of the distribution channel for books and published materials in China. As of 2006, there were 150,000 bookstores in China, with 70 percent of them private bookstores.²⁸²

In 1993, the Ministry of Radio, TV and Film (MORTF) terminated the monopoly power of China Film over the distribution of domestic films and devolved the distribution power to the movie studios. Such reform measures transformed the formerly monopolized distribution channel into an open system.²⁸³ In 2002, China established a theater band system to further break down the barriers among different provincial movie markets. Under the theater band system, movie theaters across different provinces were

²⁸⁰ Xiang, B. (05-05-1994). Pull Through Troublesome Situation, Re-create the Glory: The First Anniversary of China's Movie Distribution Reform (冲出困境, 再创辉煌: 写在中国电影发行体制改革一周年之际) .;

²⁸¹ Zhan, X. (06-19-1982). The Ministry of Culture Urges the Establishment of A New Distribution System Nationwide (文化部座谈会提出在全国组成新的发行网).: Page 4.

²⁸² Wang, Y. 汪. (2008). "Reflections on the Three Decades of Book Distribution System in China(忆发行工作改革开放三十年)." China Publishing (中国出版) (Issue 7): PP 16-18.

²⁸³ Xiang, B. 向. (01/14/1993). Roadmap Designed for the Reform of China's Movie Distribution System (电影发行体制改革方案出台) . People's Daily. Beijing: Page 1.

organized into different distribution coalitions, possessing the autonomy to determine which movies will be shown and on what schedule.²⁸⁴

Constraints still exist. In the Chinese movie industry, foreign investors are still forbidden to establish their own theaters and distribution companies. Under the *Provisional Regulations on Foreign Investment in Movie Theater Construction* issued in 2003, while foreign capital is allowed to establish joint ventures with Chinese movie distribution companies, their share cannot exceed 49 percent.²⁸⁵ Moreover, China Film kept the power to distribute imported foreign films. Foreign movie companies are not allowed to distribute movies on their own even though they gained access to the Chinese market. MORTF also stipulates that two thirds of showing time in Chinese movie theaters should be reserved for domestic films.²⁸⁶ In the publishing industry, similar restrictions exist. Although the first China-foreign joint distribution venture was established in 2005, under Article 5 of the Chinese State Council's *Decision on Non-State Capital's Accession into Cultural Industry* issued in the same year, foreign capital still cannot exceed 49 percent in the distribution joint-ventures.²⁸⁷

Due to those constraints, distribution channels at local levels cannot obtain sufficient financial resources to better reach their audience. In Chinese movie distribution channels, for example, as of 2008, there were 1,118 movie theaters in China, compared to

²⁸⁴ See, for example, Fan Lizhen, What Did Chinese Movie Industry Gain after China's WTO Entry(入世五年, 中国电影业收获了什么), from China Cultural News(中国文化报), 03-02-2007, P4;

²⁸⁵ Full text of the regulation can be accessed at Laws and Regulations(司法业务文选), 2004, Issue 6, PP23-25;

²⁸⁶ For the full text of those regulations, see State Council's Guideline Opinion on Revitalizing the Movie Industry (国务院关于繁荣电影产业的指导意见), from China Film News (中国电影报), 02/04/2010, Page 1;

²⁸⁷ Full text of the decision is available on People's Daily, 08/09/2005, Page 2;

6,200 U.S. movie theaters.²⁸⁸ Given the vast population in China, that number of movie theaters can at best inadequately meet the Chinese audience's needs for movie entertainment: the total number of screens in the U.S. reached 40,197 in 2008, an average 8,000 people per screen. In China, however, there are only approximately 9,600 screens, with 150,000 people sharing one screen.²⁸⁹ Moreover, the geographical distribution of the theaters is disproportionately imbalanced. As of 2010, 70 percent of the renovated theaters were concentrated in the 8 major metro areas in China, namely Beijing, Shanghai, Shenzhen, Guangzhou, Chengdu, Wuhan, Hangzhou, and Chongqing. That is, despite the establishment of the theater band system, the vast majority of small and medium cities and the countryside remain detached from the movie distribution channels.²⁹⁰ Such a combination of insufficient supply and abundant demand results in a high price for movie tickets. Since official distribution channels cannot meet Chinese audiences' needs well, they prefer to purchase DVD players or home video projectors and turn to the unofficial cultural market to purchase illegal copyright products. As discussed in the third section of this chapter, the situation creates space for pirated cultural products to grow.

Foreign Copyright Industry on the Chinese Soil

Even though the Chinese government exercises so many constraints on the development of the Chinese domestic copyright industry, the attitude of domestic copyright owners toward it cannot be described as complete hatred. As a Chinese

²⁸⁸ Zhou, B. (2009). Chinese Movie Market in 2008 (2008年中国电影市场概况) . China Movie Yearbook (中国电影年鉴) . Beijing, Chinese Movie Press (中国电影出版社) PP277-279.

²⁸⁹ Interview with Zhang Hongsen, Vice Minister of Radio, TV, and Film, by journalists from People's Daily, 06/28/2009, P1;

²⁹⁰ Ying, H. and C. Yi (07-01-2010). Why Are There So Few Movie Theaters in China? (中国影院何其少) . People's Daily: Page 24.

copyright owner told me, “Our attitude towards the Chinese Propaganda Department is ambivalent: we hate it because it prevents us from further improving our competitiveness; we love it because it protects us from the greedy foreign copyright industry. Without it, Chinese copyright industry will be completely eaten up by foreign devils (*yangguizi*).”²⁹¹

After closing its door to the foreign copyright industry for decades, in 1994, the Chinese government agreed to import 10 foreign blockbusters annually.²⁹² In 1995, the majority of those 10 foreign blockbusters turned out to be Hollywood movies.²⁹³ Those ten blockbusters net \$120 million U.S. When China entered WTO, the Chinese government agreed to raise that quota to 20 foreign films.²⁹⁴

As preceding scholarship rightly points out (Rosen 2002; Wan and Kraus 2002), the Chinese government did not import foreign films on their merits. Instead, their original intention was to reestablish Chinese audience’s interests in watching movies. The restrictions discussed earlier not only constrained the further development of the Chinese copyright industry, but also they constrained the free flow into China by the foreign copyright industry, which is much stronger than the incipient Chinese domestic copyright industry.

During its more than 15 years of presence on the Chinese soil, the foreign copyright industry reaped considerable benefits despite the restrictions imposed by the Chinese Chinese government. As of Nov. 14th, 2010, out of the top 10 movies with

²⁹¹ Interview with a copyright owner, Nanjing, Jiangsu, 03/14/2008;

²⁹² China Movie Yearbook, 1995, PP 168-169;

²⁹³ Those ten Hollywood movies include *Lion King*, *True Lies*, *Fugitive*, *Speed*, *Bad Boys*, *Die Hard 4.0*, etc;

²⁹⁴ Interview with Liu Jianzhong, Director of Movie Division of Chinese Ministry of Radio, TV and Film by journalist from China Film News(中国电影报), 01/21/2002;

highest box-office earnings in Mainland China, six were foreign films and two were joint productions between Hong Kong and mainland China; the movie with the highest box office earning, *Avatar*, was a Hollywood product; it almost doubled the box office earnings of *Tangshan Earthquake*, a mainland China product taking the second place. While shaking the Chinese domestic movie industry with their strong competitiveness, the foreign copyright industry brought forth cutting edge business models and operation ideas.

Table 5.3: Movies of Top 10 Box Office Earnings on the Chinese Market (2009)

	Movie Title	Place of Production	Number of Audience (in million)	Box Office Earnings (in 1 million RMB)
1	Avatar	U. S.	27.63	1378.7
2	Tangshan Earthquake	Mainland China	17.92	665.1
3	Inception	U.S.	13.29	456.6
4	Di Renjie	Mainland China.	8.74	290.2
5	Ip Man	Mainland China/Hong Kong	6.86	232.4
6	Alice in the Wonderland	U.S.	4.95	226.4
7	The Expendables	U.S.	4.35	217.2
8	Iron Man	U.S.	3.04	176.3
9	Clash of the Titans	U.S.	2.24	175.1
10	Big Soldiers	Hong Kong	2.23	160.9

Source: Kang 2009 (Kang 2009) P. 20

In recent years, Chinese copyright industry maintains the momentum of rapid development. According to Yan Xiaohong, the Deputy Director of the State Copyright Administration, between 2000 and 2008, the copyright industry recorded an annual growth rate of 15 percent, only next to Korea and Singapore in the developing countries;

in 2008 the total output of Chinese copyright industry was about 1,200 billion RMB (about \$120 million U.S.), accounting for 5 percent of Chinese GDP.²⁹⁵

However, the Chinese copyright industry is but an incipient player compared with the developed countries. According to International Intellectual Property Alliance (IIPA), a U.S.-based organization of IPR holders, the total output of U.S. copyright industries in 2005 reached an estimated \$1.38 trillion or 11.12 percent of U.S. GDP. As one of the major contributors to U.S. exports, in 2005, it was estimated that foreign sales and exports of the US core copyright industries increased to at least \$110.8 billion, higher than other major industry sectors. Those sectors include: the chemical industry (not including medicinal and pharmaceutical products at \$97.17 billion); motor vehicles, parts and accessories at \$76.26 billion; aircraft and associated equipment at \$49.79 billion; food at \$48.29 billion; and pharmaceutical products at \$25.95 billion²⁹⁶.

By definition, a pillar industry should not only account for a significant percentage, (normally 10 percent, of a country's GDP), but should also be able to promote the development of related industries.²⁹⁷ Judged by that standard, the Chinese copyright industry is not yet a pillar industry for the Chinese economy.

As a result, a dilemma comes into shape: foreign copyright-owners are well financed and experienced in copyright protection, but they cannot act freely in China; Chinese domestic copyright owners hate copyright piracy as much as their foreign

²⁹⁵ Full text of Yan's speech is available online at <http://www.zhivr.com/html/info/200711263855.html>, last accessed 10/27/2009;

²⁹⁶ International Intellectual Property Alliance, (2007). Copyright Industry in the US Economy: the 2006 Report, International Intellectual Property Alliance: <http://www.ifpi.org/content/library/20070130-highlights.pdf>, last accessed Oct. 2007/136th, 2007/2009.

²⁹⁷ There has been enormous literature on the role of pillar industry in a country's economic development. A classic definition for "pillar industry" is provided in Rostow, W. (1964). The economics of take-off into sustained growth. New York, St. Martin's Press.

counterparts, but they do not have enough financial resources to support expensive anti-piracy investigation and lawsuit. As one copyright owner's complaint goes,

“We face enemies from all directions: above us, the Chinese government oversees our behavior; on our right, we face competition from foreign copyright industries; on our left, we have to fight with potential copyright infringers; below us, the level of Chinese mass consumers' sympathy for IPR is very low. We can move nowhere.”
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Due to the above elements, the Chinese copyright industry remains a weak supportive constituency for the copyright norm. It remains a challenging task for Chinese domestic copyright industry to survive international competition and promote China's domestic culture.

Underground Cultural Market in China:

Fighting a “People's War against Piracy” Without the People's Support

After discussing the Chinese propaganda system and the Chinese copyright industry, this section analyzes copyright-infringement activities. This section is driven by the following questions: Who are the infringers? Who are the distributors and buyers of pirated goods? What is their attitude towards copyright? How does the underground cultural market work in China? What is its relationship with the legitimate market of Chinese copyright products? In answering those questions, I argue that the underground cultural market has an enormous competitive advantage compared with their legitimate counterparts. Although the exact size of that underground market remains unknown, it features with cheap pirated goods and a flexible distribution system. Coupled with a low level of IPR awareness among Chinese consumers, copyright infringement activities could very increase and also survive rounds of anti-piracy campaigns.

²⁹⁸ Interview with a publishing company's manager, Beijing, 10/30/2007;

Producing Pirated Goods: Double Headaches for Chinese Copyright Owners

There are two major sources of copyright infringement in China: one is from illegal production lines, the other is from the rapidly growing internet industry. While the former type of infringement was a popular way to infringe upon copyright in the 1990s, copyright products are increasingly uploaded to the Internet for unauthorized download. Both methods persist, creating double headache for Chinese copyright owners.

Headache 1: Illegal Production Line for Pirated DVD/Software

Illegal production lines are mostly located in Southern China's Guangdong and Fujian Provinces. According to the Chinese State Copyright Administration Spokesman, Wang Ziqiang, between 1996 and 2004, China detected 182 illegal production lines. Wang added that Chinese Customs House found that a transnational piracy supply chain operating both inside and outside China. That is, parts of those illegal production lines were smuggled in, assembled in China's coastal provinces, with pirated DVD's shipped to other inland provinces in China.²⁹⁹

According to a Guangdong Customs House official, the profit margin of illegal pirated DVD/software production line is shocking: as of 2007, the cost of the plastic material needed to make pirated DVD was only 3,000 RMB (about \$350 U.S.) per ton; the cost of raw materials making a single pirated DVD was only 0.35 RMB (about 4 cents). It takes only 3 seconds to burn one pirated DVD. Including the production cost of purchasing a DVD burning machine, workers' wages, and rent for factory, the average cost of one pirated DVD is only a little above 1 RMB (about 15 cents). If those pirated

²⁹⁹ Lai, Mingfang China is the Biggest Victim of Illegal DVD Production Line(中国是盗版侵权最大受害国), from China Press and Publication News(中国新闻出版报), 04/22/2004, P 5;

DVD's are sold at wholesale for 2 or 3 RMB (about 20 to 40 cents) to the lower level vendors to be distributed to the other parts of the country, the profit rate for the factory owner is 100% or even higher! Considering that movie and software companies invest millions of dollars in producing a new movie or developing a new type of software, pirating them is almost too cheap to meter.³⁰⁰

As those pirated DVD reach the Chinese consumers through several layers of the underground distribution system, the price can reach 10 RMB (about 1 dollar) per DVD. At the same time, the average price of legitimate DVD is between 20 and 30 RMB per disc. A legitimate DVD is no match for a pirated DVD. One copyright official said, "producing pirated DVD/software is as profitable as trafficking drugs, but the level of risk is not nearly 1 percent of drug trafficking."³⁰¹

Headache 2: Online Piracy

With the development of Internet technology, sharing videos online is increasingly more popular way of distributing copyright products. In February, 2005, three young technicians in Silicon Valley -Chad Hurley, Steve Chen and Jawed Karim – set up the first video sharing website in the world, YouTube. YouTube's competitive edge is that video clips are uploaded by Internet users. In only five months, 30 million

³⁰⁰ Interview with a Guangdong Customs Official, 05/20/2007;

³⁰¹ Interview with a copyright official, Hefei, Anhui, 08/08/2007;

worldwide became users. The rapid growth of YouTube attracted interests from Internet tycoons. In Oct. 2006, Google bought YouTube for \$1.65 billion U.S.³⁰²

Such a business model found followers in China. In 2005, Wang Wei, a young man from China's Fujian Province established the Chinese equivalent of YouTube in Beijing. He named his own video sharing website Tudou. After Wang established Tudou, other video-sharing websites run by ambitious young internet professionals took off. From 2006 to 2007, video-sharing websites multiplied by 10 times in two years, from about 30 to more than 300!³⁰³ According to a study by IT Weekly, a Beijing-based professional journal focused on Chinese internet industry, in 2005 there were 32 million Chinese Internet users who regularly viewed domestic and foreign video-sharing websites. It is predicted that in 2010 that will reach 180 million!³⁰⁴ Given the fact that China has the world's largest Internet-users pool, the potential of growth of video-sharing website is astonishing.

While the rapid growth of video-sharing websites is good news for the Internet industry, it is by no means good news for the Chinese copyright industry. In fact, the Chinese copyright industry has to fight on both fronts, not only against the illegal production factories for pirated goods and also against the rapidly growing Internet piracy. In September 2009, 110 leading Chinese presses and movie studios organized

³⁰² Google buys YouTube for \$1.65 billion: Search giant's purchase of video sharing service biggest in its history
Search giant's purchase of video sharing service biggest in its history. Associated Press, 10/10/2006;

³⁰³ Li, Zhongcun and Li Qi: The Spring of Video-Sharing Websites in China (视频网站的春天), from IT Weekly(IT时代周刊), 04-11-2008, available online at <http://www.ppcn.net/n4438c6.aspx>, last accessed 20/10/2009;

³⁰⁴ Ibid

China Alliance Against Internet Copyright Infringement (referred to as “the Alliance” hereafter). According to the Alliance, in 2008, 50 percent of movies and TV series they produced were illegally uploaded to major Chinese video-sharing websites such as Tudou without authorization, incurring an economic cost somewhere between 50 million and 100 million RMB for the copyright owners. At that point, 90 members of the Alliance launched a lawsuit against eight major video-sharing websites in China on September 16th, 2009.³⁰⁵

After the lawsuit was filed, the Alliance received negative feedback from the Chinese consumers. Specifically, consumers criticized the Alliance as “selfish, money-driven and indifferent to the interests of mass public”. They told the press that “(the defendants) should go ahead and continue to pirate”.³⁰⁶

Chinese copyright owners are confronted with a third headache, the lack of sympathy for copyright on the part of Chinese public.

Selling Pirated Goods: A Case Study of Mr. Wang³⁰⁷ and His Fellow Peddlers in Beijing

The cost of producing pirated goods is miniscule. The distribution system of pirated goods is much more flexible than the legal copyright products despite years of reform. In this section, I offer an in-depth case study of groups of Chinese street peddlers, yielding some insights into the distribution system of pirated goods that is still mysterious to outsiders. Due to the vast number of street peddlers in China and the underground

³⁰⁵ Luo, Sheng (罗生) Copyright Owners Declare War Against Video-sharing Websites(搜狐张朝阳称向优酷等宣战) from Oriental Morning News, 09/16/2009;

³⁰⁶ See, for example, Lao, Na: Support Youku, Continue to Pirate(支持优酷, 继续盗版), available online at <http://www.chinalabs.com/html/jiaodiandaodu/TNTyejie/2009/0923/30189.html>, last accessed 10/29/2009;

³⁰⁷ At the request of my interviewees, I replace their real names with improvised ones;

nature of their network, there has not been any reliable statistical data about them. This case study demonstrates that other than cheap price, the flexibility in distributing pirated goods make them all the more competitive compared with the legal copyright products.

Selling pirated goods on the street does not require any sophisticated training. The relatively low threshold makes selling pirated goods an attractive way to make a living for lower-income people in China. Indeed, street peddlers are the most salient part of the underground distribution system of pirated goods. The exact number of street peddlers in China is unknown, but the influence of street peddlers on the implementation of Chinese copyright policy is evident in their “business activities.”

During my field work in Beijing, I made friends with Mr. Wang, one of the thousands of street peddlers making a living by selling pirated goods in Beijing. A migrant worker from Anhui Province, Mr. Wang came to Beijing in 2005 after the township factory that he worked for went bankrupt. With the accumulation of more and more experience and personal connection in this business, his monthly income rose to 3,000 RMB and Mr. Wang started to enjoy a small reputation, for being capable and friendly, among his fellow pirated DVD peddlers. Moreover, compared with working staff in the state-owned audio-visual stores, Mr. Wang is very familiar with the development of the movie market. Everyday after 6:00PM, Mr. Wang starts his business at the gate of the nearby subway station nearby. Most of the twenty-odd peddlers on Mr. Wang’s personal network are migrant workers from Anhui Province and its neighboring Henan province. Their business activities are located in border areas between Southwestern Beijing’s Fengtai and Haidian Districts.

The pirated DVD's that Mr. Wang and his fellow peddlers sell are distributed by an "upper line" guy based in Beijing's neighboring Hebei Province. According to Mr. Wang, the source of the pirated goods that the upper line guy distributes is China's coastal provinces such as Guangdong and Fujian. Exactly how they are produced in Southern China and shipped to Beijing remains a mystery to Mr. Wang and many other people. Indeed, curiosity over these things risks Mr. Wang's business but also very possibly his personal security. This "upper line" guy promised to Mr. Wang that he would compensate him for his economic fines if his pirated DVD's were confiscated by the police. Of course, the condition is that Mr. Wang never tells the police the whereabouts of this "upper line" guy. The "upper line" guy always keeps his promise.

The pirated DVD's sold by Mr. Wang and his fellow peddlers range from classic movies by Chinese domestic filmmakers in the 1960s to recent ones by filmmakers in Hong Kong, Taiwan, Japan, Korea, and the United States.. In Mr. Wang's words, they can "meet the taste of people at every walk of life in Beijing." Mr. Wang and his fellow peddlers are welcomed by residents in surrounding neighborhoods, some of whom are Westerners working or studying in Beijing.

Mr. Wang and his fellow peddlers are not free from trouble, the biggest source of trouble comes from the law enforcement squad with the local cultural market management office. But street peddlers have developed increasingly sophisticated skills over rounds of cat and mouse games with law enforcement officials. A female peddler, Ms. Yin³⁰⁸, often carries a baby in her arms as a shield to protect her from police searches. That tactic proved very effective. Like many female peddlers, she rents the

³⁰⁸ Again, I use improvised name rather than real name here;

baby from another female migrant worker in Beijing, who comes from the same village!³⁰⁹ Both Mr. Wang and Ms. Yin urged me not to probe further. Otherwise, they could not guarantee my safety.

When asked about their attitude towards copyright, Mr. Wang and his fellow peddlers' first response was "What is copyright?" After I explained to them in as easy language as I could, they made the following reply:

"I do not care about copyright at all. I only care about making a living. Do not blame us as thieves. We are not. At least selling pirated DVD is better than robbery or burglary because it does no harm to common people. Our monthly income is only the cost of a banquet for those movie stars or even less. Do they know anything about our terrible living conditions? Do they care? Did the Americans urge the Chinese government to put us in prison? That is a wonderful idea. In prison, at least the government will feed us and we do not have to work so hard. Besides, does the Chinese government have so much room for so many of us in the prison? Be it American devils, Japanese devils or those disgusting guys in the Chinese government, they will never be able to annihilate us."³¹⁰

Compared with the well educated internet professionals and the owners of illegal pirated goods factories, street peddlers occupy much lower social standing. But their lower social standing does not make them trivial players on the stage. The sheer number of them makes them the foundation of the pyramid of piracy chain in China. The impact of that piracy chain cannot be ignored. And of course, there are even more consumers of pirated goods. Their low level of sympathy for IPR is an even more nightmarish hurdle for Chinese copyright owners to defend their rights.

Buying Pirated Goods: Copyright? Who Cares?

³⁰⁹ Interview with a female street peddler, Beijing, 11/10/2007;

³¹⁰ Interview with street peddlers in Beijing, 10/30/2007 to 11/15/2007;

Unlike patents, whose primary consumers are industrial enterprises, the primary consumers of copyright products are China's public. Combining my own interview data and survey data gathered by Chinese IPR scholars, I argue that the number one factor influencing the behavior of the consumers is economic. The popularity of pirated goods among Chinese mass consumers also reflects the weaknesses of the legal copyright market in China. Due to government constraints, even high-quality copyright products cannot reach the consumers in an efficient manner, creating the room for pirated goods to grow and survive rounds of anti-piracy campaigns.

The first reason for Chinese consumers to buy pirated copyright goods is their cheap price, but there are also other reasons that attract them to the street peddlers. When I asked why they bought pirated goods, one consumer answered, "In today's Beijing, who is so silly as to pay 50 RMB to sit in the theatre watching a movie if they can get it for less than 10 RMB on the street? Besides, pirated movies can appear on the market at least several days earlier before the legal ones get a chance to show on the movie theatres. We do not want to wait that long."³¹¹

The comment is mirrored in a nationwide survey funded by Chinese State Intellectual Property Office(SIPO). According to the survey, 88.4 percent of Chinese consumers admitted that they have purchased pirated books, DVDs, or software. And 72.5 percent of them admitted that the top reason for them to buy pirated DVD was the cheap price.³¹²

³¹¹ Participant Observation, Beijing, October 2007 to November 2007;

³¹² Liu, Hua, Ying Zhou and Guanghui Huang: Investigation Report of Chinese Mass Public's IPR Awareness(我国公民知识产权意识调查报告), from Wu, Handong eds, 2005 Bluebook of IPR in China(中国知识产权蓝皮书2005), pp411-431, Page 416

The survey did not provide further details about the consumers of pirated goods: who are they? What do they think about copyrights? Zhang Zhiqiang, Professor of Nanjing University in East China's Jiangsu Province, and his research team tackled those questions in a regional survey in 2005.

Contrary to the conventional wisdom, the survey indicated that a higher level of education does not necessarily lead to stronger resistance to pirated goods: among the buyers of pirated goods under examination, 65.8 percent of them have received a college education or higher. Among them, 75 percent have a monthly salary of 4,000 RMB (about \$ 700 U.S.) or higher, which is the level of a middle class income in China. Moreover, 79.7 percent of them do not feel guilty when purchasing pirated goods and 84.1 percent of them told the team that their only worry in buying pirated goods is the lower quality. When asked the reason for purchasing pirated goods, 90 percent answered "cheap price"; the second most cited reason was "efficient distribution to the market." Although that survey was not conducted on a nationwide level, it was conducted in a relatively affluent urban area, making it relevant to understanding the level of Chinese consumers' sympathy for IPR nationwide. The survey data indicates that the level of IPR sympathy is very low even among urban middle class in China. It can be reasonably inferred that the level of IPR awareness in the less affluent regions and among the less well educated populace is ever lower.³¹³

When asked to interpret the survey data, Zhang urged me to look not only at economic reasons. According to him, the higher a consumer's education level, the more

³¹³ Zhang, Zhiqiang Analysis of Urban Residents's Attitude Towards Piracy: the Case of Nanjing(城镇居民与盗版产品的接触程度分析：以南京为个案的研究), from China Copyright(中国版权), No. 3, 2005, PP 52-54;

need for cultural products. If the legitimate distribution channels cannot meet their needs, they will seek copyright products through illegitimate channels, not to mention that the price of pirated copyright products is much lower. While cheap price is no doubt the main reason for pirated goods to be so popular in China, diversified content and a more efficient distribution system make the pirated goods all the more competitive. To some extent, due to their low sympathy for IPR, Chinese consumers involuntarily help the copyright infringers to dispose of stolen goods. To solve that issue, the government should engage in consistent efforts to raid against piracy activities, but also should fix the deeper level institutional problems with both the production and the distribution of copyright goods in China to better meet the Chinese people's demand for a better cultural life.³¹⁴

In sum, in fighting a “people’s war against piracy”, the government cannot win the war without people’s support. China employed 330,000 enforcement staff as of 2007, the highest in the world. Even if Chinese IPR enforcement staff work on seven days a week, twenty four hours a day, they cannot completely monitor the selling behavior of tens of thousands street peddlers or the consumption behavior of the country’s 1.3 billion people. Interestingly, if not ironically, the rampancy of pirated copyright goods at least partially stems from the Chinese government’s rigid control over the country’s cultural life. That is, the still existing censorship mechanism prevents the production of high quality copyright products; the inefficient distribution system further hinders the circulation of copyright products. Both factors contribute to the slow development of Chinese copyright industry. The promotion of IPR sympathy among Chinese consumers

³¹⁴ Personal interview with Zhang Zhiqiang, Nanjing, Jiangsu, 06/25/2008;

is a more daunting and probably more important task for the Chinese government than raiding the piracy chain. In promoting the sympathy for IPR among Chinese people, the government should first examine the problems within its own propaganda and cultural affairs policy.

Conclusion

This chapter on copyright and the previous chapter on patent have demonstrated that, instead of viewing China as a unitary target state to comply with international IPR norm, it should be understood as a stage for diversified political and economic forces to collaborate, compete, and interact. The story does not end when China adopted international IPR norm at the turn of the 21st century. Instead, different social/interest groups pursued their own policy goals, with their own understandings of IPR. They often alter the IPR norm to suit their own interests.

As I was doing my field work in China from 2007 to 2008, my interviewees kept reminding me of the importance of the political and economic environment that Chinese copyright policy operates. According to a Shanghai-based IPR scholar, “The study of Chinese copyright policy is analogous to treating a patient in the means of Chinese traditional medicine. Only the most inexperienced doctors focus on getting rid of the symptoms. Experienced doctors typically seek to restore internal balance of the patient and ensure the smooth flow of energy inside the patient’s body.”³¹⁵ Accordingly, I seek to situate Chinese copyright policy in the greater scenario of China’s institutional reform in political and economic realms, all of which are parts of the country’s transition

³¹⁵ Interview with an IPR scholar, Shanghai, 06/18/2008;

towards a full - fledged market economy and, probably, a higher level of political democracy.

The 2008 Beijing Olympic Games opening ceremony was regarded as a unique opportunity for China to demonstrate the splendid achievement in both ancient and contemporary times. During the ceremony, the “four great inventions” in ancient China, namely the compass, gunpowder, paper-making and printing, were featured as one of the main themes of the performance. Among those “four great inventions”, two were related to copyright : paper-making and printing. It is believed that the wide-spread use of mobile-type printing technology in Europe contributed a great deal to the breaking of the monastery’s monopoly over knowledge and the birth of the notion of democracy. After we watched the opening ceremony of 2008 Beijing Olympic Games together, a Shanghai-based IPR lawyer raised a set of thought provoking questions: while paper making and printing contributed to the collapse of monarchy in Western Europe, why did those technologies did not ignite similar social changes in China until several centuries later? While the technology of spreading ideas and related copyright industry have become such an important part of the Western world’s competitive edge in this increasingly globalized world, why does the development of copyright industry still meet so many constraints in the birthplace of paper-making and printing technology? Can a free flow of ideas co-exist with an authoritarian political system? If not, what should be changed? How should it be changed?³¹⁶ The IPR lawyer’s questions, together with Chinese copyright official’s comment on the Chinese Communist Party’s Central Propaganda Department, Chinese

³¹⁶ Interview with an IPR lawyer, Shanghai, 08/09/2008;

copyright owners' complaint about government's restraint, and even Chinese street peddlers and consumers' indifference to copyright issue discussed earlier in the chapter, all point to the greater political and economic scenario in which Chinese copyright policy operates. Like the issue of patent, China's struggle over copyright is also part of the country's painful transition to an unknown future, something for Chinese decision-makers and foreign researchers to keep in mind to achieve a better understanding of the most populous country in the world.

In the end, my study has policy implications for both Chinese and foreign players on the stage of Chinese copyright policy: to echo the metaphor made by the IPR scholar earlier in this section, raiding piracy activity is just like getting rid of a patient's symptoms. There is much more to be done to improve the patient's health. Those measures should at least include international cooperation against the transnational piracy network, consistent education campaigns to promote the public's sympathy for IPR, more policy measures to build up the competitiveness of Chinese copyright industry, and probably more thorough institutional reforms into the Chinese propaganda system, one of the cornerstones of Chinese communist system.

Chapter 6. Competing in a Not Fully Competitive Market: The Implementation of Chinese Trademark Policy

Introduction: The Anatomy of an Anti-Counterfeit Raid

Why does China selectively comply with international intellectual property rights (IPR) norms, even though since the country's WTO entry in 2001 it is supposed to protect *all* intellectual property rights? Extant literature attributes the lack of respect for IPR to either the Chinese central government's defiance of external pressure to monitor IPR compliance (Ryan 1995) , or to the Chinese local government's protection of IPR infringers and the poor coordination between different branches of Chinese local government in enforcing IPR norms(Mertha 2005; Dimitrov 2009). In this chapter, I demonstrate that the extant scholarship has neglected the importance of Chinese societal actors. In fact, different attitudes towards trademark by the different sets of Chinese societal actors play a significant role in shaping China's trademark policy. Specifically, most foreign companies and a small handful of elite Chinese domestic private companies lay a great deal of significance on trademark as the key component of their competitiveness. However, the majority of Chinese domestic companies are constrained by both the legacy of a planned economy and the immaturity of China's market mechanism. Therefore, the norm of trademark protection does not enjoy as high level of popularity among Chinese domestic companies as their foreign counterparts, which in turn hinders China's complete compliance with trademark norm.

The differentiated attitudes by different sets of business actors towards trademark are exemplified in an anti-counterfeit raid that I observed during my field work in China.

In Spring, 2008, company B³¹⁷, a U.S. company with its China headquarters located in South China's Guangdong Province, noticed that their sale of shampoo and detergent powder in East China's Jiangsu province was strangely lower than expected although there were no significant changes in their marketing strategy in that region. Moreover, their peer producers of shampoo and detergent did not report an increase in their volume of sale in the same region as well. They reasoned that some counterfeit goods may have been circulated on the market. Hiring an investigation firm located in Shanghai, they also urged H County's local trademark enforcement squad to carry out a raid in this region against possible counterfeiters. Mr. Kang, an employee with the investigation firm, allowed me to observe the raid. In mid-July, I traveled to H County by bus from Shanghai, met two representatives with the investigation firm, Mr. Tan and Mr. Mao, and stayed in a local hotel to wait for the raid.

To ensure the confidentiality of the raid, I was told not to ask any questions to anybody with the investigation firm and the local enforcement squad officials during the waiting period, a nerve-racking time indeed. The only clue I heard about the raid was that the counterfeit shampoo and detergent powder was produced in Guangdong and shipped to Northern Jiangsu. After waiting for about five days, I was told that the raid was about to be carried out.

Getting up before dawn, H County's trademark enforcement squad, Mr. Tan, Mr. Mao, and I drove in a van to a house located at the western part of the H County. In a room inside the basement of that house, we found a room full of counterfeit shampoo. After raiding this place, we drove to two other warehouses based on a clue provided by

³¹⁷ At the request of my interviewees, I replace their real names with improvised ones in this chapter.

an anonymous tip. Altogether, raids to those three locations resulted in the confiscation of 289 bags of counterfeit detergent powder and 110 bags of detergent shampoo. For the sake of preserving confidentiality, I was only allowed to observe a small fraction of the raid. The enforcement official asked me to return to their office without observing the rest of their anti-counterfeit raid. However, later I was told that those counterfeit goods covered not only the brand of Company B, but also the brands of Company L, a China-U.K. joint venture and Company J, a Shanghai-based domestic company.

When the enforcement official called company B, company L, and company J respectively, the three companies responded in different ways. As the original initiator of the raid, Company B, not surprisingly, regarded the counterfeit goods as a serious issue and promised to send a representative right away. Company L thanked the enforcement squad, also promised to send a representative to the spot, and hinted that there would possibly be some financial reward. However, the first thing company J asked was how many bags of counterfeit goods covered their brand. When the enforcement official told them that it was 89 bags, company J told the official that they would not regard it as a full fledged case if the counterfeit goods amounted to less than 100 bags. The enforcement officials were very disappointed by Company J's indifference. One official on the spot said, "Why should we work so hard to protect trademark holders' interests while they do not really care? We should probably tell the counterfeiter that they should infringe upon Company J's brand to their hearts' content."

This real-world example yields the following findings that deserve our analysis: first, although it remained unknown how exactly the counterfeit goods were produced,

shipped and distributed, it was not the IPR enforcement bureaucracy that initiated the raid, but instead the trademark-holder (Company B) whose business interests were hurt by counterfeit goods. In fact, there are only 12 members of the enforcement squad of H County while the population in the region is half a million. China employs 330,000 enforcement professionals in the country's IIPR bureaucracy,³¹⁸ - the highest number in the world, but those enforcement professionals are responsible for monitoring the consumption behavior of 1.3 billion people, also the highest in the world. It is therefore impossible for the enforcement squad to keep an eye on the consumption behavior of the Chinese populace even if they work seven days a week, 24 hours a day. Since it is the business community's interests that are most directly affected, the IPR enforcement bureaucracy mainly rely on them to provide clues to organize anti-counterfeit raids. According to an IPR official, without the clues provided by the business actors, the IPR enforcement bureaucracy is both "deaf and blind".

Second, while trademark holders are important clue providers for anti-counterfeit activities, not all the trademark holders are enthusiastic about protecting their trademarks. Indeed, the above real world example demonstrates that attitudes vary among the trademark holders: the response of foreign companies (Company B and Company L) was serious and prompt; domestic companies (Company J) are serious about trademark protection, but they are not as serious as their foreign counterparts. Domestic companies certainly want to protect their trademarks, but they could also tolerate counterfeit activity unless their business interests were hurt badly. Statistical data released by Chinese media reveal similar tendency. For example, out of the 2217 anti-counterfeit cases in Shanghai,

³¹⁸ Interview with a Beijing-based IPR official, 10/22/2007;

China's economic capital, in 2006, only 6.9 percent of them were initiated by the domestic trademark holders although domestic companies account for 93 percent of the total companies in Shanghai. (Ren 05-10-2007) Why are Chinese domestic companies not as enthusiastic about protecting their trademarks while trademark is supposedly such an important part of their competitive edge? While foreign investors in China are serious players on trademark protection, why aren't their Chinese counterparts equally serious? This chapter seeks to explain the mechanism that creates that kind of differentiated attitudes.

Finally, while the above fieldwork example illustrates different attitudes among corporate actors, the case does not reveal Chinese consumers' attitudes toward trademark issue. While corporate actors are important players on the stage, what do Chinese consumers think about the issue of trademark and counterfeiting? How do their attitudes impact the implementation of Chinese trademark policy? I will also address those issues in this chapter.

The central argument advanced in this chapter is as follows: as part of the legacy of China's planned economy and the immaturity of the country's market mechanism, weaknesses remain in China's quality-management policy and market competition policy. Therefore, despite impressive achievements in the past decades, trademark is not yet the key aspect of many Chinese domestic companies' marketing strategy; except some elite private companies, many Chinese domestic companies still rely on such non-market forces such as state intervention or unfair competition techniques to reap market benefits. Therefore, they are not as dependent on trademark as their foreign counterparts.

I also contend that, in order for a better understanding of Chinese trademark policy, scholars should also examine such neighboring issue areas as Chinese quality-control and market competition policy. However, so far very few works connect the study of Chinese quality-control and market-competition policies with Chinese trademark policy. My study seeks to bridge that gap.

I organize this chapter into the following parts: the first section discusses briefly the history of Chinese trademark policy from 1949 to present. The second section discusses Chinese quality-management policy and market-competition policy, two fundamental aspects that shape the value of trademarks in China. The third section discusses how the attitudes of Chinese consumers impact the distribution and consumption of counterfeit goods. I conclude this chapter by arguing that Chinese trademark policy should not be understood as isolated from the general political and economic setting in a transitional China.

History of Chinese Trademark Policy (1949-present): Achievements and Limitations

This section delineates the brief history of Chinese trademark policy. I divide this period of history into four phases: pre-reform (1949-1978), early reform (1979-1992), reform deepening (1992-2002), and post-WTO (2002-present). This section demonstrates that while China achieved impressive achievements in the realm of trademark in the past decades, significant weaknesses still remain. Specifically, while some Chinese brands have achieved international fame as the result of China's rapid economic development since the late 1970s, they are heavily concentrated in the state-

owned sector. Moreover, most of the leading Chinese brands belong to the service sector rather than consumer products sector, which is at odds with China's status as a major manufacturing power in the world. Those achievements and weaknesses constitute the foundation of China's peculiar attitudes towards trademark at present

Four Phases of Chinese Trademark Policy between 1949 and Present

Once the Chinese Communist Party came into power in 1949, a Soviet-style planned economy model was established in China. It was not until 1978 that a market mechanism was introduced. During the three decades of per-reform era, Chinese enterprises were more production units rather than corporate entities. Their major business function was to meet the production quota set by the Chinese state. Unlike their Western counterparts, they were not responsible for marketing their products.³¹⁹

According to the statistical data gathered during the early 1980s, 80% of Chinese companies did not have their own trademarks. In Beijing, Shanghai, Tianjin, and Harbin, the four largest metro areas in China, only 29 percent of the products bore registered trademarks in the early 1980s.³²⁰

The reform and opening policy introduced in 1978 not only prompted Chinese domestic companies to adapt to market mechanisms, but it opened the gate to foreign investment. As the result, the trademark awareness of Chinese domestic companies started to increase. In 1981, *China Advertising* journal was set up as the first professional Chinese journal to discuss the promotion of business brands in China. In

³¹⁹ For a discussion of China's planned economy model, see, for example, Lardy, N. R. and K. Lieberthal (1983). *Chen Yun's Strategy for China's Development*, M.E.Sharpe.

³²⁰ Ai, F. 艾. and L. Guangdou(李光斗) (2009). "Chinese Brands' Journey in the Past Six Decades(品牌六十年：专家讲述新中国六十年企业品牌史) ."

1984, *Jianlibao*, a beverage company based in South China's Guangdong Province became the first company to promote consumer recognition by sponsoring a Chinese sports team in international competition.³²¹ On July 29, 1989, *People's Daily*, the Chinese Communist Party's mouthpiece, published an article, openly discussing the importance of brands in China's economic development.³²² In 1981, Coca-Cola established its first joint venture with Chinese domestic companies in South China's Guangdong Province and became one of the first foreign consumer products companies to begin its adventure in China.³²³ Following Coca-Cola, foreign enterprises swarmed into the Chinese market. Chinese consumers became increasingly familiar with foreign brands that were not known to them before.

After more than 10 years of development, in the early 1990s, the issue of brand and trademark attracted attention from Chinese top decision-makers. In 1992, the 14th Chinese Communist Party National Congress officially included the establishment of a "socialist market economy" into its reform agenda. In the same year, the State Council launched the Chinese Well Known Trademark Strategy, naming 45 Chinese domestic trademarks "Well-known Trademarks".³²⁴ In 1996, Chinese State Council published *Guideline to Promote Quality Work*, further laying out the steps to implement Chinese Well Known Trademark Strategy.³²⁵ During the 1990s, the cooperation between Chinese

³²¹ Wu, Hua and Zheng Wenjie(吴骅, 郑文杰) *Jianlibao's Road of Development*(健力宝的发展之路), from *People's Daily* (人民日报) August 28th, 1987, P3;

³²² Huang, Xiangyu(黄翔宇): *Establishing Chinese Company's Image through Advertisement*(广告的品牌形象法), from *People's Daily*, 07-29-1989, Page 7;

³²³ See, for example, Wu, Chuanzheng(吴传震), *Coca-Cola's 25 Years in China* (可口可乐在中国的25年), from *Nanfang Weekend*,(南方周末), 11/18/2004,

³²⁴ *People's Daily*, 06-27-1992, Page 2;

³²⁵ See *Gazette of the State Council of the People's Republic of China*, 12/24/1996;

domestic enterprises and their foreign counterparts was greatly deepened. More and more foreign companies established joint ventures with their Chinese counterparts, further promoting foreign brands in China.

In 2001, China joined the WTO. That marked the beginning of China's deeper integration into the world economy with more foreign companies entering the Chinese market. In 2002 then Chinese President, Jiang Zemin, declared the aim to establish a number of China's own world-renowned brands.³²⁶ At the same time, both the Chinese government and Chinese domestic companies demonstrated a higher level of enthusiasm for promoting China's own brands on the international arena.

Chinese Brand Building: Achievements and Limitations

During the past 30 years, particularly after China's entry into the WTO in 2001, China made very impressive achievements in the arena of global trademark affairs. According to the 2007 China Famous Brands Development Report published by the Chinese State Quality and Technology Supervision Bureau (QTSB), of the 346 industries under study, China was first in terms of total output volume in 144.³²⁷ It was generally agreed that China had turned into a major manufacturing power. For some scholars, China has won the title of "world factory."³²⁸ With the rapid growth of Chinese economy, the first decade of the 21st century also witnessed the rapid growth of the number of

³²⁶ Full text of Jiang Zemin's speech is available online at <http://www.cass.net.cn/yaowen/16da/5.htm>, last accessed 01/14/2010;

³²⁷ QTSB (2007). China Famous Brands Strategic Development Report 2007. <http://www.chinamp.org/govfile/2007nianfazhanbaogao.htm>, last accessed 01/15/2010;

³²⁸ See, for example, Zhu, H. 祝. (2008). Retrospect and Forecast of Brand Development in China(中国品牌发展的回顾与展望). 30 Years of Commercial Reform and Opening Up in China, Beijing.

trademarks in China. In 2008, the total number of annual trademark application increased by 698,000, fastest in the world.³²⁹

Chinese trademark practitioners can also find reason to be proud of their achievements through international comparison. According to a report published by World Brand Lab, a specialized research institute headed by the Nobel Economics Prize winner Robert Mondale, while the U.S. was still ranked No. 1 on the report, assuming almost 50% of the top 500 world's most influential brands in 2007, China was the only developing country ranked as one of the top 10 countries in the 2007 annual report. (see table below)

Table 6.1: Distribution of Top 500 Most Influential Brands by Major Countries in the World (2007)

Ranking	Country	Number of Brands
1	U.S.	247
2	France	47
3	Japan	43
4	U.K.	35
5	Germany	23
6	Switzerland	22
7	Netherlands	13
8	China	12
9	Italy	10
10	Sweden	8

Source: World Brand Lab (Lab 2007)

Despite these impressive achievements, weaknesses still exist. Indeed, those weaknesses affect the configuration of Chinese trademark policy greatly. First, among the 12 Chinese domestic brands that entered into the list of top 500 world's most influential brands, most belong to state-owned enterprises. As shown in the table below, only three of them are private enterprises (Haier, Changhong, and Lenovo). Moreover, most of the

³²⁹ China Intellectual Property Yearbook (2008), PP164-165;

top Chinese brands are concentrated in the service sector such as telecommunication and finance rather than consumer goods. That was at odds with China's position as one of the world's leading manufacturing powers. There is a significant lag behind between the brands of Chinese consumer products and the foreign brands on the Chinese market.

Table 6.2: Chinese Brands Included in the World's Top 500 Most Influential Brands Report (2007)

Ranking	Brand Name	Ownership Type	History of Brands(Years)	Industry
66	China Mobile	State-Owned	7	Telecommunication
71	China Central Television(CCTV)	State-Owned	49	Media
83	Haier	Private	23	Electronics
174	Industry and Commerce Banking Corporation(ICBC)	State-Owned	23	Banking
214	Bank of China	State-Owned	95	Banking
299	Changhong	Private	49	Electronics
306	China Life Insurance	State-Owned	58	Insurance
337	Lenovo	Private	23	Computer
417	China Railway	State-Owned	18	Construction
461	Air China	State-Owned	19	Aviation Industry
465	China Petroleum	State-Owned	7	Energy
473	China State Grid	State-Owned	5	Electricity

Source: World Brand Lab 2007

Although China astonishes the world with its rapidly growing trade surplus, becoming the world's top exporter in 2009, its brands recognition remains tiny. More than 95 percent of China's exported goods are under foreign-owned brand names. For example, in 2005, China produced 300 million cell phones and exported 228 million, but 95.43 percent were produced by foreign trademark owners investing in China. The

average price of a cell phone on the international market is 500 to 600 RMB (\$60 to \$90), but the profit left for the Chinese producers is only 10 RMB (a little more than \$1). The majority of the profits are earned by the trademark owners and retailers rather than the Chinese manufacturers.³³⁰ The following section will further analyze the mechanism that contributes to the above situation.

Chinese Quality Management and Market Competition Policy:

Shaping the Value of Chinese Brands

There are various means to measure the value of a brand.³³¹ However, the most fundamental aspects of a brand's value are determined by two factors: the quality of those branded products/service and the level of consumer recognition of that product/service. According to a Jiangsu-based trademark official, "The growth of a brand's fame is very similar to the growth of a tree. For a tree to establish itself in the forest, the seed of that tree should first be healthy and vibrant. But it is not enough to have healthy and vibrant seeds, the tree should also grow in a friendly environment, absorbing nutrition from the air, the soil, and the sunshine."³³²

Drawing from that metaphor, he further explained that, like the seed of a tree, high quality is the foundation of a brand's value; like the friendly environment surrounding the tree's growth, a healthy market environment helps to nurture the growth of a brand and win over long-term consumer recognition for that brand. However, as will be discussed in

³³⁰ *China Industry and Commerce Times*, 09-28-2010, available online at http://www.ce.cn/cyssc/mobile/xw/201009/28/t20100928_20512474.shtml, last accessed 11/10/2010;

³³¹ For a most recent discussion of techniques to measure the value of a brand, see Salinas, G. (2009). The International Brand Valuation Manual : a Complete Overview and Analysis of Brand Valuation Techniques, Methodologies and Applications Chichester, U.K. , Wiley Press

³³² Interview with a trademark official, Nanjing, Jiangsu, 05/26/2008;

the following section, problems exist in the policy practice of both aspects in China. In this section, I argue that the weaknesses in both Chinese quality-management policy and market-competition policy hinder the growth of world renowned Chinese domestic brands, which in turn contributes to the Chinese domestic business community's weak sympathy for the IPR norm.

Overall Level of Chinese Products' Quality: The Not So Solid Foundation for Chinese Trademarks

China is well known as the world's leading export power. However, in recent years the quality of Chinese products has raised suspicion and complaints among international consumers. The following section demonstrates that there are deep-rooted social, political, and economic reasons for the problems with Chinese product quality.

During the planned economy era between 1949 and 1978, China pursued a Soviet-style quality-management policy. That kind of policy focused on the supervision of product quality *after* the production process. That is, after certain products were produced, the quality-control personnel eliminated lower quality products during the examination process and only allowed the products that meet the standard to be sold to the consumers.³³³ Such a system sounds very reasonable in the first place. However, the rationale of that system was producer-oriented rather than consumer-oriented. That is, the consumers had little choice as to what kind of goods to purchase. Instead, they should buy the products as they were produced and sold. Under a planned model featured by

³³³ For a discussion of Soviet quality control policy, see Boitsov, V. V. (1980). Standardization in the U.S.S. R, 1925-1975. New Delhi, Oxonian Press.

“shortage economy”, as termed by the Hungarian Economist Janos Kornai,³³⁴ consumers did not have as many choices as they would under a mature market economy. For a long time such a quality-control system did not quite meet the material and cultural demands of the Chinese populace although the Chinese populace’s demands remained quite limited. However, the situation started to change with the introduction of a market mechanism.

In the late 1970s, the market mechanism started to be introduced to the Chinese economy. At that point, Chinese consumers’ demand for more diversified goods and services started to erupt after decades of suppression. The old quality-control system could no longer be strictly observed because that system slowed down the speed at which industrial products reached the consumers. However, the loosening of the old quality control system was not superseded by a well-developed new quality-control system. The old quality control system was reduced to a name, but an effective new system had not yet started to fully function.

The gap between the old quality-control system and the new one caused a serious decline in the quality of Chinese industrial products in the 1980s and early 1990s. In early 1993, the Chinese State Quality and Technology Supervision Bureau (QTSB) conducted an inspection of 1,942 types of products by 1,490 enterprises. The result of the inspection revealed that only 75 percent of them reached an up-to-grade level compared to an average of 98 percent in the developed countries. It was estimated by a Chinese scholar

³³⁴ See, for example, Kornai, J. (1980). Economics of Shortage. Amsterdam, North-Holland.

that the economic loss caused by quality problems in Chinese industrial products amounted to about 10 percent of the total industrial output volume in the early 1990s.³³⁵

The Chinese government introduced a Total Quality Management (TQM) system to monitor quality operation in China on a comprehensive scale. The Total Quality Management system originated in the United States in the 1950s. The initiator of that system was a Romanian American engineer, Joseph Juran. In the early 1960s, an American engineer, Armand Feigenbaum further developed his idea into a more comprehensive scheme.³³⁶ TQM is a complicated quality management system. In it, high quality of certain products is not just regarded the result of rigorous supervision after production; instead, quality control is conducted in a comprehensive manner. TQM advocates the combination of design, production, and post-sale service, based on thorough market research prior to production. Moreover, instead of regarding quality work as the sole responsibility of only quality control personnel, TQM advocates that all employees of a company, including a company's leader, mid-level manager, research and development staff, workers, and logistic staff alike to be involved, organized by a complete set of production regulations. Instead of attempting to eliminate low-quality products *after* they are produced, TQM attempts to get rid of problems that may cause quality problems *during* the production process.

For example, the entire production of a sweater in a typical Chinese sweater factory consists of more than 30 different procedures, from selecting the appropriate wool

³³⁵ Guanyi (王关一), W. (1995). "Causes and Solutions of Quality Syndrome for Chinese Enterprises(试论中国企业质量综合症的诱因及对策)." Lanzhou Journal(兰州学刊) (6): 24-27.

³³⁶ See, for example, Juran, J. (1962). Quality Control Handbook. New York, McGraw-Hill. Also see, Feigenbaum, A. V. (1991). Total Quality Control. New York, McGraw Hill.

to knitting the wool into a sweater ready for sale in an apparel shop. Under the old quality management system, the quality of the sweater will only be examined at the very end of the production process, after a sweater is finished and before it is shipped to the apparel shop. However, under TQM, quality examination would be conducted across all 30 different procedures. Although it seems that the quality- management personnel' task gets lighter under TQM, the entire standard for quality-control process gets higher, as the quality examination duties are distributed to the production personnel previously not responsible for quality inspection. Obviously, TQM requires a thorough overhaul of the corporate governance structure of an enterprise.

In the late 1970s, several Chinese enterprises in Beijing started to introduce TQM for experimental purposes. By 1986, 38 Quality Management Associations were established at ministerial/provincial level in China, supervising quality management work under their official duties.³³⁷ At the same time, China attempted to adopt internationally agreed quality standard upon its own corporate practice. In 1978, China joined the International Organization for Standardization (ISO). In 1988, China introduced ISO9000, adopted by ISO in 1987 as an internationally agreed upon set of standards for quality management, into 8,200 major Chinese industrial enterprises.³³⁸ Six years later, over 1000 of them met the standard set in ISO-9000 and were allowed to bear ISO 9000 recognition on their brands.³³⁹ As of 1998, that number increased to 8,117. According to a report released by Chinese State Quality and Technology Supervision Bureau, the total

³³⁷ Among those enterprises were Beijing Internal Combustion Factory and Qinghe Textile Factory, see Xie, A. 解. (1999). "TQM in China(TQM在中国) ." China Quality(中国质量) (11): PP17-22.

³³⁸ Li, C. 李. (1995). "ISO9000 in China(ISO9000在中国) ." China Standardization (中国标准化) (No. 12): Pages 3-5.

³³⁹ Ibid;

percentage of pass for Chinese products increased from 74.6% in 1995 to 87% in 2007.³⁴⁰ That is, the quality of Chinese products improved with the adoption of international quality management practice.

Compared with their Western counterparts, with several decades of quality-management experience, Chinese companies operated their quality management system in a transitional economy strongly influenced by more than three decades of planned economy experience. Moreover, market mechanisms did not gain full recognition for more than 20 years. As such, the corporate governance structure of Chinese companies is still influenced by the legacy of the planned economy; according to a survey conducted by the Chinese Quality Association in 2009, 79.8 percent of the corporate respondents still believed that quality management was only the business of quality control personnel, but irrelevant to the other divisions of their companies.

Moreover, the early stages of Chinese capitalism drives Chinese companies to put short-term benefits ahead of corporate social responsibility. Various problems haunt the still immature quality-management system of the domestic companies. As the result, in recent years Chinese products encountered a series of quality problems on the international stage, that seriously damaged China's image as a major export power. In early 2007, the U.S. Consumer Product Safety Commission (CPSC) issued warnings against 2,627,450 baby toys made in China, claiming that those products were contaminated with harmful materials including lead paint. Moreover, the CPSC claimed that small magnets attached to other toys could come loose and be swallowed by

³⁴⁰ Xinhua News Agency, 12-19-2007; full text of the report is available online at http://news.xinhuanet.com/fortune/2007-12/19/content_7280890.htm, last accessed 11/10/2010;

children.³⁴¹ In summer 2007, 10 million baby toys exported from China to U.S. were recalled for safety reasons.³⁴² That blow to the Chinese toy industry was so heavy that, Zhang Shuhong, the CEO of a leading toy company in South China's Guangdong province committed suicide in his factory after receiving the recall notice.³⁴³

The quality problems with the Chinese products were not limited to the export sector only. In 2008, a more serious quality problem broke out in China's food industry. In late summer 2008, a nationwide milk scandal was eventually uncovered despite the cover-up efforts on the part of the local government. A leading milk producer in China, Sanlu Dairy, was accused of adding melamine, a toxic chemical ingredient, to their baby milk formula to increase the output of milk powder. That melamine caused 1,253 Chinese babies to be diagnosed with kidney stones as of September 14th, 2008.³⁴⁴ In less than a week, 3215.1 tons of milk powder was recalled on the Chinese market.³⁴⁵ The milk scandal not only resulted in the arrest of Sanlu Dairy's CEO, Tian Wenhua, but it seriously tarnished the image of Chinese products again. After the milk scandal, the Director of the Chinese Quality and Technology Supervision Bureau (QTSB), Li Changjiang, resigned from his post after a public apology to China's TV audience.³⁴⁶

According to the analysis of one trademark official, the reasons for the repeated occurrence of the quality problems with Chinese products in recent years are twofold.

³⁴¹ Guo, Yingyu(郭莹玉) (02/15/2007). Chinese Toy Exporters Face Serious Challenges(我国玩具出口面临严峻挑战) . China Quality News(中国质量报) : Page 4.

³⁴² Story, L. and D. Barboza (August 15, 2007) . Mattel Recalls 19 Million Toys Sent From China. New York Times.

³⁴³ Wu, B. and Jiang, Xueqing (09-24-2007). Guangdong Toys: The Pain of Recalling(广东玩具: 召回之痛) . People's Daily (人民日报) : Page 6.

³⁴⁴ People's Daily, 09/14/2008, Page 2;

³⁴⁵ People's Daily, 09/20/2008, Page 5;

³⁴⁶ People's Daily, 09/23/2008, Page 1;

Internationally, some Chinese companies still adhere to the planned economy model and are satisfied with being a production unit and earning some processing fee from the international market. They do not understand how to explore the international market independently. Domestically, some Chinese companies only operate according to the “bad aspect” of market economy by focusing on short-term benefits, ignoring the internationally accepted moral norms.³⁴⁷

To echo the metaphor made by the trademark official mentioned earlier in the section, the production of high quality goods is the foundation of a trademark’s reputation. However, due to the above discussed problems, the overall quality level of Chinese products has not reached a level commensurate with its status as one of the world’s major manufacturing powers. Since quality is the foundation of a trademark, Chinese trademark policy’s foundation is not as solid as it should be.

Chinese Market Competition Policy: The Not So Friendly Environment for Chinese Brands

The production of high quality products is only the first step in building the value of a brand. An equally important, if not more important, next step is to market the products efficiently and establish long- term consumer loyalty. A healthy and fair market is therefore essential for the growth of a brand. However, the immature market mechanisms breed unfair competition behavior in China, which hinders the growth of world renowned Chinese brands.

³⁴⁷ Interview with a trademark official, Nanjing, Jiangsu, 05/08/2008;

The issue of unfair competition was first raised in the late 19th century, when the problems of laissez faire capitalism started to emerge. In order to curb the abuse of business rights, particularly the formation of monopoly, the governments were pushed to intervene into the operation of markets. In 1889, Canada adopted the first unfair competition law in the world; in 1890, the United State also adopted its own legislation known as the Sherman Act. During the several decades that followed, countries such as Britain, France, Germany, Japan, and Belgium adopted similar legislations.

However, China's unfair competition legislation operates in a different setting from the Western countries. Under the planned economy model, the regulation of market competition was not a problem since Chinese enterprises were regarded as the accessories to the Chinese government. Government protection prevents them from engaging in market competition.

With the introduction of market reform in the late 1970s, the majority of Chinese companies were forced to compete as market entities. However, due to the immaturity of China's market economy, Chinese companies compete under a different setting, where unfair competition is ineffectively regulated. As such, instead of relying on promoting the reputation of their brands as regulated by legal norms, many China companies rely on various unfair means to compete against other companies.

Specifically, due to the Chinese state's heavy intervention into the economic activities, Chinese companies often resort to government power to compete against the other companies. The local governments organize quality evaluation of different products on the local market, manipulate the result of the evaluation in favor of their local

enterprises, and publish that on the media. That form of local protectionism forces the Chinese companies not to prioritize on promoting their trademark's reputation through legal and economic means. Instead, their first priority is to curry the favor of the government branches in charge of market regulation.

Moreover, the profits of Chinese state-owned enterprises stem more from their monopoly over certain industry rather than market competition. Although the majority of state owned enterprises turned into market entities after market reform started in the late 1970s, it remains Chinese government's policy that state-owned enterprises should control the life line of the Chinese economy.³⁴⁸ According to Li Rongrong, Director of Chinese State Commission of Management of State-owned Assets, state-owned enterprises should assume "absolute control" over core realms related to the country's economic security. These realms include the production of military industry equipment, electricity supply, petrol and energy, telecommunication services, coal and metal mining, transportation, and machine building.³⁴⁹ For those state-owned companies, once they acquire government support, they can maximize their profits in the realms where there are no credible competitors. Therefore, it is unnecessary for them to publicize their brands. Due to their state-owned background, they do not even bother to employ the unfair competition techniques. It is not surprising that the top brands in China are concentrated in the state-owned sector. As one Jiangsu-based trademark official said,

³⁴⁸ For a most recent official discussion of this policy, see State Commission of Management of State-Owned Assets(国有资产管理委员会), S. C. o. M. o. S.-O. (2007-2008). Guideline Opinion on the Promotion of Readjustment of Management of State-owned Assets and Reorganization of State owned Enterprises (关于推进国有资本调整和国有企业重组的指导意见) China Reform Yearbook(中国改革年鉴), . Beijing: PP525-528. ;

³⁴⁹ Xinhua News Agency, Interview with Li Rongrong, Dec. 18th, 2006. Full text of the interview can be accessed online at http://www.gov.cn/ztl/2006-12/18/content_472256.htm, last accessed July 30th, 2009;;

“Market competition is somewhat similar to a soccer game, with consumer loyalty as its prize. Different companies are just like the players in that soccer game while the government is just like the referee of the game. However, some players do not obey the rules. They can still avoid being punished because of their closer connection with the referee. To make it worse, at some critical points the referee jumps into the soccer field and takes the role of soccer player. At that point, it is unnecessary for the players to compete for the prize of the game because the result of the game is already determined. That is, the consumers have no other choice.”³⁵⁰

Finally, the Chinese companies that cannot acquire state backup invest heavily on forging good relationship with the media so that the latter can make favorable advertisements. Those advertisements both exaggerate the positive aspects of their products and intentionally belittle the products of those companies’ competitors. The false advertisements not only serve to create unfair competitive advantages for their sponsors, but also mislead the mass consumers. With the rampancy of false advertisements, Chinese companies find it very hard to establish long term consumer loyalty towards their brands.

It is unfair to say that the Chinese government does nothing to curb the unfair competition behavior. Starting from the early 1980s, the Chinese government issued a series of laws and regulations to establish a sound market order. After the promulgation of Trademark Law in 1982, the Chinese government adopted the Provisional Regulations against Illicit Trading in 1987.³⁵¹ In 1993, China adopted the

³⁵⁰ Interview with a trademark official, Nanjing, Jiangsu, 04/29/2008;

³⁵¹ Full text of the regulation is available online at http://www.law-lib.com/law/law_view.asp?id=4545, last accessed Oct. 30th, 2010;

Anti Unfair Competition Law and Consumer Rights Protection Law.³⁵² In 2007, China passed the Property Rights Law, recognizing the legitimacy of property rights.³⁵³ Several months later, China passed the Anti Trust Law, which came into effect on August 1st, 2008.³⁵⁴ The adoption of the Anti Trust Law represented a new step forward to regulate China's market order.

Despite this progress, China's anti unfair competition legislations were adopted in a phase when a full-fledged market economy had not been established. According to a trademark official, under a mature market economy, a country's trademark policy is a branch growing out of the root of the country's market economy; its neighboring branches should at least include anti-unfair competition policy and product quality policy. They should be based on a legislation that defines a sound market mechanism. However, China underwent a process of "backward legislation" in the realm of trademark. Trademark Law was first adopted in 1982, but Anti-Unfair Competition Law was first adopted in 1993. Property Law recognizing the legitimacy of private property, the cornerstone of a mature market economy, was not adopted until 2007 after bitter debate among the decision making elites. Therefore, Chinese trademark policy can be aptly compared to a person with strong arms but frail legs. The function of Chinese trademark regime focuses more on providing information to consumers rather than curbing unfair competition. That constitutes the institutional causes of the problems in the

³⁵² Full text of the Anti Unfair Competition Law is available at People's Daily, 09-04-1993, Page 5. Full text of the Consumer Rights Protection Law is available at People's Daily, 11/01/1993, Page 2;

³⁵³ Full text of the Property Rights Law is available at People's Daily, 03/20/2007, Page 5;

³⁵⁴ Full text of the Anti Trust Law is available at People's Daily, 10/03/2007, Page 3;

implementation of trademark policy in China.³⁵⁵ Not only do the problems with full-fledged market capitalism haunt the Chinese business community, but also the government possesses the mandate to intervene market activities at their will and remain unaffected by the competition regulations. During the past two years, the Anti-trust Bureau of the Chinese Department of Commerce conducted more than 140 anti-trust investigations, but none of the investigation was directed against state-owned enterprises.³⁵⁶ According to Gao Shangquan, a research fellow with the Chinese Academy of Social Sciences, the Chinese state's involvement in the economic activities remains too heavy despite years of economic reform. As such, the market order in China remains vulnerable to state distortion. State-owned sectors as electricity, telecommunication, petroleum, and water and gas supply enjoy a profit rate 5 to 10 times higher than the country's average level.³⁵⁷

On average a Western brand takes an average of 12 to 15 years to establish itself on the market. For that brand to grow into a world renowned brand, an average of 30 to 50 years of nurturing is required. Under a distorted market in China, however, a dilemma encounters the ambitious Chinese trademark holders: establishing the reputation of a trademark requires long term investments, but those private enterprises with the sincerity to promote their trademarks' value do not possess the financial resources to pursue their trademark strategy, except for a small amount of elite private enterprises. State-owned enterprises possess the financial resources to promote well known trademarks, but they

³⁵⁵ Interview with an IPR official, 11/22/2007, Beijing;

³⁵⁶ Ding, L. 丁. (2010). "The Two Years Experience of Anti Trust Law(反垄断法两年考)." Chinese Economy and Information(中国经济和信息) (No. 6): pp22-23.

³⁵⁷ Gao, S. 高. (06-12-2009). Breaking Monopoly should be the New Cut-in Point for China's Economic Reform(把打破垄断作为深化改革的突破口) . People's Daily: Page 7.

do not feel the necessity to do so since their profits are guaranteed by the state. The comment by a trademark attorney aptly describes the dilemma: “(in pursuing their trademark strategy), those who have the willingness do not have the ability; those who possess the ability do not have the willingness.”³⁵⁸

According to a Beijing-based trademark attorney, the implementation of Chinese trademark policy cannot be fully comprehended without a good understanding of the state’s intervention with the market. In his words, “The logo of State Administration of Industry and Commerce (SAIC), the primary government organ in charge of Chinese trademark policy, is a red shield. But what does the color of red imply? In Chinese culture, red implies good fortune. But do not forget, red also implies imperial taboo: red is the color in which the Chinese emperor signed the Imperial Decrees; red is also the color in which a death prisoner’s name is written.”³⁵⁹ Another trademark attorney told me: “For us trademark practitioners, market is the sea, companies are boats, and trademarks are the sails of those boats. But in China the market is usually intervened or even distorted by the state. How can you expect the sail to speed up the boats if the wind blows so unpredictably?”³⁶⁰

In sum, the weaknesses in Chinese quality management practice and the not so sound market order mirror the problems inherent in the country’s political and economic institutions: despite its rocketing GDP and spectacular manufacturing ability, the country does not have a sound market infrastructure to support the development of sufficient amount of real world renowned trademarks in the country’s goods and services, which

³⁵⁸ Interview with a Beijing-based Trademark Attorney, 11/20/2007, Beijing;

³⁵⁹ Interview with a Beijing-based Trademark Attorney, 11/22/2007, Beijing;

³⁶⁰ Interview with a Beijing-based Trademark Attorney, 11/24/2007, Beijing;

pushed some of the country's producers to sell their products bearing the counterfeit trademarks so that they can take advantage of other trademarks' good reputation. Moreover, despite the country's fast development in manufacturing ability, China still lacks the means to add value to manufactured goods through an effective marketing strategy. That constitutes the major reasons for the lack of real world renowned trademark in China, which in turn explains some Chinese companies' weak sympathy for trademark protection.

**Producing and Consuming Counterfeit Goods:
How do the Illegal Goods Gain *de facto* Legitimacy?**

The above section argues that the weaknesses in Chinese quality-management policy and market-competition policy hinder the growth of Chinese domestic brands. While these weaknesses impact Chinese corporate actors' attitudes towards trademark, what are the Chinese public's attitudes towards trademark? This section argues that, contrary to the conventional wisdom, Chinese consumers are not necessarily hostile to trademark-infringement activities. In fact, they care more about the quality of the purchased goods rather than the authenticity of the trademark. Their insufficient sympathy for trademark norm adds to the difficulty for the Chinese state and societal actors to comply with trademark norm.

Producing Counterfeit Goods

Due to the illegal nature of producing and distributing counterfeit goods, I was not able to decipher the full picture of the production and distribution of counterfeit goods in China. However, my fieldwork with law enforcement officials demonstrate that the production of counterfeit goods in China is decentralized along sophisticated

manufacturing and distribution networks. That is, in the cases of trademarked goods, legitimate factories are often used to make illegitimate products while legitimate stores are also used to sell illegitimate goods.

Most people equate “counterfeit goods” with “low-quality goods”. My field work suggested otherwise: counterfeit goods were not necessarily shoddy. In practice, there are two types of counterfeit goods: some goods are both counterfeit and of low quality; some goods are counterfeit but not necessarily of low quality. In fact, with the improvement of Chinese manufacturing ability, the second type of counterfeit goods constitutes the majority of counterfeit goods in China. That is, the quality of the counterfeiters’ goods is similar or even higher than that of the legitimate producers although they bear fake brands on their products.

For example, an official from Guangdong Customs House told me that they confiscated a large number of counterfeit Italian leather shoes in the spring of 2007. But when the Italian trademark holder came to site, they found out that the hand made counterfeit shoes were of higher quality than the real machine made ones. Therefore, the Italian trademark holders asked the government not to impose financial punishment and allowed the counterfeiters to sell their hand made shoes bearing the real Italian trademark.³⁶¹

If the counterfeiters can do such a good job in manufacturing, why do not they produce legitimate goods and market them through legitimate channels so as to build their own brands? I did not have access to the producer of counterfeit shoes in the above

³⁶¹ Interview with a Guangdong based IPR official, Zhuhai, Guangdong, 05/20/2007;

case, but my interview with a business man in east China's Jiangsu Province illustrates their rationale for producing counterfeit goods, particularly during the early stage of developing their business.

When Mr. Y started his apparel business in the late 1990s, he did not have the financial resources to invest in by advertising his apparels on TV, radio, or other media outlets like his more mature business competitors did. Moreover, starting his business in a relatively remote area, Mr. Y first chose the medium and low income consumers as his target clients to earn the first profits. While Mr. Y was no match for the international apparel giants on the Chinese market such as Pierre Cardin, Dunhill, and Montagut, the only advantage he could rely on was the cheap labor he hired and the relative geographic proximity between the market and his apparel factory. Therefore, the top priority was not to create his own brand since he knew that his own brand was no match for the more mature competitors on the apparel market. Instead, the strategy that he used was to take advantage of the reputation of the established brands, produce apparels bearing those brands, and sell them at much cheaper price to the local customers. According to Mr. Y,

“When I entered the apparel business ten years ago, I was like a high school teenager fighting against Michael Tyson on the boxer ring. Should I obey the rule? In theory, maybe the answer is yes. But if I really play by the rule, a high school teenager would be beaten to death by Michael Tyson. Keep that in mind: the rule is designed by the strong, not weak people like us. Therefore, the only way for me to survive is to disobey the rule and create my own. Obey the trademark law? Give me a break. Can the trademark law feed my workers and my family? I can only survive by taking advantage of the cracks in the Chinese trademark law! I know the importance of building my own brands, but my first priority is to make enough money to afford the expensive advertisement fee set by the TV station.”³⁶²

³⁶² Interview with a Jiangsu-based apparel businessman, Nantong, Jiangsu, 06/08/2008;

The experience of Mr. Y not only explains why millions of Chinese start-up business people engage in producing counterfeit goods as new comers to business competition, it also serves as a useful prism to view China's role as an important producer with so many fewer important world-renowned brand owners in the global economy.

The production aspect of counterfeit goods is just one side of the story. Equally important are the attitudes of the Chinese consumers. After all, if the Chinese consumers cannot tolerate counterfeit goods, counterfeiters cannot survive despite their products' low price and decent quality. The reality is that the Chinese mass consumers tolerate and even welcome counterfeit goods.

Consumption of Counterfeit Goods

Before China started its market reform in the late 1970s, Chinese consumers only passively purchased consumers goods as supplied by Chinese producers. The notion of consumer rights did not come into full shape during the early stage of market reform. In a survey conducted by the Chinese Consumer Association in the early 1990s, after the respondents realized that they had purchased counterfeit goods, only 37.5 percent chose to return the goods to the sellers and ask for a refund; if the counterfeit goods were worth less than 100RMB (about \$ 15 U.S.), 66 percent of the respondents chose not to bother to argue with the seller and keep the counterfeit goods.³⁶³ Chinese consumers did not have strong inclination of self protection when they purchase counterfeit goods. The situation

³⁶³ People's Daily, 02/05/1991, Page 2;

did not start to change until the Chinese Consumer Rights Protection Law was adopted in 1993.

With years of consumer rights advocacy in the past 20 years, consumers became increasingly picky with the products' quality. However, for the average consumers, the first priority remains price and quality rather than the authenticity of the brands. Under some circumstances, the consumers even intentionally choose to buy counterfeit products if counterfeit goods can help to uphold their sense of vanity. Some consumers still knowingly buy counterfeit goods. According to a young man who purchased counterfeit goods in one of Shanghai's famous counterfeit markets, Qipu Road,

“I buy counterfeit Cartelo T-shirts simply because I want to look really cool. After all, famous brands are made to demonstrate to the other people. Who cares whether my T-shirts are made legally or illegally? Moreover, counterfeit T-shirts are different from counterfeit drugs. They are not life threatening. Maybe the legal T-shirts are of better quality, but the counterfeit ones are much cheaper. If you have a choice between spending 5,00RMB on a legal T-shirt that can last for five years and spending 20 RMB on a counterfeit T-shirt that last for two years, which choice do you prefer? For me, I will prefer the latter. If a counterfeit T-shirt is worn out, I can buy five or even ten more counterfeit ones. That can still last much longer than the real ones.”³⁶⁴

Obviously, in the case of many Chinese consumers such as the young man I interviewed, it is of secondary importance whether the products they purchase are legal or counterfeit.

The young man's comment finds support in a nationwide survey funded by Chinese State Intellectual Property Office (SIPO). According to the survey, 57.9 percent

³⁶⁴ Interview with a Shanghai based consumer, 07/15/2008;

of Chinese consumers admitted that they have purchased counterfeit goods even if they know they are fake; 42.1 percent of them claimed to have never purchased counterfeit goods. As for the reason to purchase counterfeit goods, 50.4 percent of them admitted that the top reason for them to buy counterfeit goods is cheap price for similar quality.³⁶⁵ Moreover, according to the Chinese Consumer Rights Association, in 2007, the Consumer Rights Associations at different levels in China received 656,863 complaints about consumer products in China. Among those complaints, 62.0 percent of them were about quality, 6.0 percent about unfair price, 5.4 percent about unclear buyer-seller contract, 2.0 percent were about product safety, only 1.8 percent of them were about counterfeit.³⁶⁶ That is, the Chinese consumers are much more concerned with the quality or price of those consumer products than the authenticity of trademarks because the former represents more immediate interests for them than the latter.

Due to the Chinese consumers' inadequate sympathy for trademark, law enforcement agencies mainly rely on corporate actors to provide clues for counterfeit activities. However, due to the weaknesses in Chinese quality management and market competition policy, Chinese domestic companies do not have as much stake in brand protection as their foreign counterparts. The imbalance adds to the difficulty of enforcing trademark norm on the part of Chinese law enforcement agencies.

³⁶⁵ Liu, Hua, Ying Zhou and Guanghui Huang: Investigation Report of Chinese Mass Public's IPR Awareness(我国公民知识产权意识调查报告), from Wu, Handong eds, 2005 Bluebook of IPR in China(中国知识产权蓝皮书2005), pp411-431, Page 416;

³⁶⁶ China Consumer Rights Association(中国消费者协会), C. C. R. (2008). "Analysis of 650,000 Cases of Consumer Complaints in 2007 (2007: 65万件投诉大透析)." China Quality: 10, 000 Miles Journey(中国质量万里行) (3): PP38-40.

Conclusion

During an interview with a Jiangsu-based trademark official during my field work in China in 2008, he invited me to a tea break in a tea shop, where we could oversee the Yangtze River. During the conversation, that Chinese official reminded me that not far away from the tea shop was a pavilion to commemorate Zheng He, a Chinese naval admiral living in China's Ming Dynasty (1368-1644) who headed a grand fleet on a series of overseas expeditions. During almost three decades of his military career (1405-1433), Zheng led his fleet to what is now East Africa's Somalia and Kenya. It was widely agreed that those grand expeditions were more than half a century earlier than Columbus' expedition to the American continent in 1492. Zheng's expedition represented the high point of China's influence in the outside world.³⁶⁷ After the expedition, Chinese tea, silk, and ceramics dominated international trade for several centuries until the Western colonial powers dwindled China's economic primacy in the mid 19th century. Among the official's pride I also heard his whining. In his words, "Chinese tea used to dominate international trade, but take a look at today's tea shops in China, they are all dominated by foreign brands!" When I asked him for his opinion as to why China declined from its glorious past, he sighed, admitting that "maybe we should blame ourselves first for the waning of Chinese products' historical glory before criticizing Western powers' economic invasion."³⁶⁸

³⁶⁷ There are numerous studies of Zheng He's overseas expedition in the 15th century, see, for example, Levathes, L. (1997). When China Ruled the Seas: The Treasure Fleet of the Dragon Throne, 1405-1433, Oxford University Press.

³⁶⁸ Interview with a Nanjing-based trademark official, Nanjing, Jiangsu, 05/08/2008;

That official did not further explain what aspects of the Chinese political and economic setup should be blamed for the lack of competitiveness of Chinese brands on the international arena. However, my study shows that the weaknesses exist at both the micro level and the macro level. At the micro level, Chinese domestic companies still lack an effective quality- management mechanism based on a sound corporate governance system, which creates problems for the improvement of the overall level of Chinese products' quality. At the macro level, the market competition in China remains in disorder and vulnerable to state interference. The handling of all those problems goes beyond the realm of Chinese trademark policy. In fact, it is reasonable to expect a thorough reform into the means in which the Chinese state governs the country's economic activities as China develops its own world renowned trademarks on the international economic stage. Without that, Chinese business community and mass consumers are not able to benefit from the implementation of the country's trademark policy. Trademark infringement activities will still be tolerated or even welcome by China's societal actors; consequently, China will still be blamed for not fully complying with international trademark norm.

The previous three chapters respectively address China's compliance with three major issue areas of international intellectual property rights (IPR) regime: patent, copyright, and trademark. In those chapters, I demonstrate that the lack of domestic constituency is the major hindrance for an international IPR norm to be fully implemented in the practice of the domestic political economy even after China incorporated IPR norms into the country's domestic legislation after the country's WTO

entry in 2001. Although the mechanism may differ across different issue areas, my analysis demonstrates that different social/interest groups pursue their own policy goals, with their own understandings of IPR. They often alter the IPR norm to suit their own positions on the stage.

In a nutshell, while the production and consumption of counterfeit goods in China is partially the result of the country's ongoing market reform and opening to the outside, it can be safely concluded that that problem cannot be resolved without the introduction of further reform measures. Those measures should include more thorough reforms of China's quality-management and market-competition policies so that trademark can become a key aspect of Chinese domestic companies' market competitiveness. They should also include consistent education campaigns to promote the public's sympathy for IPR, and cooperative efforts between the Chinese state and societal actors such as the foreign and domestic business community and consumers to crack down trademark infringement activities. All those are part of the political and economic reforms that China will inevitably experience in its efforts to build the country into a credible world power.

Chapter 7 Conclusion

My conclusion chapter is structured as follows: In the first section, I will summarize the major findings of my dissertation. The second section compares and contrasts my central argument with alternative explanations. In the final section, I will discuss the theoretical and policy implications of my research and suggest a future research agenda.

Summary of Dissertation

Why *de facto* compliance with the IPR norm has failed to come into shape in China despite the country's consistent legislation and enforcement efforts since its WTO entry in 2001? Under what conditions does the Chinese state, particularly the local state, protect IPR infringement? Under what conditions do they stand on the side of IPR-holders? These are the primary questions that drive my dissertation project.

My dissertation has described and analyzed the dynamics behind China's (non)compliance with an international intellectual property rights (IPR) norm. I argue that Chinese IPR policy is a multi-dimensional and multi-stage process. Instead of following an IPR policy formulated by the central government in a concerted manner, various state and social actors have chosen parts of The IPR norm considered useful to them to advance their own political and economic agenda. It is fair to say that there are various Chinese IPR *policies*, rather than one monolithic IPR policy, at work. As such, the outcome of policy implementation is dependent on whether or not a social consensus can be built to align the interests of different actors, namely, foreign business, Chinese domestic society, and the Chinese state. The more successfully that consensus is built, the

better the IPR norm is complied with; the more conflicted the relationship between the three, the less likely The IPR norm is implemented.

Chapter 2 focuses on the political economy of China's *de jure* compliance with IPR norms. I demonstrate that an incipient notion of protecting innovation through legislative means had already emerged in China even before China introduced reform and opening policy in the late 1970s. However, socialist public ownership, which dominated the Chinese economy for three decades, prevented Chinese IPR legislation from merging into the international track for a considerable amount of time. In the 1990s, external pressure hastened the steps of Chinese IPR legislation: both bilateral pressure from the United States and multilateral pressure from the WTO reinforced the already existent (although still weak) domestic appeal for enhancing IPR protection. That pressure pushed the Chinese central government to adopt IPR as an international norm that it rejected for a long time. However, it is noteworthy that, at least during the early stage of adoption, Chinese government was a "strategic ratifier" rather than a "sincere ratifier".³⁶⁹ That is, Chinese government adopted IPR norms into its domestic legislation not for the sake of enhancing IPR protection, but more because it wanted to avoid direct trade conflict with the United States in the early 1990s and ameliorate its bid for WTO membership in the late 1990s. Thus, although Chinese IPR legislation had already reached the minimum standard set by the WTO during the country's entry in 2001, obstacles remained when it came to the implementation stage.

³⁶⁹ For a discussion of strategic ratification of international law, see Simmons, B. (2009). Mobilizing for Human Rights: Internatioanl Law in Domestic Politics, Cambridge University Press. , PP 57-111; For a discussion focused on China, see Kent, A. (2007). Beyond Compliance : China, International Organizations, and Global Security Stanford, Stanford University Press.

Chapter 3 moves on to analyze the coordination, or the lack thereof, between the various branches of Chinese IPR enforcement bureaucracy. The analytical level moves from Chinese central government to local government branches, focusing on local administrative enforcement bureaucracy and the court system. I demonstrate that during the implementation stage, the IPR norm will have to first travel through the challengingly confusing labyrinth of Chinese bureaucratic system in order to be accepted. Specifically, after China introduced decentralization reform to the country's fiscal system in the mid 1990s, the country was transformed into a *de facto* federal state economically. As a means to generate much-needed tax revenue, IPR infringement activities receive protection from various levels of local governments, defying the authority of the central government. Even though IPR infringement activities are detected, they do not incur sufficient financial or legal punishment that would deter possible future infringement. Under some circumstances, local government branches even serve as the patron of IPR infringers and lobby their upper level government branches to minimize financial and legal punishment. Moreover, although China started to establish a relatively independent IPR specialized tribunal system staffed by well-trained judges after the early 1990s, Chinese IPR holders still mainly resort to administrative enforcement as the primary means of IPR protection due to the lengthy and expensive legal procedure. Finally, the uneasy relationship between administrative enforcement bureaucracy and IPR courts often prevents the latter from accessing necessary evidence to launch effective legal protection measures.

Chapters 2 and 3 seem to have already ended the story. Indeed, as will be discussed later, preceding scholars did mainly focus on the role of the state actors to explain China's partial compliance with global IPR norms. However, what remains unexplored or under-explored is the attitude of China's societal actors. While it is true that local protectionism forged between local government and counterfeiters hinders the implementation of IPR policy, is it possible that in some economic sectors and geographical areas IPR holders take the upper hand over pirates and counterfeiters and thus press the local government to take IPR protection measures? While tax revenue from counterfeiters helps local government officials to maintain or strengthen their power, what if the tax revenue comes from innovators or IPR-holders? What if tax revenue from innovators is higher than pirates and counterfeiters and therefore innovators have a stronger voice than pirates and counterfeiters? These questions require us to move further down from local bureaucratic institutions to examine the power relationship between different societal actors such as the business community and consumers.

After discussing Chinese central and local IPR bureaucracies, I move on to discuss the role of societal actors in the following three chapters. Chapter 4 focuses on patent, which mainly protects technological and industrial innovation. Instead of focusing on patent enforcement bureaucracy only, I situate Chinese patent policy against the greater backdrop of Chinese science and technology policy. I argue that China's science and technology reform started in the late 1970s and has produced mixed results. On one hand, an incipient market mechanism was introduced to China's applied research sector; on the other hand, the legacy of planned economy still continues to influence innovation

activities in China. That legacy contributes to differentiated attitudes by different Chinese societal actors: both foreign IPR holders investing in China and elite Chinese private companies sincerely adhere to The IPR norm since the norm upholds rewarding their innovation activities with market benefits. But state-owned companies are less enthusiastic about innovation since their profits are backed by the state. For the majority of small- and medium-sized private companies that cannot afford to invest in expensive research and development activities, IPR is nothing more than a luxury for the big business players. As demonstrated by my previous chapters, they constitute the majority of IPR violators. Therefore, it can be reasonably concluded that successful implementation of patent policy under some circumstances in China should be attributed not only to efficient coordination between various enforcement branches, as existing literature argues, but also to IPR holders' active efforts to internalize IPR norms into governments' policy practice for the government to *willingly* enforce them.

Chapter 4 moves on to Chinese copyright policy. As in chapter 3, I do not focus on Chinese copyright policy in a vacuum. Instead, I put Chinese copyright policy within the greater landscape of the interaction between market reform and the evolving Chinese propaganda and ideology policy. Specifically, my findings suggest that, in making Chinese copyright policy, Chinese government pursues multiple policy goals: the top priority is to ensure stability in the realm of ideology and cultural life in the country so as to create legitimacy for the rule of Chinese Communist Party. The second priority is to generate economic benefits from literature and artistic creation as part of the broader scheme of building up copyright industries in China. Protecting the economic and moral

rights of literature and artistic creators only comes as the third priority. In practice the first two goals, particularly the first one, often override the third goal. My findings also suggest that the development of Chinese domestic copyright industry is constrained by the Chinese propaganda state despite three decades of market reform. Specifically, foreign and private capital are only allowed limited access to the production and distribution of copyright works in China; the censorship mechanism still shackles the creativity of Chinese copyright owners. Therefore, the Chinese copyright industry possesses neither sufficient financial resources nor legal experience to conduct anti-piracy activities. As such, in addition to the economic loss caused by copyright piracy and the challenge posed by foreign copyright industry, Chinese copyright holders must work with the shackles imposed by the Chinese government. Last but not least, my findings suggest that the Chinese public have very limited sympathy for The IPR norm despite the government's repeated advocacy campaigns. They accuse the Chinese government's concession on IPR negotiations as betraying China's national interests; like some local officials, they tolerate or even praise IPR infringement as a patriotic act against what they call "Western imperialists" or "foreign devils." As such, copyright infringers in China not only benefit from extremely high economic return from piracy, they are also backed up by consumers with little copyright sympathy.

Chapter 6 discusses the implementation of Chinese trademark policy. I found varying level of sympathy for trademark among different types of business actors in China: first, foreign companies and elite Chinese private companies strongly adhere to trademark protection as an important means of safeguarding their competitiveness.

Second, although state-owned companies occupy important positions on the ranking of trademark value in China, the value of their brands lie in their state-sponsored profits rather than market competition. Therefore, they merely pay lip service to the norm of trademark. Third, the millions of small- and medium-sized private enterprises are the major contributors to China's position as the world's leading manufacturing power, known as the "world's factory", but their manufactured goods lack their own independent brands. They either act as the processors of the products already designed by foreign trademark owners or rely on counterfeiting to take a free ride on the good name of the already established brands. I also trace the mechanism that contributes to the varying level of trademark sympathy. My findings suggest that different business actors' attitudes towards trademark should be attributed to their differing strategies in building up brands recognition and applying brands in their market competition. Although China has installed a complete set of quality control policy since the late 1970s, the policy results in uneven implementation outcomes among different sets of Chinese business community: foreign enterprises and elite private enterprises comply with the quality-control regulations to ensure the quality of their products, but the majority of small and medium private enterprises regard profits rather than quality as their first priority. Moreover, due to the immature nature of the Chinese market mechanism, Chinese domestic enterprises, with the exception of some elite ones, mainly rely on unfair market competition practice such as price warfare or government connection to gain consumer recognition. The above mechanism contributes to differentiated levels of brand value among different sets of business actors, which in turn contributes to their different attitudes towards trademark.

Finally, Chinese consumers' attitudes towards trademark plays a significant role as well: my findings suggests that, in purchasing branded products, Chinese consumers care more about commodity price and quality rather than the authenticity of brands. Chinese consumers' indifference to trademark creates a market for counterfeit goods to grow and survive rounds of government organized anti-counterfeit campaigns.

My study identifies three stages in the formulation of Chinese IPR policy since the early 1980s: adoption stage, implementation stage, and internalization stage. It should be noted that the boundaries between those three stages, particularly the latter two stages, are rather blurred. While it is primarily the government actors that plays the major role in the adoption stage, focusing only on the Chinese state will yield an insufficient understanding of the problems arising during the implementation and particularly the internalization stage. In fact, the real problem is that under many circumstances Chinese government is *unwilling* rather than *unable to* protect IPR. For the purposes of understanding why China state is willing to take IPR protection measures under some circumstances but not others, the impact of Chinese societal actors should be taken into full consideration.

Theoretical Contribution, Practical Implications and Future Research Agenda

Theoretical Contribution

My study makes substantive contributions to the study of a developing country's compliance with international norms. As Cortell and Lewis argued, there are two shortcomings in the extant literature on a domestic approach to international norm compliance that should be redressed. First, insufficient attention has been devoted to the

measurement of a norm's strength, legitimacy, or salience in a country's domestic political arena. Second, the mechanisms and processes by which international norms can or cannot attain domestic legitimacy remain underdeveloped. (Cortell and Davis 1996; Cortell and Davis 2000) Risse (1995) also pointed out that "(A promising avenue for future research will be) to study those cases in which formal organizational structure and political culture do not simply reinforce each other, but where tensions between the two appear."(Risse, 1995: 313) Instead of treating IPR as a monolithic set of norms, I demonstrate that it consists of multiple facets and therefore has multiple meanings to different actors. Instead of merely focusing on state actors, I demonstrate that the impact of societal actors is significant although not necessarily so obvious. My study also demonstrates that, instead of existing in a vacuum, the norm of IPR has to get along with other types of existing ideologies to be internalized into the Chinese scenario. Those ideologies do not only reverberate with The IPR norm, but also compete with it under many circumstances. My field work with ordinary citizens in China also illuminates the role of the public in developing country's complying with international norms. All the above is not only relevant to IPR or China specifically, but also adds to the general body of compliance literature.

As an interdisciplinary study situated at the intersection of international relations and comparative politics, my project also adds to comparative politics literature, particularly contemporary Chinese studies, by bringing into perspective an understudied policy area. As one of the small handful of political science treatments of Chinese IPR issue, my study demonstrates that Chinese IPR policy is more than an economic or legal

issue. Nor is it only a foreign policy issue. Instead, many domestic political forces in China revolve around the IPR issue. The study of Chinese IPR policy contributes to our understandings of some basic themes in comparative politics such as the interaction between international and domestic politics, political and economic development, and the state-society relationship. Indeed, throughout my field work, a significant number of findings were gathered from my conversations with people on the ground. My interviewees kept urging me to bear the following important questions in mind while studying Chinese IPR issue: Through the prism of Chinese intellectual property rights policy, what can we infer about the achievements and limitations of China's reform and opening scheme starting from the late 1970s? While domestic reform (*gaige*) and opening to the outside (*Kaifang*) are always juxtaposed with each other in Chinese official policy discourse, what is the relationship between those two? How does opening to the outside affect China's domestic reform, and vice versa?³⁷⁰ Moreover, during my interviews a considerable number of Chinese professional elites pointed to the non-obvious link between the issue of IPR and the seemingly unrelated issue of China's political liberalization. For them, the struggle over IPR enforcement is not merely an economic or legal issue, but is a key manifestation of the gradual political reform in China. The IPR norms rest on protecting intellectual creation as *private* property and private property constitutes the foundation of Western concepts of civil society and rule of law. However,

³⁷⁰ There were too many interviewees raising those issues on various occasions for me to name. On the following occasions, the discussion of those questions dominates the conversation between the author and the interviewees: Interview with a Beijing-based copyright official, 11/28/2007; interview with a Beijing-based IPR scholar associated with the Chinese Academy of Social Sciences, 12/07/2007; interview with a Jiangsu-based trademark official, Nanjing, Jiangsu, 04/04/2008; interview with two Jiangsu-based IPR officials, Nanjing, Jiangsu, 05/26/2008.

in a country dominated by socialist public ownership for decades such as China, for a long time the notion of private property has been non-existent. Neither private entrepreneurs nor literary or artistic creators have existed as independent social groups in Chinese society until recently. Protecting intellectual property rights also requires protecting such important aspects of civil liberty as individual autonomy and the free flow of ideas, which in turn demands a thorough reform of the political and economic underpinnings of China's communist system. Therefore, in an important way China's partial compliance with IPR norms reflects the coexistence between an emerging capitalist market economy and one of the world's only few remaining communist political systems in China. As far as I know, no Western-based researchers have explored that orientation before, so my study opens a venue for new scholarship to grow.

A comment by a Beijing-based IPR scholar aptly summarizes the implication of the IPR issue under study:

“U.S.-China IPR disputes should not only be understood as happening between a group of people debating with each other across the negotiation table. Instead, that is part of the ongoing bilateral interaction between the world's biggest developed country and the world's biggest developing country, between the world's biggest democracy and one of the world's few remaining communist countries, and probably between the world's incumbent superpower and its ambitious possible successor. A thorough knowledge of that issue can deepen our understanding not only of Chinese and probably American political economy, but also the bilateral relationship between the two countries, which is bound to profoundly influence each other and, quite likely, the entire world.”³⁷¹

Policy Implication

³⁷¹ Interview with a Beijing based IPR scholar, Beijing, 11/05/2007;

The policy significance of the Chinese IPR issue is pretty straightforward: innovation constitutes the key aspect of a country's economic competitiveness. With an annual growth rate of 20 percent since 2001, China's total trade volume reached \$ 2.2 trillion U.S., second only to the United States in 2009.³⁷² At the same time, however, China constantly involved itself in trade disputes with the existing powers in the world trade system, mainly the United States. Both China and the United States agree that the issue of intellectual property rights is among the top three most controversial points in the bilateral trade relationship, with the other two being the exchange rate of Chinese currency and the excessive volume of U.S. trade deficit with China.³⁷³ It is also agreed that the issue of trade deficit is closely related to intellectual property rights. In all the nine strategic economic dialogues between China and the United States between 2006 and 2010, IPR issue remained on the negotiation agenda. It can be safely predicted that that issue will continue to affect the fast expanding U.S.-China bilateral trade in the foreseeable future.³⁷⁴

The policy recommendations flows naturally from the theoretical implication of my study discussed above. First, given the importance of societal actors in China's compliance with IPR norms, the policy focus should be shifted from external coercion of IPR norms to domestic promotion. In fact, although mainly resorting to the bureaucratic/institutional argument to explain Chinese IPR policy, some scholars have

³⁷² Related statistical data can be accessed at the website of the U.S.-China Business Council, <http://www.uschina.org/statistics/tradetable.html>, last accessed April 22, 2010;

³⁷³ For a press briefing of those three salient issues, see <http://news.sina.com.cn/z/zmmyqjl/index.shtml>, last accessed April 21, 2010

³⁷⁴ For information on China-U.S. strategic economic dialogue, see <http://www.ustreas.gov/initiatives/us-china/>, last accessed April 21, 2010

already come to realize that it is inadequate to solely rely on bureaucratic and legal procedures to protect IPR. For those scholars, the task of IPR protection cannot be accomplished without a normative shift by the Chinese society at large.³⁷⁵ That is, the Chinese public should be more sophisticated so that their tolerance for pirated and counterfeit goods will go down, which will possibly trigger a fundamental conceptual change in local government's understanding of the role of intellectual property rights. Indeed, scholars have already found out that, in other parts of the world, the sustainability of a new policy such as IPR in a developing country depends on the emergence of a powerful domestic constituency committed to that policy.³⁷⁶ Other scholars have also suggested that, in order to win the acceptance of the local leaders and Chinese public, American business can invest part of their profits back into the local community as education benefits.³⁷⁷ If successfully implemented, those initiatives will help to alleviate the public's skepticism, if not hostility, toward the Western IPR norms.

While the above policy initiative focuses on the international side of the IPR issue, China should make efforts to promote individual rights and civil liberties to really reap the benefits of IPR. There is a close link between the respect of individual rights and the promotion of creative activities and thus the successful functioning of an effective IPR system. So far, China has come to recognize IPR as an essential road to promote the country from an early development stage relying on heavy input of cheap labor and

³⁷⁵ This argument was briefly alluded to by Andrew Mertha in Mertha (2001), pp189-190;

³⁷⁶ See, for example, Hoffman, G. and G. Marcou (1990). "Combating the Pirates of America's Ideas." Computer Law(July, 1990).

³⁷⁷ See, for example, Yu, P. K. (2000). "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century." American University Law Review **50**: 131-243.

natural resources to an upgraded development model relying on innovation. The Communist Party remains reluctant to accommodate the necessary political transformation brought forth by the above economic process. As the Chinese economy continues to change, it is reasonable to expect IPR holders to play a more important role or even demand further policy changes. For sure, upholding individual rights in a country with more than 2,000 years of imperial history is a painful task. However, as an ancient Chinese teaching goes, wise political leaders should “dig a well before drought hits and strengthen a roof before heavy rain pours down.” An active forward looking agenda to promote individual rights will give the Chinese Communist Party much more initiative than forced by the Chinese public demanding more individual rights in the future.

Future Research Agenda

The end of my dissertation project is not the end of my intellectual exploration. My future research builds on my dissertation Other than the link between IPR and Chinese political liberalization, another major unexpected finding during my field work is that a considerable amount of Chinese professionals frame IPR issue and the broader issue of foreign trade and development, traditionally in the “low-politics” realm, as a matter concerning the “life or death of the entire Chinese nation.” They not only call IPR “a weapon employed by Americans in their economic warfare against China,” but also treat other aspects of China’s economic interaction with the West as “a battlefield without gun smoke.”³⁷⁸ That analogy should not be interpreted as accidental or emotional nationalistic rhetoric. In fact, some scholars in the West already started to trace the link

³⁷⁸ Again, there were too many interviewees framing the issue in that way for me to name.

between international political economy and national security in the 1990s.³⁷⁹ In China, economic matters such as IPR were not promoted to the level of national security until most recently. This type of economic security issues, together with other issues such as environment security and human security, are categorized as “non-traditional security challenges” facing China at the turn of the century.³⁸⁰ Why and how do traditionally low politics issues get connected to national security in the Chinese policy discourse? Or why and how a traditionally low politics issue escalates into the realm of high politics? How does China’s economic and political transition shape that policy discourse, and vice versa? Appreciation of the political and economic logics behind the above phenomenon will eventually contribute to deepening our understanding of a continuously changing China and its relationship with the rest of the world.

³⁷⁹ For one of the pioneering works in this aspect, see Kapstein, E. (1992). The Political Economy of National Security : a Global Perspective Columbia, University of South Carolina Press.

³⁸⁰ For a representative study in this regard, see Jiang, Y. 江. (2009). Hunting the Chinese Dragon: An Analysis of Chinese Economic Security (猎杀中国龙：中国经济安全透视). Beijing, Economic Science Press (经济科学出版社) .

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Appendix A: Timeline of Major IPR Legislations and Administrative Regulations in China since 1980

Year	IPR Legislation	Remarks
1980	State Administration for Publication	
1982	PRC Trademark Law	Revised in 1993 and 2001
1984	PRC Patent Law	Revised in 1992 and 2000
1986	Ministry of Radio, Film and Television, Copyright Interim Regulations	
1990	PRC Copyright Law	Revised in 2001
1991	State Council, Regulations on Computer Software Protection	Revised in 2001
1992	State Council, International Copyright Conventions Implementing Provisions China Acceded to Berne Convention	
1993	PRC Anti-Unfair Competition Law	
1994	State Council, Regulations on Audio-Visual Products Administration	Revised in 2001
1995	State Council, IP Customs Protection Regulations,	
1996	State Agency for Industry and	

	Commerce(SAIC), Well-know Marks Interim Provisions	
1997	PRC Criminal Code1979 revised, criminalizing serious IPR infringement	
1999	PRC Contract Law	
2000	Second Revision of PRC Paten Law	
2001	Revision of Trademark Law, Copyright Law, Computer Software Regulations, Audio- Visual Products Regulations, etc, in compliance with TRIPS standards	
2002	State Council, Implementing Regulations of Copyright Law and Trademark Law revised	

Source: Wangfang online database on Chinese laws and administrative

regulations(万方中国政策法规数据库): (<http://www.wanfangdata.com.cn>)

Appendix B: Major International IPR Agreement or Treaties China Signed or Joined since 1979

Year	Major Multilateral Treaties	Major Bilateral Agreement
1979		China-US Trade Agreement
1980	China Joined WIPO	
1985	China acceded to the Paris Convention	
1989	China signed the Treaty on Intellectual Property in Respect of Integrated Circuit and became a member of the Madrid Agreement for international Registration of Trademarks	
1992	China Acceded to the Berne Convention	China-US Memorandum of Understanding on IPR
1995	China acceded to the Madrid Protocol on the Protection of Trademarks	China-US Agreement on IPRs
1999		China-US Memorandum of Understanding on China's Entry into WTO
2001		China Acceded to WTO

Source: Feng 2003 (Feng 2003)

Appendix C: US Special 301³⁸¹ Decisions on China, 1989-2002

Year	Special 301 Decisions
1989	Priority Watch list
1991	Priority Watch list
1991	Priority Foreign Country
1992	Not on the Special 301 list
1993	Priority watch list
1994	Priority Foreign Country
1995	Not on the Special 301 list
1996	Priority Foreign Country
1997	Special 306 monitoring
1998	Special 306 monitoring
1999	Special 306 monitoring
2000	Special 306 monitoring
2001	Special 306 monitoring
2002	Special 306 monitoring

Source: USTR Annual Special 301 Reports, 1989-2002

³⁸¹Under Section 301 of US 1974 Trade Act requires the US Trade Representative(USTR) to identify and investigate countries deemed as doing “unfair trade practices” and impose sanctions where appropriate. Under the lobbying efforts by trade interest groups, the 1988 Omnibus Trade and Competitiveness Act empowered USTR to investigate and level trade sanctions against countries deemed to violate US intellectual property. For more information about Special 301, see Ryan, M. P. (1995). Playing by the Rules: American Trade Power and Diplomacy in the Pacific, Georgetown University Press, Puckett, A. a. W. R. (1996). "Rules, Sanctions, and Enforcement under Section 301: At Odds with the WTO?" American Journal of International Law **90**(4). , Li, M. 李. (2000). Special 301 and China-US IPR Dispute(特别301条款与中美知识产权争端). Beijing, Social Science Publishers(社会科学文献出版社)

Appendix D: Interviews Cited

Place	Date	Interviewee's Occupation	Interviewee's Affiliation
Hong Kong	05/20/2007	Customs Official	Guangdong Customs House (phone interview)
	05/27/2007	IPR attorney	Hong Kong based law firm
Anhui	06/26/2007	IPR official	Anhui Provincial Intellectual Property Office
	06/27/2007	IPR official	Hefei City Science and Technology Bureau
	06/29/2007	Former Cultural Affairs Official	Hefei City Cultural Affairs Bureau
	07/03/2007	IPR official	Anhui Provincial Administration of Industry and Commerce (AIC)
	07/05/2007	IPR attorney	Anhui Based Law Firm
	07/16/2007	IPR holder	A domestic private company based in Hefei, Anhui
	08/06/2007	IPR scholar	Chinese University of Science and Technology, Law School
	08/08/2007	IPR official	Anhui Provincial Copyright Administration
	08/21/2007	IPR judge	Anhui Provincial High People's Court
	08/27/2007	IPR attorney	Anhui based law firm
	08/30/2007	IPR judge (follow-up interview)	Anhui Provincial High People's Court
Beijing	09/18/2007	IPR attorney	A Beijing-based Chinese Law Firm
	09/27/2007	IPR attorney (follow-up interview)	A Beijing-based Chinese Law Firm
	10/10/2007	IPR attorney	A Beijing-based law firm
	10/15/2007	Former staff	Xinhua Bookstore
	10/17/2007	IPR attorney	A Beijing-based Chinese law firm
	10/18/2007	Former IPR official	Chinese Patent Association
	10/22/2007	IPR official	Ministry of Commerce
	10/25/2007	Legal Representative	IPR holder Association
	10/29/2007	Copyright Holder	Beijing-based publishing company

	10/30/2007	Follow up interview with the copyright holder interviewed on 10/29/2007	
	11/01/2007	IPR judge	Beijing Intermediate People's Court
	11/03/2007	Former IPR official	State Intellectual Property Office (SIPO)
	11/05/2007	IPR scholar	Chinese Academy of Social Sciences
	11/07/2007	A female street peddler	
	10/30/2007 to 11/15/2007	A number of street peddlers selling pirated goods in Beijing	
	11/08/2007	IPR attorney	Beijing branch of a foreign law firm
	11/20/2007	IPR attorney	Beijing-based law firm
	11/22/2007	Official	Chinese National People's Congress
	11/22/2007	Trademark attorney	Beijing-based law firm
	11/24/2007	Trademark attorney (follow-up interview)	Beijing-based law firm
	11/28/2007	Former IPR official	State Copyright Administration
	11/30/2007	IPR scholar	Chinese Academy of Social Sciences
	12/01/2007	IPR scholar (follow up interview)	Chinese Academy of Social Sciences
	12/06/2007	IPR official	Ministry of Culture (MOC)
	12/08/2007	IPR scholar	Chinese Copyright Association
	01/04/2008	IPR attorney	Chinese Copyright Association
Jiangsu	03/07/2008	Former IPR official based in Nanjing, Jiangsu	Jiangsu Provincial Patent Bureau
	06/25/2007	A Beijing-based Scholar Visiting Nanjing	Central Academy of Chinese Communist Party
	03/20/2008	IPR judge	Nanjing City Intermediate People's Court
	04/27/2008	IPR official	Jiangsu Provincial Intellectual Property Office
	04/29/2008	Two IPR scholars	Nanjing University Law

			School
	04/30/2008	Former Copyright Official Studying at Nanjing University	
	05/26/2008	Trademark Official	Jiangsu Provincial Administration of Industry and Commerce
	05/29/2008	Representative	Copyright Office of Dieshiqiao Village, Nantong City, Jiangsu Province
	06/06/2008	IPR scholar	Jiangnan University, Wuxi City, Jiangsu Province
Shanghai	04/28/2008	Police officer	Economic Crime Branch, Shanghai Municipal Public Security Bureau (PSB)
	06/12/2008	Business representative	Shanghai Branch of a U.S. Company
	06/18/2008	IPR scholar	Fudan University
	06/19/2008	IPR scholar based in Nanjing	Phone interview from Shanghai
	07/02/2008	IPR official	Shanghai Municipal Government Policy Research Department
	07/09/2008	IPR official	Shanghai Municipal Intellectual Property Office
	07/15/2008	A Shanghai-based consumer	
	07/21/2008	Representative	A Foreign Business Association
	08/05/2008	IPR Attorney	Shanghai Branch of a Western Law Firm
	08/09/2008	IPR attorney	Domestic law firm in Shanghai
Guangdong	10/10/2008	IPR holder	A domestic private company