

Intellectual Property Rights in the People's Republic of China: Analysis and Investigation

by

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AN ABSTRACT OF THE THESIS OF

Dylan M.S. Leibel for the degree of bachelor of Arts in International Studies in Electrical Engineering presented on September 8, 2008. Title: Intellectual Property Rights in the People's Republic of China: Analysis and Investigation

Abstract approved: _____

Dr. Molly Shor

Intellectual property rights is an incredibly important and salient issue today in both China and the rest of the world. This topic of intellectual property rights, or IPRs, has been an increasingly frictional and hostile issue of contention between China and the rest of the world for many years. IPR issues and violations in China touch upon nearly every facet of world wide commerce, trade, research and development spending, transnational corporate culture, international relationships, and international diplomacy. This thesis will delve into the history of IPRs, international conventions involving the People's Republic of China, the history of China, international organizations like the UN and the WTO, the People's Republic of China's internal judicial and law enforcement infrastructure and organizational hierarchies, and possible solutions to the above mentioned hot topic issue of a need for an increased and strengthened protection policies of IPRs.

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Bachelor of Arts in International Studies in Electrical Engineering

Thesis of Dylan M.S. Leibel

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I understand that my thesis will become part of the collection of Oregon State University. My signature below authorizes release of my thesis to any reader upon request. I also affirm that the work represented in this thesis is my own work.

Dylan M.S. Leibel, Author

0Introduction

Intellectual property rights is a hot topic issue today in both China and the rest of the world. This topic of intellectual property rights, or IPRs, has been an increasingly frictional and hostile issue of contention between China and the rest of the world for many years. IPR issues and violations in China touch upon nearly every facet of world wide commerce, trade, research and development spending, transnational corporate culture, international relationships, and international diplomacy. However, before all this is delved into, I believe one must adhere to the old saying, “Know Thine Enemy”, and understand the great, powerful, yet mysterious eastern nation known as China. I would like to look at China's history of intellectual property rights and their traditional history in order to reveal culture patterns, habits, and other innuendos to shed light upon the current situation on IPR to correctly identify the problem, identify solutions, and effectively yet smoothly implement these solutions.

1Materials and Methods

There were two methods used in gathering information in writing the thesis. The first method involved doing face to face interviews with Chinese laypersons including but not limited to students, teachers, other members of Chinese academia, small store merchants and large scale corporation’s low level managers. Later on I interviewed law professors in the Judicial and Law Department of the Central University of Nationalities, 中央民族大学 ZhongYangMinZuDaXue. Before interviewing any participants, I applied for approval with the institutional review board (IRB) to become a clinical investigator. This was not only necessary but had the intent to protect the rights and welfare of the research subjects for my behavioral and judicial research and interviews with my thesis's participants. I applied for IRB approval November 2004 before I went to China. I began interviews with subjects June 2005

and continued until my return from China in December 2005 and performed a few later interviews March and April 2006.

In addition to interviews I used many research materials available on the Internet, research foundations based online, and materials from OSU's Valley Library. At the Valley Library I searched the extensive OSU libraries catalog, databases, and E-Journals for relevant information. My research foundation and online sources are all cited in the sources section at the end of the thesis.

The questions asked for the interviews included five general questions;

- 1) Do you think illegal software is a problem in China?
- 2) When did illegal software begin to be sold in China?
- 3) Do you think people can't afford legal software so they buy illegal software?
- 4) Do you think businesses need illegal software so they can afford the software they need?
- 5) Do you think people don't take buying illegal software as a serious illegal act?

The results of the 13 general interviews and the two professor interviews I performed were all saved on my personal computer and compiled together. Later all the information was contributed into my thesis in the current policies' effects and results, lax police enforcement, and lack of respect of ordinary citizens section of my thesis.

2History

2.1History of intellectual property rights and China

The history of international intellectual property rights starts with the convention establishing the world intellectual property organization, or WIPO convention, which was signed at Stockholm, Sweden, on July 14, 1967 and entered into force on April 26, 1970. As its name suggests, it established the World Intellectual Property Organization (WIPO). WIPO Convention has 183 Contracting Parties. The Convention is written in English, French, Russian and Spanish, all texts being equally authentic. The Convention was amended on September 28, 1979.

Intellectual property rights (IPRs) have been acknowledged and protected in the People's Republic of China (PRC) since 1979. The People's Republic of China has acceded to the major international conventions on protection of IPRs. Domestically, protection of intellectual property law has also been established by government legislation, administrative regulations, and decrees in the areas of trademark, copyright and patent. This has led to the creation of a comprehensive legal framework to protect both local and foreign intellectual property.

Some attribute the difference in protection of IPRs and strength of implementation of enforcement of IPRs as a geographical phenomenon known as the North-South gap. The North-South gap is a geographical description and divide between the more developed countries of the world generally in the northern hemisphere who traditionally have stronger IPR protection and the financially poorer generally geographically southern world countries who traditionally have had weaker IPR protection. The boundaries between the North-South gap aren't necessarily as

black and white as made out to be, instead the gap exists more as a generally correlated geographical phenomenon where much gray area exists. For example Singapore has much stronger IPR protection policies and implementations than the Russian Federation where IPR violations are more rampant but the Russian Federation is clearly in the northern hemisphere but Singapore is near the equator.

Nevertheless, following this history up until present day, the violation of intellectual property in the PRC is still common, due to weak law enforcement and lax support of the law by the population at large as well as the various governmental agencies. The PRC's record on IPRs is still poor and has attracted criticism from foreign investors and their governments, especially the United States.

2.2 International conventions of the PRC

According to the White Paper on IPR Protection by the China Daily and the online European Union Intellectual Property Overview Text of China. in 1980, the PRC became a member of the World Intellectual Property Organization (WIPO). It has patterned its IPR laws on the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

Mainland China acceded to the Paris Convention for the Protection of Industrial Property on the 14th of November 1984 and became an official member on the 19th March 1985. Mainland China also acceded to the Madrid Agreement for the International Registration of Trademarks in June 1989.

In January 1992, the PRC entered into a Memorandum of Understanding with the United States government to provide copyright protection for all American "works" and for other foreign works. Several bilateral negotiations have been conducted between the two governments. At some points, trade sanctions were threatened by the two governments over IPR issues. At the conclusion of negotiations in 1995, the Sino-US Agreement on Intellectual Property Rights was signed. In June 1996, the two governments entered into another agreement protecting American intellectual property in the PRC.

Generally, once the PRC has acceded to an international treaty, the People's Courts can quote the provisions of the treaty directly in deciding an intellectual property infringement case, without reference to a Chinese domestic law by which the treaty provision is incorporated. This way the implementation of the IPR protection court case can be expedited without having to follow through with complex byzantine like procedures.

2.3History of China

Civilization started in China with the Xia dynasty in the 22th century BC. The Xia dynasty started as an evolution of the archaeological Erlitou Culture which consisted of agricultural and animal husbandry settlements and tribes in the Yellow River area. However this evolution was one of organization and bureaucracy. Tribal chiefs organized into dukes and kings, ministers and bureaucrats. A leadership structure was born out of a previously simple chieftain power hierarchical structure. The Xia were by no means an advanced civilization; they themselves were illiterate and hadn't

invented writing[1], but they showed the first central organization and power concentration in the history of Chinese civilization, albeit a weak centralization.

Eventually the Xia were displaced by the Shang dynasty who further precipitated writing and literacy. Thus the first historical and written records appeared in Chinese civilization. However the Shang became weak, lax, disorganized and lost centralization of power and control. Eventually power and influence was usurped and passed onto the Zhou. Starting with the Xia, Shang, then Zhou dynasties is a dynastic cycle which has continued in modern China up until modern day. This shifting of power has also been closely correlated with another phenomenon called the “Mandate of Heaven” ,天命 TianMing. The Mandate of Heaven is a concept stating that, if the rulers are fulfilling their obligations to the populace effectively and justly, then there will be prosperity, no natural disasters, and a general happiness with the citizenry. In other words, the nation and its people are healthy and prosperous, which shows that the ruler has, by heaven’s good graces, a mandate to rule. However if the rulers are decadent, weak, and corrupt with their administrative duties and obligations, then many disasters such as flooding, earthquakes, and barbarian invasions will occur. When such events occur, they show that the rulers have lost the Mandate of Heaven.

Throughout China’s history this dynastic cycle continued itself. As shown in the time line from illustration 1, dynasty after dynasty followed each other, overthrowing the previous one. After the Zhou came the Qin, then in chronological order, the Han dynasty, three kingdoms era, Jin dynasty, Sui, Tang, Song, Yuan, Ming, and Qing dynasty.

| | | | | |
|--------------------------|---|---|------------------------|--|
| Ancient China | Neolithic ca. 12000 - 2000 B.C. | | | |
| | Xia ca. 2100-1800 B.C. | | | |
| | Shang 1700-1027 B.C. | | | |
| | Western Zhou 1027-771 B.C. | | | |
| | Eastern Zhou 770-221 B.C. | 770-476 B.C. -- Spring and Autumn period 475-221 B.C. -- Warring States period | | |
| Early Imperial China | Qin 221-207 B.C. | | | |
| | Western Han 206 B.C. - 9 A.D. | | | |
| | Hsing (Wang Mang interregnum) 9-25 A.D. | | | |
| | Eastern Han 25-220 A.D. | | | |
| | Three Kingdoms 220-265 A.D. | | | |
| | Western Chin 265-316 A.D. | | | |
| | Eastern Chin 317-420 A.D. | | | |
| | Southern Dynasties | 420-478 -- Song | | |
| | | 479-501 -- Qi | | |
| | | 502-556 -- Liang | | |
| | | 557-588 -- Chen | | |
| | | Southern and Northern Dynasties 420-588 A.D. | | |
| | Northern Dynasties | 386-533 -- Northern Wei | | |
| | | 534-549 -- Eastern Wei | | |
| 535-557 -- Western Wei | | | | |
| 550-577 -- Northern Qi | | | | |
| 557-588 -- Northern Zhou | | | | |
| Classical Imperial China | | Sui 580-618 A.D. | | |
| | | Tang 618-907 A.D. | | |
| | | Five Dynasties 907-960 A.D. | 907-923 -- Later Liang | |
| | | | 923-936 -- Later Tang | |
| | | | 936-946 -- Later Jin | |
| | 947-950 -- Later Han | | | |
| | 951-960 -- Later Zhou | | | |
| | Ten Kingdoms A.D. 907-979 | | | |
| | Song A.D. 960-1279 | 960-1125 -- Northern Song | | |
| | | 1127-1279 -- Southern Song | | |
| | Liao A.D. 916-1125 | | | |
| | Western Xia A.D. 1038-1227 | | | |
| | Jin A.D. 1115-1234 | | | |
| Later Imperial China | Yuan A.D. 1279-1368 | | | |
| | Ming A.D. 1368-1644 | | | |
| | Qing A.D. 1644-1911 | | | |

Illustration 1: Chinese Dynastic Time line [2]

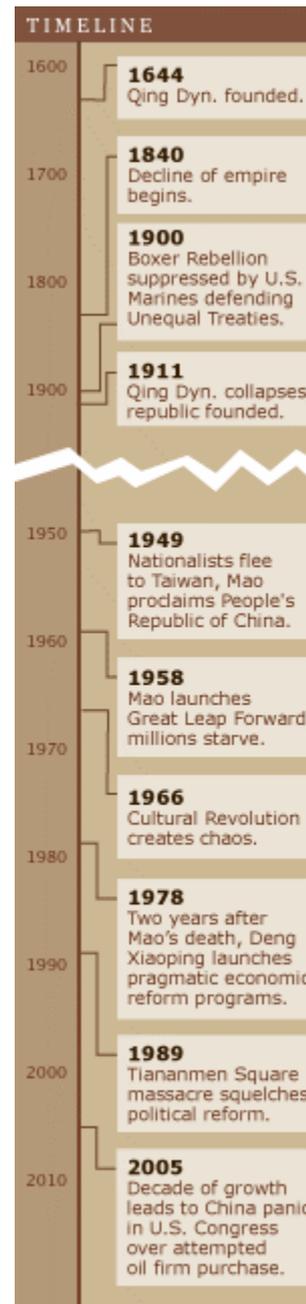


Illustration 2: Time line of Contemporary China[3]

Illustration 2 shows the contemporary history of China during the last dynasty of China, the Qing Dynasty, when foreign domination ensued and afterwards the last emperor PuYi abdicated in 1911 and the monarchy was abolished[4]. Power was shifted to the Republic of China headed by Chiang Kai Shek, then after the Chinese civil war the communists took over and united all of China except for Taiwan under the newly founded People's Republic of China in 1949. It is also worth noting the weakness of China during the latter 19th century and early 20th century. This time was known as the “National Humiliation”, 国耻 GuoChi, where foreign domination of China and internal weakness and administration ran rampant in China during the late Qing dynasty.

Throughout the whole process from the Xia Dynasty to the time of the Hundred Schools of Thought Period, there has been much development of legal, governmental, and philosophical thinking that have immensely shaped current Chinese thinking in every facet of their life formed by the great Chinese classical scholars. What this all boils down to is whenever China faces internal disorder, mismanagement and chaos, another power or ruling clique usurps power and unites China again. The new ruling power places utmost highest precedence on the conflict to reunify China until the reunification is complete. In fact the current People's Republic of China still views itself as trying to reunite what they see as the renegade province of Taiwan with China.

No matter how modern China, its ruling party, and its people develop, they still are the same Chinese people, with the same fundamental cultural views, ideals, and family orientation as they have been for thousands of years since the formulation of classical Chinese philosophical and government schools of thought from classical Chinese scholars such as Confucius and LaoZi.

This developed in parallel with western philosophy in ancient Greece in the same areas of legal, governmental, and philosophical areas. During the later years of the

Zhou dynasty before the rise of the Qin dynasty was a period in Chinese history known as the **Hundred Schools of Thought Period**, 诸子百家 ZhuZiBaiJia, from 770 BC – 221 BC, when many philosophers and schools of thought developed and flourished.

Many very influential and especially important individuals and schools include Kong Fuzi (Confucius) 6th and 5th century BC, Meng Zi, 4th century BC, Lao Zi the founder of Daoism 6th century BC, and the principal legalist figure, Shang Yang, circa 4th century BC was chief minister to the Duke of Qin. All of these important schools of thought and individuals that flourished during this time were eventually ended by the tyrant Qin Shihuangdi, the first Qin Emperor, 221-210. Qin ShiHuangDi used many legalist ideas by Shang Yang to make the state of Qin more efficient, powerful, and ultimately a lean, mean, state-run machine to unify China under a fist of iron rule[5]. Like many tyrants who unified China, Qin ShiHuang tried to turn back the clock on the development and continuation of ideas he considered dangerous to the survival of his state and regime. However, as with many tyrants since him in China, Chinese culture and history has been interconnected and deeply influenced by both Shang Yang's legalist ideas and Confucian societal ideals and hierarchies.

Confucianism, 儒家思想 RuJiaSiXiang, is an ancient Chinese ethical and philosophical system originally developed from the teachings of the early Chinese philosopher Confucius. It focuses on human morality and good deeds. Confucianism is a complex system of moral, social, political, philosophical, and quasi-religious thought that has had tremendous influence on the culture and history of East Asia. Confucianism is so ingrained in East Asian society, it is considered to be the state religion of East Asian countries because of governmental promotion of Confucian values.

The cultures most strongly influenced by Confucianism include those of China, Korea, Taiwan, Japan, Singapore, and Vietnam, as well as various territories settled predominantly by Chinese people and Chinese living outside of china.

Legalism, 法家思想 FaJiaSiXiang, quite literally "School of law", is one of the four main philosophic schools during the Spring and Autumn Period and the Warring States Period. The Hundred Schools of Thought Period from 770 to 221 BC was an era of great cultural and intellectual ferment in China, giving rise to many important schools of thought. In China, under the political leadership of the Qin dynasty's prime minister, Li Si, the form of Legalism became a totalitarian ideology in China, Li Si's Legalism was one of the earliest known totalitarian ideologies.

Legalism was a very pragmatic political philosophy, with maxims that boiled down to "when the epoch changed, legalism is the act of following all laws"[6], and its essential principle is one of jurisprudence, in other words, when the times and eras change, law and the following of the judicial system of jurisprudential stays constant and laws are enforced with utmost rigidity. Legalism here can bear the meaning of political philosophy that upholds the rule of law, and is thus distinguished from the word's Western sense. The school's most famous proponent and contributor Li Si believed that a ruler should govern their subjects by the following trinity [7]:

1. Fa 法, literally "law or principle", The law code must be clearly written and made public. All people under the ruler were equal before the law. Laws should reward those who obey them and punish accordingly those who dare to break them. Thus it is guaranteed that actions taken are systematically predictable. In addition, the system of law ran the state, not the ruler. If the law is successfully enforced, even a weak ruler will be strong.
2. Shu 術, literally "method, tactic or art", Special tactics and "secrets" are to be

employed by the ruler to make sure others don't take over control of the state. Especially important is that no one can fathom the ruler's motivations, and thus no one can know which behavior might help them getting ahead; except for following the laws.

3. Shi 勢, literally "legitimacy, power or charisma", It is the position of the ruler, not the ruler himself or herself, that holds the power. Therefore, analysis of the trends, the context, and the facts are essential for a real ruler.

Both Legalism and Confucianism have heavily influenced Chinese thought, politics, culture, and ultimately every facet of their society and civilization through the ages up to present day. However Legalism has influenced government policies and enforcement, the strict abidance to law, method, and tactics, while Confucianism affects the organization of the Chinese family, respect given to whom and what hierarchical power to be. In other words, respect in a Chinese family is given to the parents and primarily to the father. The children are expected to be filial, 孝顺 XiaoShun, to the parents by being loyal, listening to advice and discipline that the parents hand down to the children. Much like a family, according to Confucian principles, the entire country of China is seen as a huge family, and the emperor is the father of China. This means every citizen is expected to be filial, loyal, and obeying to the central father figure of the emperor who unites and brings order to chaos at times of disunity and disorder.

What this sums up to and relates to intellectual property rights is the often conflicting policies in Chinese society when it comes to laws made to protect IPR and lax enforcement which fails to give teeth and force to the laws in China's jurisdiction. Chinese society is one in which personal relationships and loyalty to another based on your relationship is key. This is called relationships, 关系 GuanXi, this is also

referred to by personal influence, 人情 RenQing, by having Confucian loyalty to a superior who can scratch your back and you'll scratch theirs, favors and unwritten reciprocally favorable and beneficial relationships and business transactions can occur. While many of these transactions are illegal, such as providing design information on a foreign products layout, they are nonetheless heavily ingrained in the Chinese people and Chinese society. Furthermore I believe that Shang Yang's legalist theory, while theoretically sound, fails to hold its water and consistency to make a perfect society in the face of Confucianistic-influenced good buddy networks created which further encourage corruption, lack of solid written agreements, and a paper trail to help track down and expose illegal transactions, IPR theft, and assistance to law enforcement to protect IPRs.

3The International Stage

3.1The UN

The United Nations is an international organization whose stated aims are to facilitate cooperation in international law, international security, economic development, social progress and human rights issues. The UN was founded in 1945 to replace the League of Nations, to stop wars between nations and to provide a platform for dialog.

There are now 192 member states, including almost every recognized independent state. From its headquarters on international territory within New York City, the UN and its specialized agencies decide on substantive and administrative issues in regular meetings held throughout the year. The organization is divided into many administrative bodies including; the General Assembly, the Security Council, the Economic and Social Council, the Secretariat, and the International Court of Justice. However in terms of intellectual property rights, patents, and their protections within the framework of the United Nations, we must look at one of the 16 specialized agencies of the United Nations, WIPO.

WIPO, World International Property Organization, was created in 1967 with the stated purpose "to encourage creative activity, and to promote the protection of intellectual property throughout the world". WIPO currently has 184 member states, administers 23 international treaties. In addition there exists WIPOnet, a global information network that links together over 300 intellectual property offices in all WIPO Member States[8]. These intellectual property offices exist to provide reasonable and easy access to patent offices and infrastructure for any individuals or

groups to internationally register ideas, inventions, and designs for intellectual protection.

WIPO usually attempts to reach decisions by consensus, but in any vote, each Member State is entitled to one vote, regardless of population or contribution to the funding. This is important, because there is a significant North-South divide in the politics of intellectual property. During the 1960s and 1970s, developing nations were able to block expansions to intellectual property treaties, such as universal pharmaceutical patents which might have occurred through WIPO.

In summary, the United Nations provides significant infrastructure and framework for the protection of intellectual property rights, patent offices, and executive law enforcement agencies able to use the international diplomatic weapons and threats including but not limited to trade sanctions, condemnations, tariff impositions, and UN member peacekeeping missions to properly enforce WIPO rulings and intellectual property protection.

3.2WTO

The WTO (World Trade Organization) is another very relative and important UN organization and agency closely linked to the IPR and patent protection process and international policy imposition and execution.

The WTO grew out of its predecessor, the General Agreement on Tariffs and Trade (GATT), which was established after World War II in the wake of other new multilateral institutions dedicated to international economic cooperation such as the Marshall Plan and the European Economic Community. GATT was especially notable for its early boost to trade liberalization and improvement of economic ties between nations of different economic structures and comparative advantages for overall worldwide economic benefit.

WTO has continued for many years focusing primarily on trade talks and trade rounds occurring in 1947, 1949, 1950, 1956, 1960, 1964, 1973, 1986, and 2001 [9]. These trade talks focused on reduction of tariffs, admission of new members, and international economic cooperation. What brings the WTO into full force in respect to UN infrastructure and IPR protection is the executive power of the WTO in imposing economic blockades, censuring, and condemning member states in the economic and intellectual property arena. In addition, since the People's Republic of China's admission into the WTO, many threats have been brought up against China in accordance but not limited to their monetary policy, uneven import and export strategic policies, and lax domestic internal IPR protection policies.

Another important responsibility and invention of the WTO are Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Specifically, TRIPS contains requirements that nations' laws must meet for copyright rights, including the rights of performers, producers of sound recordings and broadcasting organizations; geographical indications, including appellations of origin, industrial designs, integrated circuit layout designs, patents, monopolies for the developers of new plant varieties, trademarks, trade dress, and undisclosed or confidential information. These TRIPS also specify enforcement procedures, remedies, and dispute resolution procedures to be carried out by executive organs of the WTO and its ultimate parent organization, the UN.

Together the WTO and WIPO form the UN infrastructure on IPR international implementation and protection. However, the UN organizations' relationship to the People's Republic of China's domestic departmental hierarchy and judicial structure is very complex and is bound with much red tape and inefficiency.

4 Inside China

4.1 Infrastructure

4.1.1 Courts

The Chinese court system is based on civil law, modeled after the legal systems of Germany and France. According to the Constitution of the People's Republic of China of 1982 and the fundamental law of the People's Courts that went into effect on January 1, 1980, the Chinese courts are divided into a four-tier or level court system,

At the highest level is the Supreme People's Court in Beijing, the premier appellate forum of the land, which supervises the administration of justice by all

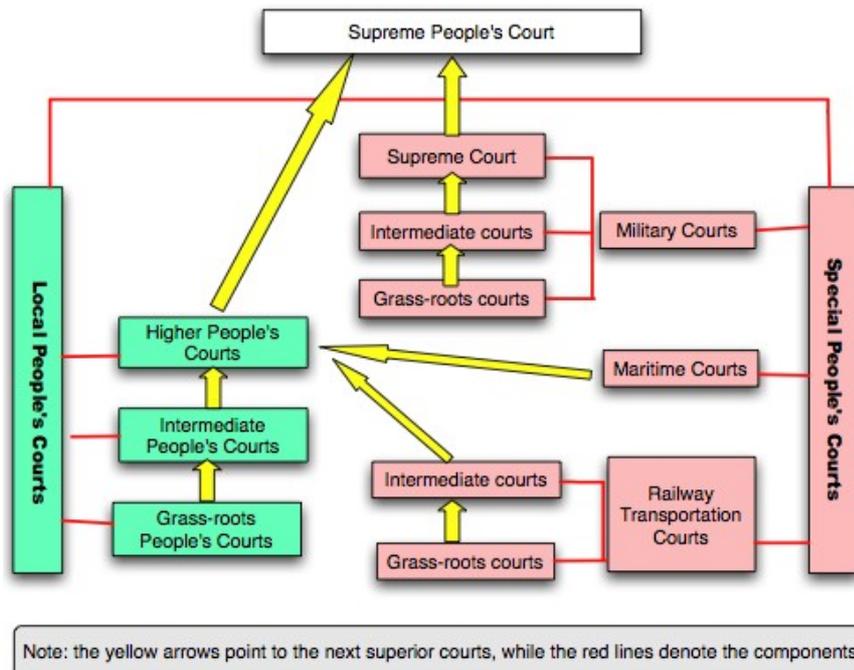


Illustration 3: Chinese Court System Hierarchy

subordinate local and special People's Courts on the bottom tier.

Local People's Courts, the courts of the first instance, handle criminal and civil cases. These People's Courts make up the remaining three levels of the court system and consist of high People's Courts at the level of the provinces, autonomous regions, and special municipalities. Intermediate People's Courts at the level of prefectures, autonomous prefectures, and municipalities; and "basic People's Courts" at the level of autonomous counties, towns, and municipal districts [10]. In summary, different hierarchical levels of People's Courts have jurisdictions over different but still localized areas where IPR protection court cases might occur.

Courts of Special Jurisdiction, the special courts, comprises the Military Court of China, Railway Transport Court of China and Maritime Court of China, and forestry. The court system is paralleled by a hierarchy of prosecuting offices called People's Procuratorate, the highest being the Supreme People's Procuratorate. Meanwhile Hong Kong and Macau have separate court systems maintained under China's famous "One Country Two Systems" policy, 一国两制政策 YiGuoLiangZhiZhengCe. [4]

4.1.2 Police Enforcement

In 1998, China established the State Intellectual Property Office (SIPO), with the vision that it would coordinate China's IP enforcement efforts by merging the patent, trademark and copyright offices under one authority[5]. However, this has yet to occur. Today, SIPO is responsible for granting patents through a national office,

registering semiconductor layout designs, and enforcing patents at local SIPO offices, as well as coordinating domestic foreign related IPR issues involving copyrights, trademarks and patents.

Protection of IP in China follows a two track system. The first and most prevalent is the administrative track, where an IP rights holder files a complaint at the local administrative office. The second is the judicial track, through which complaints are filed through the court system. China has established specialized IP panels in its civil court system throughout the country. Determining which IP agency has jurisdiction over an act of infringement can be confusing. Jurisdiction of IP protection is diffused throughout a number of government agencies and offices, with each typically responsible for the protection afforded by one statute or one specific area of IP related law. There may be geographical limits or conflicts posed by one administrative agency taking a case, involving piracy or counterfeiting that also occurs in another region. In recognition of these difficulties, some regional IP officials have discussed plans for creating cross jurisdictional enforcement procedures. China's courts also have rules regarding jurisdiction over infringing or counterfeit activities, and the scope of potential orders.

For administrative enforcement actions, the following is a list of the major players. Again this list is not exhaustive, as other agencies, such as State Drug Administration, for pharmaceutical counterfeits, or the Ministry of Culture, for copyright materials and markets, may also play a role in the enforcement process. In most cases, administrative agencies can not award compensation to a rights holder. They can however fine the infringer, seize goods or equipment used in manufacturing products, and/or obtain information about the source of goods being distributed.

The **Administration for Quality Supervision, Inspection and Quarantine (AQSIQ)** is China's standard setting agency primarily tasked with ensuring Chinese product quality and standards, also handles infringements of registered trademarks, when the infringing products are inferior or shoddy quality goods. AQSIQ also issued administrative regulations regarding protection of geographic indications separately

recognized by China.

The **State Administration on Industry and Commerce (SAIC), Trademark Office** maintains authority over trademark registration, administrative recognition of well known marks, and enforcement of trademark protection. The Fair Trade Bureau handles disputes arising under the Law to Counter Unfair Competition, including trade secret matters. In enforcement efforts, SAIC has the power to investigate the case. When an infringement is determined, SAIC has the power to order that the sale of infringing items cease and to stop further infringement, order the destruction of infringing marks or products, impose fines, and remove machines used to produce counterfeit goods.

The **State Intellectual Property Office (SIPO)** at the national level is responsible for the examination of foreign and domestic patents and supervision of local SIPO bureaus. Provincial offices generally handle the administrative enforcement of patent complaints.

The **National Copyright Administration (NCA)** is responsible for copyright administration and enforcement. NCA is also responsible for nationwide copyright issues, including investigating infringement cases, administering foreign related copyright issues, developing foreign related arbitration rules and supervising administrative authorities. Though administrative remedies are available, NCA generally encourages complainants to use the court system due to lack of personnel.

The **General Administration of Customs (GAC)** is an organization through which the Customs Regulations ban the import/export of IPR infringing goods. In order for Customs to exercise this right, the IP holder must record its IP with Customs. The certificate issued by Customs is valid for seven years and is renewable for seven year periods. When a right holder suspects infringing goods are about to enter or exit China, he/she may submit a written application to Customs at the suspected point of entry or exist where protection is sought. When Customs' investigation reveals a case of infringement, it has the authority to confiscate the

goods, and may destroy or remove the infringing goods, and impose a fine.

The **Public Security Bureau prosecutors**, under enforcement provisions of TRIPs, must provide IP remedies through criminal enforcement for commercial scale piracy and counterfeiting. China's laws and regulations stipulate that IP administrative authorities and Customs may transfer egregious IP infringement cases to police and prosecutors for initiating criminal investigation. Despite these criminal provisions, most IP cases continued to be handled through the administrative system. Under Chinese law, individuals also have the right to prosecute criminal cases, which has rarely been used.

The **Regional IPR Bureaus** exist in an attempt to coordinate local IP enforcement efforts. Some provinces and municipalities in China have established IPR bureaus or IPR committees to coordinate public awareness campaigns and, to a more limited extent, enforcement. A local IPR bureau is generally a good source for companies seeking information on local regional enforcement mechanisms.

4.2 Current Policies' effects and results

4.2.1 Lax Enforcement

Since the admission of China into the WTO in the 1990's during the days of the Clinton Administration, the United States has filed many complaints to the World Trade Organization over piracy and counterfeiting in China. Most if not all of these complaints filed have had to do with lax enforcement and/or lax protection in the enactment of laws to protect IPRs. These complaints have undermined trade relations

between the two countries, but do these allegations hold any water or are they backed up factually by current events?

In the face of strengthening bilateral economic and trade ties and properly solving trade disputes the Bush administration in recent years has requested that the Geneva-based WTO begin dispute-resolution consultations over complaints that China has failed to make adequate changes in its enforcement of anti-piracy laws. This complaint is followed up with charges that China has failed to meet its WTO obligations to remove barriers to trade in books, music, videos and movies. Some of these anti-piracy laws have been enacted such as the requirement of operating systems pre-installed on computers before them leaving the factory. Computers sold in this fashion would have the price and premium of the operating system included in the computer's cost therefore preventing a loophole for software piracy to fill in.

A second complaint charges China has failed to remove barriers to distribution of many of those goods, leaving an opening for pirates and counterfeiters. This comes as the current administration finds itself under increasing, bipartisan pressure in Congress to crack down on Chinese currency and trade practices, which U.S. firms charge have left them at a disadvantage.

Many current Chinese currency and trade practices and policies have been intentionally made to protect budding local Chinese industry and Chinese exports while putting imports from other countries at an increasing and widening disadvantage. For example the purposeful devaluation of the Chinese yuan makes production and therefore exports cheaper than other countries exports thus increasing immensely the competitiveness of Chinese goods. In addition, using analogy and empirical reasoning, one could reason the Chinese government is intentionally being lax on IPR protection in order to allow local industry to capitalize on stolen product designs they need to stay competitive. In essence, Chinese devaluation of the yuan, maintenance of tariffs, and now intentional lax enforcement of IPR protection is all used to protect local industry.

Meanwhile the United States policy makers and representatives repeatably purport “Vigorous enforcement of intellectual property rights is good for the United States, good for China's economy, and good for our bilateral economic relationship.”[11] Apparently they aren’t economists and Chinese cultural experts who need to realize China does not have the R&D money to spend compared to U.S. Companies. Also U.S. Trade Representatives and think tanks should understand China faced much humiliating foreign domination in the past century and seeks to develop local industry that is sufficiently protected from what China sees as unfair foreign competition.

Intellectual property rights and geopolitics have a huge divide, the North-South Gap, which is the socioeconomic and political division that exists between the wealthy developed countries, known collectively as "the North", and the poorer developing countries or "the South."

Developed countries have a lot more capital and funding to invest in research and development while less developed countries have less potential R&D funding. For developing countries that need funding for roads, railroads, electrical power generation and distribution, school facilities and tools for learning, money is simply better spent on using existing ideas and designs such as local cheap copies of school learning software, or locally made pirated electronics copied off of a computer motherboard design.

An interviewed professor mentioned in an interview, “Why spend so much money on R&D when a design can be stolen and copied for much less money? In addition domestic Chinese companies' personal creativity to develop their own ideas and intellectual property should be encouraged in the meantime”.

There exist legions of engineers who unlike their American counterparts do not do design work, product engineering, or testing engineering. Instead they are dedicated to back engineering current products and designs. Nintendo Wii is released in the United States, immediately a single console or many is bought and shipped over

to China. Over in China the product is back engineered extensively so layouts and designs can be copied and locally manufactured. Sometimes a Wii isn't bought in the United States and shipped back to China, with all Wii manufactured in China, a Wii is simply stolen out of the manufacturing plant by an unscrupulous employee.

Such scenarios above are repeated for countless goods such as consumer electronics, pharmaceuticals, and solid state equipment. The underlying problem isn't that Chinese engineers are able to back engineer our equipment, the problem consists more of Chinese firms' ability to capitalize and manufacture illegal pirated goods and products which goes tolerated and unpunished by the government due to their lax SMEs are below the scrutiny of law enforcement of the laws and executive powers vested in China's nicely frame worked IPR protection system.

4.2.2Lack of respect of ordinary citizens

Another common problem of intellectual property right violations is the illegal software and movie industry in China. This industry consists of illegally copied computer software, music, and movies in the optic-digital format of DVDs and CDs. This medium is very cheap and reproducible. This industry accounts for tens to hundreds of billions of lost dollars to many artists worldwide and artists in China, Hollywood, film makers, and software companies. [12]

From information gleaned in interviews, the reasons why many Chinese people buy from the illegal pirating industry are twofold. First buying software, music, or movies on optic media isn't seen as stealing because those media aren't tangible or the information is downloaded which is a totally virtual, non-tangible asset which by many Chinese is not seen as stealing. This problem of stealing something tangible like a car or TV is seen as stealing and theft but digital downloadable information or optical media such as DVD's or CD's isn't seen as stealing.

Another reason for theft and lack of respect for IPRs is the cut-throat society in which China exists. With competition for scarce jobs very intense, high population, and the need for cost cutting in Chinese small businesses, many people and businesses resort to cheaper pirated software and operating systems. Chinese and foreign experts estimate that small to medium size enterprises (SMEs) are now responsible for about 60% of China's industrial output and employ about 75% of the workforce in China's cities and towns. Larger corporations need to be more responsible and law-abiding with their software usage and licenses but SME's are below the scrutiny of law enforcement of software IPRs.

An interviewee commented on this, "In respect to middle sized or large scale corporations, they must pay attention to this software problem and implement policies so that at anytime, anywhere, any government official can unexpectedly come to the company and perform an impromptu search and sting operation to search for illegal software. Therefore large and medium sized corporations need to be more responsible for the consequences of their actions."

In summary, the ordinary Chinese citizenry face their rat-race of everyday competitive work. Meanwhile small and medium size enterprises are pursuing budget corner cutting and cost cutting. Intangible products and goods such as software garner no respect in the IPR arena.

5 Solutions?

Though China is a party to international agreements to protect intellectual property (including WIPO, Bern Convention, Paris Convention, among others), a company must register its patents and trademarks with the appropriate Chinese agencies and authorities for those rights to be enforceable in China. Copyrights do not need to be registered but registration may be helpful in enforcement actions. Below are some solutions for international firms to follow for protection of intellectual property rights. The solutions below work within the Chinese judicial and IPR system.

Foreign firms in China need to first and foremost apply for patents. China's first patent law was enacted in 1984 and has been amended twice, 1992 and 2000, to extend the scope of protection [13]. To comply with TRIPs, the latest amendment extended the duration of patent protection to 20 years from the date of filing a patent application. Chemical and pharmaceutical products, as well as food, beverages, and flavorings are all now patentable. China follows a "first to file" system for patents, which means patents are granted to those that file first even if the filers are not the original inventors[14]. This system is unlike the United States, which recognizes the "first to invent" rule, but is consistent with the practice in other parts of the world, including the European Union. As a signatory to the Patent Cooperation Treaty in 1994, China will perform international patent searches and preliminary examinations of patent applications. Under China's patent law, a foreign patent application filed by a person or firm without a business office in China must apply through an authorized patent agent, while initial preparation may be done by anyone[15]. Patents are filed with China's State Intellectual Property Office (SIPO) in Beijing, while SIPO offices at the provincial and municipal level are responsible for administrative enforcement.

Trademarks are an essential and necessary to work within the Chinese system.

China's trademark law was first adopted in 1982 and subsequently revised in 1993 and 2001. The new trademark law went into effect in October 2001, with implementing regulations taking effect on September 15, 2002. The new trademark law extended registration to collective marks, certification marks and three dimensional symbols, as required by TRIPs. China joined the Madrid Protocol in 1989, which requires reciprocal trademark registration for member countries, which now include the United States. China has a 'first to register' system that requires no evidence of prior use or ownership, leaving registration of popular foreign marks open to third party[16]. However, the Chinese Trademark Office has canceled Chinese trademarks that were unfairly registered by local Chinese agents or customers of foreign companies. Foreign companies seeking to distribute their products in China are advised to register their marks and/or logos with the Trademark Office. Further, any Chinese language translations and appropriate Internet domains should also be registered. As with patent registration, foreign parties must use the services of approved Chinese agents when submitting the trademark application, however foreign attorneys or the Chinese agents may prepare the application. Recent amendments to the Implementing Regulations of the Trademark Law allow local branches or subsidiaries of foreign companies to register trademarks directly without use of a Chinese agent.

In addition copyrights also are essential and necessary to fit within the Chinese IPR framework system. China's copyright law was established in 1990 and amended in October 2001 [17]. The new implementing rules came into force on September 15, 2002. Unlike the patent and trademark protection, copyrighted works do not require registration for protection. Protection is granted to individuals from countries belonging to the copyright international conventions or bilateral agreements of which China is a member. However, copyright owners may wish to voluntarily register with China's National Copyright Administration (NCA) to establish evidence of ownership, should enforcement actions become necessary. [18]

Another law to fit within the IPR protection solution formula is China's Unfair Competition Law which provides some protection for unregistered trademarks, packaging, trade dress and trade secrets[19][20]. The Fair Trade Bureau, under the State Administration for Industry and Commerce (SAIC) has responsibilities over the interpretation and implementation of the Unfair Competition Law. Protection of company names is also provided by SAIC. According to the TRIPs Agreement, China is required to protect undisclosed information submitted to Chinese agencies in obtaining regulatory approval for pharmaceutical and chemical entities from disclosure or unfair commercial use[21]. China's State Drug Administration and Ministry of Agriculture oversee the marketing approval of pharmaceuticals and agricultural chemicals, respectively.

Taking this whole infrastructure and organization in consideration, the system can be part of the solution as well as more international pressure from the world community and possible internal Chinese consumer and overall culture change.

5.1 International pressure

International pressure needs to be applied to China from foreign firms, WIPO, WTO, and any nations in the world from which China relies on for trade and export trade. This includes international pressure for the PRC to change its monetary policy of artificially keeping the Chinese dollar's value low to make its' own exports more competitive. In addition pressure on the PRC government to implement similar to the Regulations of the Trademark Law to allow a more extensive ability at local branches or subsidiaries of foreign companies to register trademarks directly without use of a Chinese agent or middleman. This will allow more direct control of a foreign company's interests, investments, and business in China. China will never change its law enforcement or update current laws and stipulations unless sufficient pressure on it is applied from abroad.

5.2 Culture change?

Much like how the Cold War ended in 1991 with the collapse of the Soviet Union, the era of foreign domination and national humiliation has ended with China. The China of the 21st century is stronger, richer, militarily prepared, prosperous, and modern.

The economic reforms initiated and maintained by the communist party have dramatically reduced the number of people below the poverty line from more than 200 million in 1981 to about 70 million in 1995 [22]. If there has been a Mandate of Heaven given to the rulers of China, I would say the communist party, despite all their imperfections, has that mandate.

Local protectionism from competition from foreign firms needs to be relaxed by China. The protectionism from foreigners is a leftover from the era of domination by foreigners in the late 19th and early 20th century. This cultural mentality of xenophobia needs to be relaxed, in addition a larger emphasis on legalism, and respectful Confucian values towards laws and property need to be more emphasized.

6Conclusion

In summary, the Chinese devaluation of the yuan, maintenance of tariffs, and now intentional lax enforcement of IPR protection, is all used in tandem in a trinity of protection policy format to protect local industry. The opium wars of the 19th century, wars of Japanese aggression and domination of China during World War II, and the cold war in the east behind not the iron curtain but “the bamboo curtain” are all over. China needs to realize this to build more cooperative and global friendly IPR and economic policies to become the respected WTO member of the global community. It is cooperation and economic relationships that earn respect from the global community not pure military might. The Qin Dynasty emperor Qin ShiHuang tried to conquer and hold together a plethora of diverse people under the steel fist of military might and fear, this annal of Chinese history should always be remembered but not followed. The Qin dynasty and its military force lasted 15 years, but friendship and cooperative relationships last forever and stand the test of time.

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