THE SWEET AND SOUR STORY OF CHINESE INTELLECTUAL PROPERTY RIGHTS

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Introduction

In the late 1980s and early 1990s, the United States lost about $2 billion of revenues annually due to rampant piracy in China.¹ To protect its businesses, the U.S. government adopted a coercive policy, threatening China repeatedly with economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China’s entry into the World Trade Organization (WTO).² As a result of these “external pushes,” the Chinese government established a new intellectual property regime and an institutional infrastructure that sought to protect and enforce intellectual property rights.³ Intellectual property soon appeared at the forefront of the U.S.-China bilateral trade agenda, and Chinese leaders began to show interest in implementing domestic legal reforms. Meanwhile, the Chinese people also have acquired a better understanding and heightened awareness of intellectual property rights.

This Chapter traces the development of intellectual property rights in China since the mid-nineteenth century and discusses the repeated attempts by the U.S. government to transplant intellectual property laws in the country. The Chapter then describes how, and explains why, intellectual property protection has improved significantly in China even after the U.S. government backed away from its coercive tactics. The Chapter concludes by making two observations on intellectual property law developments in China. The first observation challenges the cultural explanation of intellectual property piracy and counterfeiting problems in general. The second observation maintains that the extensive mp3 piracy problem on the Internet necessitates a critical reexamination of the piracy and counterfeiting problems in China.

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Early Historical Traces of Intellectual Property Concepts in China

Although China has more than 4000 years of history and was the first to invent paper and the printing press, the country had not developed any notion of intellectual property rights. As Professor William Alford pointed out in his seminal work, *To Steal a Book Is an Elegant Offense*, the earliest effort to regulate publication and reproduction was through an edict issued by Emperor Wenzong of the Tang dynasty in A.D. 835. This edict “prohibited the unauthorized reproduction by persons of calendars, almanacs, and related items that might be used for prognostication.”4 Because the Chinese considered the emperor to be the link between human and natural events, this prohibition was needed to protect the emperor against findings that would have undermined the dynasty or predicted its downfall. By the end of the Tang dynasty, the edict was further expanded to “prohibit[] the unauthorized copying and distribution of state legal pronouncements and official histories, and the reproduction, distribution, or possession of ‘devilish books and talks’ (yaoshu yaoyan) and most works on Buddhism and Daoism.”5 Rather than fostering creation and promoting authorship, this edict was designed to sustain imperial power.

The Song dynasty expanded this portion of the Tang Code to include prepublication review and registration by “order[ing] private printers to submit works they would publish to local officials.”6 The principal goal of this institution was “to halt the private reproduction of materials that were either subject to exclusive state control or heterodox.”7 In addition to works covered by the Tang edict, prohibited materials included authorized versions of the classics, model answers to imperial service examinations, maps, materials concerning the inner workings of government, politics, and military affairs, pornography, and writings using the names of members or ancestors of the imperial family in “inappropriate” literary styles or in writings that were “not beneficial to scholars.”8 Like the British Stationers’ Company, this review and registration system was mainly instituted to control the dissemination of ideas.9

In the trademark context, the dynastic codes “restrict[ed] the use of certain symbols associated with either the imperial family (such as the five-clawed dragon) or officialdom.”10 They also “barred the imitation of marks used by the ceramists of Jingdezhen and others making goods for exclusive imperial use” and forbid certain craftspersons from exporting their works.11 In addition, guild regulations, clan rules, and local laws protected producers of tea, silk, cloth, paper, and medicines by registering their brand names and symbols they had developed.12 Tight family control and screening of employees also were used to protect the confidentiality of vital manufacturing processes.13 Nonetheless, the dynastic codes and the various regulations and control efforts did not result in any formal, centralized intellectual property protection.14

The First Coming of Intellectual Property Rights

Intellectual property rights first came to China “with such inventions and novel ideas as the gunboat, opium, ‘most favoured nation’ trading status, and extraterritoriality” in the early twentieth century, when China opened its coastal ports to Western trade after the Opium War.15 In the 1840s, “there was little foreign investment in China, and trade was confined to items such as opium, tea, and raw silk, sold as bulk commodities, rather than under brand names.”16 While “there were periodic allegations of inferior grades of tea being passed off as their more costly counterparts,”17 substantial problems of intellectual property piracy did not arise until decades
later. By the turn of the twentieth century, foreign imports and investment had increased substantially, and intellectual property piracy had become a serious problem.

To protect the intellectual property rights of its nationals, the United States, which had recently acceded to the Paris Convention for the Protection of Industrial Property and had enacted the Chace Act to provide formal intellectual property protection to foreigners, used its military and economic strengths to induce China to sign a commercial treaty in 1903, which granted copyright, patent, and trademark protection to Americans in return for reciprocal protection to the Chinese. Despite this treaty and similar commercial treaties with Britain and Japan, China did not introduce a substantive copyright law until 1910, a substantive patent law until 1912, and a substantive trademark law until 1923. Although these laws appeared on paper, they offered foreigners very limited intellectual property protection. In fact, due to increasing industrialization, the growth of the urban elite, and the spread of literacy, the piracy problem worsened despite the introduction of these new laws.

The failure of the 1903 treaty can be attributed to several factors. First, the United States failed to consider the relevance of its intellectual property model to China and premised the new regime on registration. Hampered by problems that were uniquely Chinese, such as geographical difficulties, high corruption, and strong regional protectionism, the registration system turned out to be substantially ineffective, rendering the new intellectual property laws virtually unenforceable. Second, the United States was unable to convince the Chinese government why intellectual property laws could benefit China. Indeed, most Chinese officials, including the very powerful Empress Dowager, were skeptical of the need for legal reforms. To these officials, law reforms were merely “an unfortunate short-term expedient needed to calm the restive masses and appease the treaty powers before Qing power could be reasserted in its proper form.” Finally, the United States did not rally the support of Chinese holders of intellectual property rights behind the new intellectual property regime. The United States also failed to train Chinese officials with responsibilities in the field and to educate the Chinese populace about the importance of, and rationales behind, intellectual property rights.

Instead, the United States “presumed that foreign pressure would suffice to induce ready adoption and widespread adhesion to [the new intellectual property] laws.” In the beginning, China was willing to comply with the treaty because it naively assumed that introducing intellectual property laws would put an end to the unequal treaties signed in the latter half of the nineteenth century, in particular the extraterritoriality provisions, which allowed foreigners accused of crimes against Chinese subjects to be tried in China according to their own laws by the representatives of their home government. Once the Chinese government realized that legal reforms would not affect China’s semi-colonial status, it lost interest in pursuing those reforms. In fact, the Chinese government took advantage of the Western position and used legal reforms to provide leverage against the treaty powers.

The Second Coming of Intellectual Property Rights

After the fall of the Qing dynasty, China experienced “decades of wars, famines and revolutions,” and intellectual property rights did not return until the Chinese Communist Party reopened the country to the international community in the late 1970s. Unlike Mao Zedong, Deng Xiaoping saw economic wealth as the foundation of China’s power and realized that China
could not modernize in isolation without the benefits of foreign science, technology, capital, and management skills. Thus, Deng and his fellow leaders vigorously pushed for the renewal of diplomatic and commercial ties with the United States, Japan, and other Western developed countries. Among the earliest treaties signed shortly after China’s reopening was the Agreement on Trade Relations Between the United States of America and the People’s Republic of China, which called for copyright, patent, and trademark protection to the nationals of the other party. As a result of this Agreement, “China assumed an international legal obligation for intellectual property rights protection [even] before it had established a domestic intellectual property protection system.”

Shortly after signing the agreement, China became a member of the World Intellectual Property Organization (WIPO). China also promulgated a new trademark law in 1982, a new patent statute in 1984, and joined the Paris Convention in 1985. Notwithstanding these new laws and multilateral agreements, China afforded authors and inventors very limited protection. After all, Chinese leaders at that time remained very reluctant to introduce private property, as they were concerned about the conflict intellectual property rights would create within the socialist economic system. Thus, instead of creating new rights to protect individual authorship and inventions, the new intellectual property statutes were drafted primarily to rehabilitate authors, inventors, and scientists by enhancing their position through legal recognition while promoting “socialist legality with Chinese characteristics.” Although the trademark and patent laws granted individuals rights in their marks and inventions, these statutes included so many limits that the original grants became insignificant.

Concerned about the lack of protection in China, U.S. businesses began to lobby their government heavily for stronger pressure on China. In the late 1980s and early 1990s, the U.S. government repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China’s entry into the WTO. Such threats eventually led to the signing of the Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property (“1992 MOU”) in 1992, the Agreement Regarding Intellectual Property Rights (“1995 Agreement”) in 1995, and an accord that reiterated China’s commitment to intellectual property protection in 1996.

In retrospect, the 1992 MOU was effective in revamping China’s intellectual property system. Pursuant to the 1992 MOU, China acceded to the Berne Convention for the Protection of Literary and Artistic Works and ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. China also amended the 1990 Copyright Law, issued new implementing regulations, and adopted a new unfair competition law that provided trade secret protection.

Likewise, the 1995 Agreement was effective in helping China create an institutional infrastructure that was conducive to protecting and enforcing rights created under the new intellectual property regime. The Agreement introduced the State Council Working Conference on Intellectual Property Rights and the Enforcement Task Forces. To protect CDs, laser discs, and CD-ROMs, the Agreement also established a unique copyright verification system, proposing to punish by administrative and judicial means any manufacturer of audiovisual products who failed to comply with the identifier requirement. In addition, the Agreement called for title registration of foreign audiovisual products and computer software in CD-ROM format.
with the National Copyright Administration and local copyright authorities. The Agreement also required customs offices to intensify border protection for all imports and exports of CDs, laser discs, CD-ROMS, and trademarked goods. Finally, the Agreement stipulated that relevant authorities would conduct training and education on intellectual property protection throughout China. The Agreement further provided that the Working Conference would develop a transparent legal system while compiling and publishing guidelines regarding application and protection in various areas of intellectual property law.

Notwithstanding these two agreements, piracy remained rampant in China, and the United States lost about $2 billion of revenues annually due to rampant piracy in China in the late 1980s and early 1990s.43 Consider computer software, for example. According to one industry estimate, 99% of all computer software in China was pirated in the late 1990s.44 Because of this enormous piracy, some commentators labeled China a “one copy” country, implying that a single copy of computer software would satisfy the demand of the entire country through unlimited reproduction.45 Although Chinese authorities firmly denied the 99% figure, a market survey conducted by China ComputerWorld in April 1998 indicated that “63 per cent of CD-ROMS used by users with college degrees were pirated, though the piracy rate was lower for users from other education backgrounds.”46

The About Turn in the Mid-1990s

Since the mid-1990s, China has introduced many new intellectual property statutes and regulations and has entered into various international treaties. In 1996, China issued the Regulations on the Certification and Protection of Famous Trademarks and the Regulations on the Protection of New Plant Varieties while amending its Criminal Law to include a section on intellectual property crimes.47 In April 2000, China became a member of the International Union for the Protection of New Varieties of Plants48 and offered protection to trademark holders against cybersquatters.49

In addition, China made various institutional reforms to strengthen protection and enforcement of intellectual property rights. In April 1998, China upgraded the State Patent Bureau to the State Intellectual Property Office (SIPO), a ministry-level branch of the State Council that replaced the State Council Working Conference on Intellectual Property Rights established by the 1995 Agreement.50 China also developed training programs that facilitate research and training in the intellectual property field.51 To meet the increasing demand for expertise in intellectual property laws, Chinese universities began to offer courses, degrees, and departments in intellectual property law.52

As China prepared to enter the WTO, it revamped its entire intellectual property system, amending copyright, patent, and trademark laws while adopting a new regulation on the protection of layout designs of integrated circuits.53 Taken as a whole, these amendments aligned the existing intellectual property regime with China’s changing socialist market economy. The amendments also strengthened protection, simplified procedures, and harmonized the regime with the TRIPs Agreements and other international treaties.54

In November 2001, the WTO member states finally approved China’s accession to the international trading body after more than fifteen years of exhaustive negotiations.55 Shortly
after its accession, China issued regulations for copyright and trademark laws, as well as implementing rules concerning integrated circuits, computer software, and pharmaceuticals. In addition, the State Council, the State Administration of Industry and Commerce, and the National Copyright Administration issued measures to improve China’s intellectual property regime.

Moreover, the Chinese government has made major improvements on the enforcement front. From time to time, the Chinese authorities have launched large-scale crackdowns on pirated and counterfeit products. For example, they launched an anti-counterfeiting campaign in November 2000 and followed it up a few months later with a major crackdown on counterfeit products that posed health and safety risks, such as food, drugs, medical supplies, and agricultural products. In 2002, the Chinese government initiated a new anti-counterfeiting and anti-piracy campaign, which in turn resulted in high numbers of seizures of infringing products.

In addition, the Chinese leaders, through speeches and position papers, have emphasized the importance of intellectual property as an economic strategy. Taking the lead from their leaders, books, television talk shows, media articles, and government and academic reports have highlighted the importance of intellectual property protection to China’s economic development. Most recently, the Chinese government appointed Vice Premier Wu Yi to head a new leading group on intellectual property issues. Because Vice Premier Wu was heavily involved in the negotiation of China’s intellectual property agreements with the United States in the early 1990s, this appointment signaled the Chinese leaders’ recognition of the need for more focused and sustained efforts to tackle intellectual property enforcement problems and their concern that inadequate intellectual property protection would impede trade, foreign investment, and the development of a knowledge-based economy.

Notwithstanding these efforts by the Chinese authorities, significant problems still exist with enforcement of intellectual property laws, especially at the grassroots level and in rural areas. As the recent National Trade Estimate Report noted:

In 2003, IPR infringement in China continued to affect products, brands and technologies from a wide range of industries, including films, music, publishing, software, pharmaceuticals, chemicals, information technology, consumer goods, electrical equipment, automotive parts and industrial products, among many others. According to a July 2003 report by the State Council’s Development Research Center, the market value of counterfeit goods in China is between $19 billion and $24 billion, which translates into enormous losses for IPR rights holders. Various U.S. copyright holders report that inadequate enforcement has resulted in piracy levels in China that have remained at 90 percent or above in 2003 for all copyright sectors, and that estimated U.S. losses due to the piracy of copyrighted materials continues to exceed $1.8 billion annually.

These problems were further exacerbated by the “lack of coordination among Chinese government ministries and agencies, local protectionism and corruption, high thresholds for initiating investigations and prosecuting cases, lack of training and inadequate administrative penalties.” Even worse, the increasing use of the Internet and the rapid proliferation of new communications technologies might exacerbate the existing problems, as piracy activities are no longer limited to commercial pirates and members of organized crimes, but individuals who sit at home or cyber cafés swapping copyrighted music or movies via peer-to-peer networks.
Why Has China Changed?

In light of these recent developments, one therefore might wonder why intellectual property protection in China has improved even though the U.S. government and American businesses backed away from their earlier coercive tactics. After all, the logic behind these tactics was that the Chinese intellectual property regime could not sustain itself and, therefore, required foreign pushes to rejuvenate the system. While these foreign pushes were undoubtedly helpful in establishing the Chinese intellectual property system in the early 1990s, recent improvements in intellectual property protection in China can be largely attributed to three other factors.

First, although foreign companies and governments were generally reluctant to take any substantial effort to promote awareness of intellectual property rights among the Chinese people and to communicate to them why better protection would be in their interest, foreign and local businesses, trade associations, and industry groups have been very active in promoting awareness and understanding among the Chinese people. A case in point is the joint effort by the Business Software Alliance and the Chinese Software Alliance to promote the use of original software in China. Thanks to these efforts, the Chinese have become increasingly aware of the basic functions of, and the rationales behind, intellectual property rights. To many Chinese, these rights are no longer alien, abstract, and incomprehensible. Rather, they are closely related to their daily lives and the country’s domestic growth and international reputation.

Furthermore, by the late 1990s, the Chinese—perhaps influenced by the developments in the United States and the European Union—have begun to realize the importance of a well-developed information economy. All of a sudden, the phrase “knowledge economy” has become a catchphrase frequently seen in major Chinese newspapers, such as Guangming Daily and The People’s Daily, and heard in presentations made by government officials. Chinese businesses also quickly adopted words like “e-commerce” and “e-business” to enhance public recognition and stock market value. In 2000, the National People’s Congress unveiled a five-year plan that includes information technology among the major goals of China’s long-term economic development.

Second, the Chinese, in particular their leaders, have begun to notice the benefits of protecting intellectual property rights. In April 1997, the Chinese government provided assistance to set up special intellectual property affairs departments, create intellectual property protection networks, and build a self-protection system in enterprises and institutes to which intellectual property rights are particularly important. These enterprises and institutes included major oil and chemical corporations, computer companies, and prestigious universities and scientific research institutes. The Ministry of Information Industry also was determined “to create 30 large software companies with an annual revenue of RMB10 billion, and ten larger companies with an annual revenue of RMB 30 billion.” Unlike what they did in the past, the Chinese leaders no longer consider intellectual property rights exploitative devices that help protect the West’s dominant position. Rather, they have begun to see how these tools can help promote national growth.

Third, and most important of all, many Chinese have become stakeholders or potential stakeholders. Intellectual property therefore matters to them. Since the mid-1990s, China’s
software industry has experienced a tremendous growth. By 1997, the value of the software market had doubled from RMB 6.8 billion in 1995 to RMB 12.6 billion. The Chinese government also has been active in developing the local software industry, establishing software bases in Liaoning, Hunan, Shandong, and Sichuan Provinces and in Beijing, Shanghai and Zhuhai districts.

While the software industry was growing, the Internet population exploded. In October 1997, there were only 299,000 computers connected to the Internet, and 620,000 Internet users. Today, based on the July 2004 survey by the China Internet Network Information Center (CNNIC), there are 36.3 million computers connected to the Internet, and 87 million Internet users. Although the growth in the Chinese Internet user community recently slowed down, China already has surpassed all the major developed countries except the United States and now boasts the second largest Internet population in the world, ahead of Japan, Germany, and the United Kingdom.

Moreover, the Chinese have begun to perceive themselves as passive stakeholders. In other words, they now understand the danger of inadequate intellectual property protection and how the lack thereof could impair the well-being of their country while slowing down its development. They also realized the damage the lack of intellectual property protection could inflict upon the country’s international reputation. Because intellectual property protection remains a key issue in the WTO accession negotiation, the Chinese understand that the stakes for the lack of intellectual property protection extend beyond the intellectual property arena, covering almost every other area that implicates international trade, including agriculture, banking, electronics, insurance, professional services, securities, telecommunications, and textiles.

In November 2001, China finally became a member of the WTO. Although the accession process was complicated and involved many different factors, it would not be too far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights. Indeed, some commentators considered the WTO membership a major impetus for China’s recent improvements in intellectual property protection. As two leading commentators in Chinese intellectual property law explained:

In general, China’s entry to the WTO significantly influenced the speed and scope of the development of the Chinese IP law system. It is interesting to note that IP rights reforms kept pace with Chinese WTO negotiations. When the negotiations encountered obstacles, the IP rights reform slowed down; when the negotiations reached agreements to promote the accession process, the IP rights reform accelerated noticeably. Since China has become a member of the WTO, Chinese IP law reform has also peaked.

What Can We Learn from Intellectual Property Law Developments in China?

When one compares the history of intellectual property law developments in China with that of other countries and the recent developments on the Internet today, one can make at least two interesting observations. First, despite what many commentators have argued, intellectual property piracy and counterfeiting is not a cultural phenomenon, even if China is concerned. Culture has always been a powerful explanation for extensive intellectual property piracy. For example, commentators discussed at length the classic Greek and Roman beliefs that works were
created through “inspiration by the muses,” the Confucian underpinnings of Chinese society, the familial and community values embodied in Islam laws, and the hacker culture that paves the way to widespread MP3 piracy. However, if examined carefully, this cultural explanation is as unconvincing as the argument that extensive MP3 piracy occurs in Western societies because of the communitarian underpinnings in Judeo-Christian teachings. Communitarian philosophies were (and are) not unique to the Greek and Roman republics, China, the Middle East, or hackers. They are found in civilizations around the world.

Undeniably, cultural barriers might make it difficult for intellectual property laws to emerge or develop. A culture-based analysis also might provide insight into a community of which the public has limited understanding. However, a different, or even pro-copying, culture does not necessarily result in extensive intellectual property piracy and counterfeiting. As Professor William Alford pointed out in his book, the Confucian culture militated against copyright protection in so far as it did not allow intellectual property protection to take root by itself. This non-Western culture, however, had not prevented intellectual property protection from functioning in Chinese society once it was introduced—in this case by the United States and its European neighbors. Indeed, there is strong compatibility between intellectual property rights and Confucianism, just as there is between Western human rights and Confucianism.

Moreover, piracy and counterfeiting are not unique to China. Many less developed countries, including the United States in the eighteenth century, and many newly emerged industrialized countries (such as Singapore and South Korea), have experienced extensive piracy and counterfeiting before they implemented intellectual property law reforms. In fact, as many commentators have pointed out, the United States was one of the biggest pirating nations in the world in the late eighteenth and early nineteenth centuries. Section 5 of the 1790 Copyright Act, the country’s first copyright statute, stated explicitly that

nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.

It was not until more than a century later that Congress extended copyright protection to foreign authors from countries that the President proclaimed had offered Americans reciprocal copyright protection. As the former Register of Copyrights Barbara Ringer summarized succinctly: “Until the Second World War the United States had little reason to take pride in its international copyright relations; in fact, it had a great deal to be ashamed of. With few exceptions its role in international copyright was marked by intellectual shortsightedness, political isolationism, and narrow economic self-interest.”

Second, with the advent of the Internet and new communications technologies, piracy and counterfeiting have resurfaced in countries that traditionally have strong intellectual property protection, such as Canada, the United States, and many European Countries. This recent development therefore necessitates a critical reexamination of the piracy and counterfeiting problems in China. Consider, for example, the extensive mp3 piracy problem in the United States in recent years. Since September 2003, the recording industry has filed several rounds of lawsuits, suing more than two thousand individuals suspected of swapping music illegally via peer-to-peer networks. The recording industry’s action was understandable. After all, global
CD sales have dropped dramatically in the past three years. As the International Federation of the Phonographic Industry (IFPI) pointed out recently, music piracy had threatened 600,000 jobs in the European music industry. If piracy continued at the current level, it would not be surprising to find a similar number of—or even more—American jobs jeopardized.

Unfortunately, the strategies used by the Recording Industry Association of America (RIAA) are ill-advised, hurried, disorganized, costly, and ultimately ineffective. These strategies also have raised major concerns among legal commentators, consumer advocates, and civil libertarians and threaten to backfire on the constituents the trade group was charged to protect—record companies, musicians, artists, songwriters, engineers, producers, retailers, and truck drivers. Even worse, instead of coercing pirates into submission, the industry’s lawsuits are likely to drive pirates underground, forcing file-swappers to turn to proxy servers, offshore and mirror Web sites, and encrypted peer-to-peer systems. Indeed, a large variety of anonymizing technologies already exist. For instance, Freenet software allows file-swappers to encrypt download requests by passing the requests from one computer to another without disclosing how and where the user obtains the files. Programs like Red Rover, Publius, and Red Haven also provide attractive alternatives for file-swappers to remain anonymous, thus avoiding censorship and recrimination.

To some extent, the RIAA’s recent efforts resemble the ineffective tactics used by the Chinese government to control the dissemination of unwanted information over the Internet. There is no doubt that the Chinese authorities have created a significant deterrent by cracking down repeatedly on cyber cafés, handing out heavy jail sentences to online dissidents, and implementing new and restrictive laws and regulations. However, the heavy-handed tactics used by the Chinese authorities also have heightened the cautiousness and sophistication of Chinese netizens. As a result, anti-monitoring technologies proliferated, and Chinese users increasingly rely on proxy servers, offshore and mirror Web sites, and encrypted peer-to-peer systems to avoid detection.

Conclusion

The history of intellectual property law developments in China has been filled with love and hate, hope and illusion, aspiration and skepticism. While China has been slow in reforming its intellectual property regime, recent developments have been promising. With the recent accession to the WTO, intellectual property protection in China can only improve, although the country might initially suffer from a short transitional period of political and socio-economic setbacks. Notwithstanding these improvements, many commentators—including the public media—continue to use cultural differences to account for the piracy and counterfeiting problems in China. If cultural differences are unavoidable, perhaps commentators should at least focus on the “sweet and sour” nature of intellectual property law developments in the country in the past century.

21 W. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 13 (1995).

22 The Tang Code was significant for two reasons. First, it was the oldest surviving code in China today. Although comprehensive legal codes were enacted in the Qin and Han dynasties, most of these codes have been lost except through scattered quotations found in other works.

23 Second, the Tang Code was based on the earlier laws of the Song dynasty. Although comprehensive legal codes were not enacted in these dynasties, the Tang Code was significant for its emphasis on the protection of intellectual property, particularly through the use of penal servitude as a punishment for copyright infringement.


25 The Agreement also provided that “each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.”

26 See Treaty for Extension of the Commercial Relations Between [China and the United States], reprinted in TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919 (J.V.A. MacMurray ed., 1921). This treaty represented “one of the first efforts by the United States anywhere to use its strength bilaterally to bring about greater intellectual property protection.”

27 While China was negotiating the commercial treaties with Britain, Japan, and the United States, the treaty powers hinted that they might relinquish extraterritoriality if they were satisfied with the state of the Chinese law and the arrangement for its administration. Id. at 36.

28 The Agreement on Trade Relations Between the United States of America and the People’s Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4652. The Agreement provided that “each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.” The Agreement also provided that “each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.”

29 See ALFORD, supra note 4, at 70.

30 Id. Indeed, the State Council noted in a White Paper released in 1994 that intellectual property laws aim “to rapidly develop social productive forces, promote overall social progress, meet the needs of developing a socialist market economy and expedite China’s entry

37 See Yu, From Pirates to Partners, supra note 2, at 140-51 (describing the United States’ use of section 301 sanctions and various trade threats to induce China to protect intellectual property rights).

38 1992 MOU, supra note 3.

39 1995 Agreement, supra note 3.


43 See Faison, supra note 1.

44 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, supra note 34, at 15.


50 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, supra note 34, at 21-22.


53 The English versions of these statutes are available on the website of the State Intellectual Property Office at http://www.sipo.gov.cn.


57 Id. at 73.


59 Id. at 57.

60 2004 NTE REPORT, supra note 56, at 73.

61 Id.


63 Axford, supra note 20, at 142 (noting that “[f]or all its much ballyhooed expressions of concern, neither the U.S. government nor many of the companies driving [the American foreign intellectual property] policy . . . have made any substantial attempt . . . to communicate to the Chinese why better intellectual property protection would be in their interest.”); Daniel C.K. Chow, Counterfeiting in the People’s Republic of China, 78 WASH. U. L.Q. 1, 46 (2000) (noting that “brand owners are reluctant to commit the amount of resources necessary to achieve these goals or to risk seriously offending the Chinese government”); see also Patrick H. Hu, “Mickey Mouse” in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT’L L.J. 81, 111 (1996) (noting that “active involvement by U.S. companies and lawyers, for example through special seminars, exchange programs, mock proceedings, and other assistance to the Chinese media, will expedite the training process”); Eric M. Griffin, Note, Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People’s Republic of China, 6 TEX. INT’L L. & POL’Y 169, 190 (1998) (arguing that “U.S. Companies must take a proactive stance and not be content to rely on government for help”).


73 XUE & ZHENG, SOFTWARE PROTECTION IN CHINA, supra note 34, at 8 (citing PC World China, Mar. 9, 1998, at 15).

74 Id. at 9.


76 XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, supra note 66, at xxxix.


For example, adulterated drugs and counterfeit products will lead to illness, extended injuries, and unnecessary deaths. Emerging entrepreneurs, authors, and creative artists will be unable to capture the benefits of their inventions, innovations, and creative endeavors. To make up for the potential infringement of their fellow citizens and organizations, businesses and educational centers will have to pay more for the needed foreign technologies and materials. Consumers who receive worse products despite paying the same price will be reluctant to consume in the open market. Foreign entities will be wary of investing in China because of widespread intellectual property piracy. And worst of all, “the best and brightest from [China will] feel compelled to leave their home country for the more remunerative systems in developed nations.”

Yu, From Pirates to Partners, supra note 2, at 194-95 (footnotes omitted).

78 XUE & ZHENG, CHINESE INTELLECTUAL PROPERTY LAW, supra note 66, at 77.

79 See Richard E. Vaughan, Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property”? A Lockean, Confucian, and Islamic Comparison, 2 ILSA J. INT’L & COMP, L. 307, 345 (1996); see also PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 66 (Lise Buranen & Alice M. Roy ed., 1999) (discussing how some teachers attribute plagiarism by Middle Eastern students to the emphasis of community and family values in Middle Eastern cultures).


81 See Yu, supra note 79, at 4-7 (discussing the importation of intellectual property rights into China by Western countries); Edmund W. Kitch, The Patent Policy of Developing Countries, 13 UCLA PAC. BASIN L.J. 166, 178 (1994) (noting that “[o]ne can play a constructive role by insisting that the [intellectual property] issues be addressed within a larger and principled framework.”).

82 See Yu, From Pirates to Partners, supra note 2, at 224-25 (discussing the compatibility between the Chinese culture and Western intellectual property notions); Yu, Piracy, Prejudice, and Perspectives, supra note 76, at 76-77 (same). Compare XIANFA art. 20 (1982) (amended Mar. 29, 1993) (“The state promotes the development of natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions.”), and id. art. 47 (“The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.”), with U.S. CONST. art. I, § 8, cl. 8 (“The Congress
shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

85 In the past decade, substantial research has been devoted to explore the common grounds between human rights and the Chinese culture, in particular Confucianism. See, e.g., DANIEL A. BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA (2000); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); Wm. Theodore de Bary, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999); HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES (Michael C. Davis ed., 1995).


87 See ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT ch. 6 (1990) (discussing the introduction of a modern copyright law in Singapore in the late 1980s and the adoption of modern patent and copyright laws in South Korea in 1987).

88 See JAMES BOYLE, SHAMANS, SOFTWARE & SPELENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 3 (1996) (noting that the United States used to be the biggest pirate in the late eighteenth and early nineteenth centuries); Alford, supra note 20, at 146 (stating that the United States has been “notorious for its singular” and “cavalier attitude toward the intellectual property of foreigners” during the time when it was a less developed country); Thomas Bender & David Sampliner, Poets, Pirates, and the Creation of American Literature, 29 N.Y.U. J. INT’L L. & POL’L 255, 255 (1997) (stating that the United States failed to observe foreign intellectual property rights during its formative period and did not sign any international intellectual property agreements until the end of the nineteenth century).


92 See Saul Hansell, Crackdown on Copyright Abuse May Send Music Traders into Software Underground, N.Y. TIMES, Sept. 15, 2003, at C1.


94 See generally Alan Brown, Red Rover, in PEER-TO-PEER, supra note 97, at 133 (describing Red Rover); Marc Waldman et al., Publius, in PEER-TO-PEER, supra note 97, at 145 (describing Publius); Roger Dingledine, Free Haven, in PEER-TO-PEER, supra note 97, at 159 (describing Red Haven).


96 See China and the WTO, supra note 55.