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Recommended Citation

Amanda S. Reid, *Enforcement of Intellectual Property Rights in Developing Countries: China as a Case Study*, 13 DePaul J. Art, Tech. & Intell. Prop. L. 63 (2003)

Available at: <https://via.library.depaul.edu/jatip/vol13/iss1/4>

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CASE NOTES & COMMENTS

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES: CHINA AS A CASE STUDY

Protectable property interests are present in both real property and intellectual property. Real property is a commonly understood concept; it is any physical or tangible property, such as a house, a watch, or a piece of land.¹ Intellectual property on the other hand is not usually something you can touch, but exists and has value just the same. Copyrights, patents, trademarks and trade secrets are all forms of intellectual property.² Intellectual property rights (IPR) are protected by both domestic and international legislation.

Intellectual property is divided into two categories: industrial property and copyright.³ Industrial property includes patents, trademarks, industrial design, and geographic indications of source.⁴ Whereas copyright protects literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs, sculptures and architectural designs.⁵

Both individuals and businesses have an interest in protecting the investments made in various forms of intellectual property.

1. *See, e.g.*, RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 5.04 (1968) (noting that “historically, the line between real and personal property stems from the types of assets administered on death respectively, in the king’s and in the church’s courts”).

2. *See generally*, MELVILLE B. NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS (1982); DONALD S. CHISUM, CHISUM ON PATENTS: A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY AND INFRINGEMENT (1997); J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (1996); ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS (1993).

3. *About Intellectual Property*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, at <http://www.wipo.org/about-ip/en/> (last visited Feb. 28, 2003).

4. *Id.*

5. *Id.*

There is a great deal to be lost when IPR are not protected. Piracy and counterfeiting fosters organized crime and adversely affects business and private consumers.⁶

The director of the U.S. Patent and Trademark Office, James Rogan, reported that more than 50% of U.S. exports in 2001 depended on some form of IP protection.⁷ The International AntiCounterfeiting Coalition (IACC), representing a cross section of businesses and industries, is the largest international organization devoted solely to combating product counterfeiting and piracy.⁸ According to an IACC report, U.S. Customs Service seized more than \$45 million in counterfeit and pirate products in 2000, representing more than 3,200 shipments.⁹ In 2001, the U.S. Customs Service seizures increased to more than \$57 million worth of products, representing nearly 3,600 shipments.¹⁰ And more than \$98 million in counterfeit and pirate products were seized in 2002, representing nearly 5,800 shipments.¹¹

Developing countries have a notorious reputation for being the most egregious violators of IPR. The IACC reports that China was

6. See discussion *infra* Part I.

7. Vicki G. Norton & Alexander R. Schlee, *Protecting Intellectual Property Overseas*, SAN DIEGO DAILY TRANSCRIPT, July 31, 2002, available at <http://www.sddt.com/reports/2002/07/intellectualproperty/td.cfm>.

8. See *International AntiCounterfeiting Coalition (IACC) Frequently Asked Questions*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at <http://www.iacc.org/teampublish/uploads/IACC-FAQs.pdf> (last visited Feb. 28, 2003).

9. *Customs Seizes \$45 Million in Counterfeits in FY 2000, China Leading Source*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1742.cfm (last visited Feb. 28, 2003). The fiscal year runs from October 1 through September 30.

10. *Customs Seizures over \$57 million in Counterfeits during Fiscal Year 2001*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1742.cfm (last visited Feb. 28, 2003).

11. *Customs Seizures over \$98 million in Counterfeits during Fiscal Year 2002*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1742.cfm (last visited Feb. 28, 2003).

the leading source of seized shipments in 2000, 2001, and 2002.¹² In 2002, the IACC reports “China was far and away the leading source of counterfeit items, accounting for 26% of the seizures and 46% of the value.”¹³ According to the IACC report, the domestic value of goods seized from China was more than \$48 billion, while the total domestic value of all seized goods was in excess of \$98 billion.¹⁴

The purpose of this article is to explore the cultural or socio-economic forces that help explain the problems of enforcing IPR in developing countries, such as China.¹⁵ Part I of this article explores the scope of piracy and counterfeiting as it affects businesses and consumers, and fosters organized crime. Part II discusses the concept of IPR and the international mechanisms that are in place to protect them. Part III of this article focuses on developing countries and their unique attributes that contribute to their views on IPR. Part IV examines China’s legal and administrative structure generally, and also as it relates specifically to IPR. And finally, part V concludes that an emphasis on strengthening the economy and the legal infrastructure of developing countries through training and educating more scientists, engineers, lawyers and judges, while acknowledging the existential realities framing the social setting, is a critical step to successfully resolving enforcement deficiencies.

12. *Id.* See also *Customs Seizes \$45 Million in Counterfeits in FY 2000*, *supra* note 9. See also *Customs Seizures over \$57 Million in Counterfeits during Fiscal Year 2001*, *supra* note 10.

13. *Id.* IACC reports that Taiwan was second with 27%, followed by Hong Kong with 4%.

14. *Id.*

15. Herein, “China” refers to mainland China, or the People’s Republic of China. For a discussion of the development of formal sources of law in China, including the current legal modernization, the important historical influences that affect contemporary law making, and the way ideas concerning the proper organization of positive law have been adapted to the political and administrative realities of China see Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994).

I. SCOPE OF COUNTERFEITING

A. Adverse Effects on Businesses

Intellectual property theft robs businesses of billions of dollars worldwide. The International Intellectual Property Alliance estimated that U.S. businesses lost \$1.9 billion in 2001 because of copyright piracy in China.¹⁶ Sam Porteous, manager for a global risk consulting company on mainland China, notes “[f]oreign multinationals estimate they lose at least 20 percent of the value of all sales in China to counterfeits.”¹⁷ An IACC survey of Fortune 500 companies reported companies, on average, spend between \$2 to \$4 million per year combating counterfeit products.¹⁸ Some companies reported spending up to \$10 million.¹⁹

The influx of cheap, low-quality counterfeits hurts foreign companies by decreasing market demand for genuine brand-name products and by undermining the reputation and goodwill of higher-quality goods.²⁰ A recent example of a counterfeit involved the purported fifth installment of the Harry Potter series, “Harry Potter and the Leopard Walk Up to Dragon,” which is already in

16. USTR’s 2002 “Special 301” Decisions and IIPA’s Trade Loss Estimates and Piracy Levels for 2000-2001, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, at http://www.iipa.com/pdf/2002_Jul11_Asia_LOSSES.pdf (July 11, 2002). Chinese piracy is roughly a quarter of the total global losses attributed to copyright violations. See Joseph Kahn, *The Pinch of Piracy Wakes China Up On Copyright Issue; It’s More Than a Trade Dispute When the Victims Are Chinese*, N.Y. TIMES, Nov. 1, 2002, at C1.

17. Sam Porteous, *China’s Trade Advantage Undermined by Counterfeiting Menace*, WORLD TRADE, November 1, 2001 at http://www.worldtrademag.com/CDA/ArticleInformation/features/BNP_Features_Item/0,3483,66510,00.html.

18. *Loss to Industry*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1677.CFM#anchor185830 (last visited Feb. 28, 2003).

19. *Id.*

20. Christian M. Wade, *China Pledges Tougher Trademark Laws*, UNITED PRESS INT’L, September 20, 2002 (on file with author).

Chinese bookstores.²¹ According to the British author's publisher it is an inventive fake and the official version, with a different title and subject matter, will not be available until next year.²² Other examples involve the U.S.- based Heinz Company, which found 36 different counterfeit Heinz food products in a Chinese factory, and SC Johnson, which estimates that two-thirds of the company's products in China bearing the SC Johnson trademarks are counterfeit.²³

Some industries are particularly vulnerable to IPR theft. Widespread piracy and counterfeiting cost the computer software industry as a whole between \$12 and \$16 billion per year.²⁴ This amounts to more than 40% of all software industry revenues.²⁵ In some countries, more than 90% of the computer software copies are illegitimate.²⁶ According to the Business Software Alliance (BSA), in 2000, software piracy cost the U.S. economy over 118,000 jobs and \$5.7 billion in wage losses.²⁷ BSA reported that

21. See Kahn, *supra* note 16.

22. See *id.*

23. Wade, *supra* note 20. Wang Liu, a marketing consultant on product design for several Shanghai-based companies, explains that company executives often do not understand the concept of trademark protection. *Id.* Executives look for well-known designs and names and then create products based on that idea rather than creating their own design. *Id.*

24. *Loss to Industry*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1677.cfm#anchor185830 (last visited Feb. 28, 2003). See also *Report Says Software Piracy Is Rising Globally*, N.Y. TIMES, June 10, 2002, at A8. Twenty-five percent of business software titles in the United States were pirated in 2001, a percentage point increase from the previous year. The worldwide piracy rate jumped from 37 percent in 2000 to 40 percent in 2001, costing the industry about \$11 billion. *Id.*

25. *Id.*

26. *Id.*

27. *Fiscal 2003 Budget: Patent and Trademark Office: Statement of James E. Rogan, Under Secretary of Commerce for Intellectual Property Before the House Comm. on the Judiciary*, 107th Cong. (April 11, 2002) (statement of James E. Rogan, director of the USPTO and Under Secretary of Commerce for Intellectual Property), available at 2002 WL 25101019. Rogan reported that by 2008, these numbers are expected to rise to 175,000 lost jobs, \$7.3 billion in lost wages and \$1.6 billion in lost tax revenues. *Id.*

the world software piracy rate, measured as the amount of business application software installed in 2001 without a license, was up to 40%, an increase from 37% in 2000 and 36% in 1999.²⁸ As an illustration of this piracy in China, Joseph Kahn, a writer for the New York Times, reported that before Microsoft formally released its latest operation system, Windows XP, in China for \$180, it was selling for 32 yuan, less than \$4, in the back alleys of Beijing's technology district.²⁹

In April 2002, ABC News reporter Mark Litke was amazed by the variety and quantity of counterfeits he found just across the border from Hong Kong, in the town of Shenzhen.³⁰ He observed that “[n]ot only were there the latest DVDs, like *Monsters, Inc.* for \$1 each, the latest software, like the newest version of PhotoShop and Windows, at one-tenth the cost, but just about every consumer product imaginable.”³¹ The range of consumer products he saw included American Standard toilets, Head & Shoulders shampoo, Gillette razors and Skippy peanut butter.³² Not only are consumer items counterfeited, but Litke also reported, “[t]hey even sell fake Viagra.”³³

B. Effects on Consumer Health

Sam Porteous reports “[t]hese counterfeits represent financial losses running well into the billions of dollars and, in many cases, serious safety hazards to consumers.”³⁴ Businesses are not the only entities threatened by piracy and counterfeiting. Some of the disturbing counterfeit consumer products recently uncovered

28. *Piracy Study*, BUSINESS SOFTWARE ALLIANCE, at <http://www.bsa.org/resources/2002-06-10.130.pdf> (June 11, 2002).

29. See Kahn, *supra* note 16.

30. Mark Litke, *Faking It: China Manufacturing Huge Amounts of Knockoffs*, ABCNEWS.COM at http://abcnews.go.com/sections/wnt/DailyNews/China_counterfeits020418.html (April 21, 2002).

31. *Id.*

32. *Id.*

33. *Id.*

34. Porteous, *supra* note 17.

included “[b]rake pads stuffed with dried grass with a tendency to burst into flames” and “reconstituted penicillin pills containing only half their marked potency.”³⁵

Counterfeit medicines, which can look like the real thing, are made with inferior and sometimes dangerous ingredients.³⁶ “In 1995, tainted cough medicine killed 89 Haitians.”³⁷ CBS News Correspondent Sharyl Attkisson observes that there is mounting evidence that counterfeit drugs have permeated the United States and doctors may unknowingly prescribe them to American patients.³⁸ In July 2002, Martin Fackler, Associate Press writer, reported “China has become one of the world’s largest producers of bogus medicines, which kill thousands of [Chinese] people every year and are increasingly making their way overseas.”³⁹ In Ohio, police seized 36,000 counterfeit pills of the popular impotence drug, Viagra, before they could be sold.⁴⁰ Fackler reports that they were traced back to China, which the U.S. Food and Drug Administration singled out as a top producer of counterfeit medicines.⁴¹ Viagra is now the most widely-counterfeited drug in the world and worth as much to the crooks as illegal narcotics.⁴²

35. *Id.*

36. Health, *Counterfeit Drugs: Rx for Danger*, CBSNEWS.COM at <http://www.cbsnews.com/stories/2002/01/31/health/main326515.shtml> (December 8, 2000).

37. *Id.*

38. *Id.*

39. Martin Fackler, *China’s Fake Drugs Kill Thousands*, THE SAN FRANCISCO EXAMINER, available at <http://www.examiner.com/headlines/default.jsp?story=n.bogus.0729w> (July 29, 2002).

40. *Id.*

41. *Id.*

42. CBS Evening News, *Bogus Viagra Business Booms*, CBSNEWS.COM, at <http://www.cbsnews.com/stories/2002/10/02/eveningnews/main524109.shtml> (October 2, 2002).

C. Fosters Organized Crime

IPR theft not only raises serious concerns about lost profits and dangerous medicines, but it also threatens life and limb as it attracts organized crime. One of the most prevalent organized crime entities is commonly known as the Chinese Triads. These syndicates are increasingly turning to product counterfeiting as a source of tax-free income.⁴³ Recent estimates total over 160,000 members who operate internationally.⁴⁴

Organized crime from New York to Los Angeles has been suspected of intellectual property theft. Law enforcement officials in L.A. investigated the involvement of the Wah Ching Chinese organized crime syndicate in a counterfeit software ring. A recent raid of that syndicate netted \$10.5 million in counterfeit Microsoft software, shotguns, handguns, TNT and plastic explosives. Ultimately, three Asian organized crime groups were believed to be involved.⁴⁵

Other criminal organizations are getting into the act. Police raids and criminal cases have confirmed that the Italian Mafia, the Russian mob, the Irish Republican Army, and Middle Eastern terrorists have ties to the software black market, according to USA Today reporter Edward Iwata.⁴⁶ Iwata also reports “[t]he counterfeit rings are growing in strength and number, and some are modeling their operations after the drug cartels of Latin

43. *Get the Facts on Fakes!: Organized Crime*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1676.CFM (last visited Feb. 28, 2003).

44. *Id.*

45. *Get the Facts on Fakes!: Violent Crime & the Link to Knock-Offs*, INTERNATIONAL ANTICOUNTERFEITING COALITION, at http://www.iacc.org/teampublish/109_476_1676.CFM (last visited Feb. 28, 2003).

46. Edward Iwata, *Software Piracy Takes Toll on Global Scale*, USA TODAY, Aug. 1, 2001, at 1B, available at <http://www.usatoday.com/life/cyber/tech/review/2001-08-01-software-piracy.htm>.

America.”⁴⁷ The involvement of organized crime is a disturbing development in the international effort to curb piracy and counterfeiting.

II. INTELLECTUAL PROPERTY RIGHTS

A. Overview of IPR

In the U.S., the purpose of federal copyright and patent protection, as authorized by the Constitution, is “[t]o 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.”⁴⁸ Trademarks, on the other hand, are not specifically mentioned in the Constitution. Trademarks and other forms of unfair competition law are regulated under the Commerce Clause and seek to prevent consumer confusion between marks.⁴⁹

A copyright protects the form of an author’s expression, rather than the underlying idea in the work.⁵⁰ A copyrightable work must be original, fixed in a tangible medium, and exhibit some creativity.⁵¹ For an original work to be “fixed in a tangible medium” it generally means that it must be capable of being heard or read again. This can be either directly or with the aid of a machine. From the moment an original work of authorship is fixed in a tangible medium, it has copyright protection. The copyright need not be registered for protection to attach. However, registering a work offers additional benefits when the copyright owner seeks to enforce the IPR and collect statutory

47. *Id.*

48. U.S. CONST. art I, § 8, cl. 8.

49. *See* Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051- 1127 (2003). *See* The Trademark Cases, 100 U.S. 82 (1879) (invalidating the first trademark statute based on the Copyright and Patent Clause of the Constitution).

50. U.S. Code, Title 17 outlines the criteria of a copyrightable work. *See* 17 U.S.C. § 102(a) (2003).

51. 17 U.S.C. § 101 (2003).

damages.⁵²

Patents award inventors with exclusive property rights for their discoveries for a limited time. An invention must meet the criteria of “novelty,” “non-obviousness,” and “utility.”⁵³ Patents can protect a range of products such as prescription drugs, computer software and genetically engineered roses.

A trademark can be a word, design, slogan, symbol or distinctive product packaging.⁵⁴ Companies value trademarks because they identify and distinguish their goods or services. Trademarks also are the embodiment of goodwill generated by the company. The purpose of enforcing trademarks is to prevent a likelihood of confusion for consumers.⁵⁵ The shape of the Coca-Cola bottle, Internet domain names and the Nike swoosh are examples of protectable trademarks.

The terms “piracy” and “counterfeiting” are often used interchangeably. However, piracy is generally related to the theft of IPR by some form of copying the original.⁵⁶ Whereas, counterfeiting is the copying of a product’s trademark or the distinctive way the package looks.⁵⁷ As technology improves, so do pirating techniques; digitally stored information is easily reproduced creating a “just as good as the original” version.⁵⁸

52. See 17 U.S.C. § 504 (c) (2003).

53. See 35 U.S.C. §§ 102-03 (2003). In the U.S., patents are protected under U.S. Code, Title 35. The law recognizes three types of patents: design patents, utility patents, and plant patents.

54. See 15 U.S.C. § 1127 (2003). U.S. Code, Title 15, Chapter 22 outlines the domestic trademark protections.

55. See 15 U.S.C. § 1052 (d) (2003).

56. Piracy is “[t]he unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.” BLACK’S LAW DICTIONARY 1169 (7th ed. 1999).

57. To counterfeit is “[t]o forge, copy, or imitate (something) without a right to do so and with the purpose of deceiving or defrauding.” BLACK’S LAW DICTIONARY 354 (7th ed. 1999).

58. Don E. Tomlinson, *Intellectual Property in the Digital Age: The Piracy/Counterfeiting Problem and Antipiracy and Anticounterfeiting Measures*, 8-SUM CURRENTS: INT’L TRADE L.J. 3, 3 n.5 (1999). Tomlinson notes, In the realm of intellectual property, “counterfeiting” generally relates to the copying of a product’s trademark and trade dress, e.g., using the CD packaging

When digital materials are pirated and trademarks counterfeited, the total product created can appear to the consumer indistinguishable from the original.⁵⁹

B. Avenues for International IPR Protection

Since commerce does not stop at national boundaries, IPR protection cannot either. Signed in 1883 and later revised in 1967, the Paris Convention for the Protection of Industrial Property is one of the earliest international agreements for intellectual property enforcement.⁶⁰ The Paris Convention seeks to establish consistent legal principles and the consistent application of those legal principles regardless of the citizenship of the person seeking IPR protection.⁶¹ Consistent application is achieved through “national treatment,” which requires member nations to extend to foreign intellectual property owners all of the benefits and protections that nation extends to its own nationals.⁶² However, one criticism of the Paris Convention is that equal treatment in some instances may not provide much protection. For example, if a signatory nation does not respect IPR of its own citizens, then it is not required to extend such protections to foreigners either.⁶³

which accompanies the CD itself as the “master image” for purposes of printing as much CD packaging “just as good as the original” as an entity might wish to print to accompany the CDs

Id.

59. *Id.* (citing Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT’L & COMP. L.J. 431, 486 n.444 (1996)).

60. *Paris Convention for the Protection of Industrial Property*, of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979 [hereinafter *Paris Convention*], available at <http://www.wipo.int/clea/docs/en/wo/wo020en.htm> (last visited Feb. 28, 2003).

61. *Id.* For a list of participating nations and their status see <http://www.wipo.int/treaties/documents/english/word/d-paris.doc> (last visited Feb. 28, 2003).

62. See *Paris Convention*, *supra* note 60, art. 2(1).

63. Scott A. McKenzie, Comment, *Global Protection of Trademark*

Despite this criticism, the Paris Convention has been generally regarded as instrumental in the promotion and protection of international IPR.⁶⁴

Signed in 1886, the Berne Convention for the Protection of Literary and Artistic Works represents the first multilateral copyright treaty.⁶⁵ The Berne Convention provides some of the most comprehensive intellectual property protection of all the copyright treaties. It demonstrates how important an agreement can be when properly drafted and enforced among signatory nations.⁶⁶ The Berne Convention has three notable concepts that influenced subsequent intellectual property treaties: (1) union, (2) minimum standards, and (3) national treatment. “Union” implies that the Convention’s members are unified in upholding the principles and provisions of the treaty. The “Berne Union” constitutes a separate cooperative entity that exists regardless of future admittance or withdrawal from the Berne Convention by individual nations.⁶⁷ Berne guarantees minimum standards,⁶⁸ such as a copyright duration of at least the life of the author plus fifty years, to foreign copyright owners.⁶⁹ “National treatment” guarantees an author of literary and artistic pieces the same

Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China versus the European Union, 34 GONZ. L. REV. 529, 535-36 (1998-99). See also Monique L. Cordray, *GATT v. WIPO*, J. PAT. & TRADEMARK OFF. SOC’Y (1994).

64. See McKenzie, *supra* note 63, at 536.

65. *Berne Convention for the Protection of Literary and Artistic Works* of September 9, 1886 as last revised by the Paris Act of July 24, 1971 and amended on September 28, 1979 [hereinafter Berne Convention], available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm> (last visited Feb. 28, 2003).

66. See McKenzie, *supra* note 63, at 536.

67. See Berne Convention, *supra* note 65, art. 1 and 35. See also Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT’L L. & POL’Y 769, 780 (1997).

68. Article 5(1) refers to “rights specially granted by this Convention,” and as such these are minimum standards that a member nation must provide to foreign copyright owners irrespective of the level protection granted to its nationals. Berne Convention, *supra* note 65, art. 5(1).

69. See Berne Convention, *supra* note 65, art. 7(1).

protection for their works in other member nations as those nations would guarantee for their own citizens.⁷⁰ Thus, under the Berne Convention foreign authors are guaranteed a minimum level of protection, and cannot receive less protection than member nations extend to their own nationals.

In 1967 the World Intellectual Property Organization (WIPO) was formed as one of sixteen specialized agencies within the United Nations.⁷¹ WIPO administers twenty-one international treaties dealing with various aspects of IPR protection.⁷² However, the Paris and the Berne Conventions remain the cornerstones of the WIPO treaty system. Subsequent treaties are important because they have broadened the scope of protection offered to IPR owners.⁷³ Technological developments as well as new areas

70. Berne Convention, *supra* note 65, art. 5. See also Hicks & Holbein, *supra* note 67, at 780.

71. *Convention Establishing the World Intellectual Property Organization*, 14 July 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3; *What is WIPO*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, at <http://www.wipo.int/eng/dgtext.htm> (last visiting Feb. 28, 2003). For a list of member states see *Member States*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, at <http://www.wipo.org/members/members/index.html> (last visited Feb. 28, 2003).

72. *About WIPO*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, at <http://www.wipo.org/about-wipo/en/> (last visited Feb. 28, 2003). These include the Paris Union (protecting industrial property), Madrid Agreement (suppressing false or deceptive representations as to origins of goods), the Madrid Union (promoting the international registration of trademarks), the Patent Cooperation Treaty Union (promoting international cooperation in the registration process of patents), the Berne Union (protecting literary and artistic works), the Rome Convention (protecting performers, producers, and broadcasting organizations), the Washington Treaty (protecting technology relating to integrated circuits), the Madrid Protocol (further promoting the development of international registration of trademarks), and the International Union for the Protection of New Varieties of Plants (promoting biotechnology within the scope of intellectual property). McKenzie, *supra* note 63, at 538-39. See also *Treaties and Contracting Parties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, at <http://www.wipo.org/treaties/general/parties.html#1> (last visited Feb. 28, 2003).

73. *Development of International Intellectual Property Law*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, at <http://www.wipo.org/about-wipo/en/> (last visited Feb. 28, 2003).

of interest and concern are encompassed in these new treaties.⁷⁴

There are other international organizations that have shaped the course of IPR protection. In the wake of World War II, the World Bank and the International Monetary Fund (IMF) collaborated to create the General Agreement on Tariffs and Trade (GATT).⁷⁵ GATT was established to provide a framework for a multilateral economic system. To promote that objective, it sponsored “rounds” as a forum for signatory nations to meet and further the established goals of the organization.⁷⁶

In 1994 at the “Uruguay Round” the World Trade Organization (WTO) was created and replaced GATT’s old administrative structure.⁷⁷ The WTO is the only global international organization dealing with the rules of trade between nations with the goal of helping producers conduct their business.⁷⁸ The WTO structure is made up of three primary pillars: The Agreement on Trade Related

74. *Id.* The WIPO Copyright Treaty came into force March 6, 2002. *WIPO Copyright Treaty* [hereinafter WCT], available at <http://www.wipo.int/clea/docs/en/wo/wo033en.htm> (last visited Feb. 28, 2003). WCT Article 8 provides authors of literary and artistic works the exclusive right to authorize communication of their copyrighted material to the public by wire or wireless means, which would include the Internet. Article 11 of the WCT restricts anticircumvention technologies and requires adequate legal protections and remedies for copyright owners. The WIPO Performances and Phonograms Treaty also has a provision that applies to Internet transmission of works. *WIPO Performances and Phonograms Treaty* [hereinafter WPPT], available at <http://www.wipo.int/clea/docs/en/wo/wo034en.htm> (last visited Feb. 28, 2003). Article 10 of the WPPT provides performers with the exclusive right to authorize the making available to the public their performances fixed in phonograms, by wire or wireless means.

75. McKenzie, *supra* note 63, at 539.

76. *Id.*

77. The Uruguay Round was the eighth round sponsored by GATT. General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], 15 December 1993, 33 I.L.M. 13 [hereinafter WTO Agreement].

78. *What is the WTO?*, THE WORLD TRADE ORGANIZATION, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Feb. 28, 2003).

Aspects of Intellectual Property Rights (TRIPS),⁷⁹ the General Agreement on Trade in Services (GATS), and GATT – 1994.⁸⁰ The TRIPS Agreement has been hailed as “a landmark in the evolution of an international consensus on intellectual property protection and is the most significant advance in the international protection of intellectual property since the adoption of the Berne and Paris Conventions in the late 19th century.”⁸¹

The TRIPS Agreement is based on the principles of national treatment and most favored nation (MFN) status. National treatment under TRIPS provides that “[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. . . .”⁸² This provision is similar to the protection afforded by the Berne and Paris Conventions. MFN, on the other hand, requires that in IPR protection, any advantage, favor, privilege or immunity granted by one member nation to the nationals of any other country shall be conferred immediately, and unconditionally, to the nationals of all other member nations.⁸³ Thus, MFN supports national treatment by assuring that all MFN nations are treated equally.

These international, multilateral agreements signal a fundamental shift in the global protection of IPR. The level of international cooperation and commitment to these organizations is unprecedented in the history of IPR. Armed with a basic understanding of the international scene, the status of IPR in developing countries will be explored.

79. Agreement on Trade-Related Aspects of Intellectual Property Rights Agreement on Trade-Related Aspects of Intellectual Property Rights, [hereinafter TRIPS Agreement], available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last visited Feb. 28, 2003).

80. See *The WTO . . . In Brief*, THE WORLD TRADE ORGANIZATION, at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Feb. 28, 2003).

81. Hicks & Holbein, *supra* note 67, at 783.

82. TRIPS Agreement, *supra* note 79, art. 3(1).

83. TRIPS Agreement, *supra* note 79 art. 4.

III. DEVELOPING COUNTRIES

A. Characteristics of Developing Countries

What do people mean when they speak of “development” and “developing countries?” Milton Esman, Professor Emeritus at Cornell University and a leading scholar on Southeast Asian development and public administration, explains that development “connotes steady progress toward improvement in the human condition; reduction and eventual elimination of poverty, ignorance, and disease; and expansion of well-being and opportunity for all.”⁸⁴ Development involves societal transformation; it implies modernization, but not necessarily Westernization.⁸⁵

Relative to the rest of the world, the degree of progress or development in a country depends on several criteria, including: gross national product levels, life expectancy, literacy, legal certainty and environmental conditions.⁸⁶ Developing countries share a number of common features concerning their history, political system, economic and social structures, and administrative and legal systems. In developing countries, the legal system is a mixture of customary, religious, colonial, and new national rules. Because of the dynamics of development, these competing systems are often in a situation of flux and thus uncertainty may prevail.

Fred W. Riggs, Professor Emeritus at the University of Hawaii, analyzed the social structure and administration in developing countries during the 1960’s.⁸⁷ As an American born in China, he

84. MILTON J. ESMAN, *MANAGEMENT DIMENSIONS OF DEVELOPMENT: PERSPECTIVES AND STRATEGIES* 5 (1991).

85. *Id.*

86. This is certainly not an exhaustive list, but merely a guide.

87. Fred Riggs is perhaps best known for his “prismatic model.” He used this model to “help explain the internal contradictions of countries like China, Thailand and India, or even the United States and Mexico, Bosnia, Rwanda, and Somaliland: they all link in mutually reactive tensions the traditional (fused)

worked extensively in Asian countries as a political scientist.⁸⁸ According to Riggs's analysis, developing countries are in a transitional phase, what he calls a "prismatic society."⁸⁹

Riggs's prismatic society is a heterogeneous mix of traditional or "fused" characteristics and modern or "diffracted" traits.⁹⁰ Analogizing the effect of breaking white light (fused) by wavelength into a rainbow spectrum (diffracted), Riggs uses these ideals or constructs for the heuristic purpose of describing real world situations.⁹¹ The fused structure, such as the family, "may perform a wide range of functions, including not only the biological role of reproduction, but also educational, economic, political, social, and religious functions."⁹² However, a diffracted structure, such as a bureau of labor statistics, has the "more limited and exclusive function" of gathering and disseminating current figures on employment and wage rates.⁹³ All societies are "prismatic" to a degree because none are fully fused or fully diffracted.

One feature of the prismatic society is a high degree of "heterogeneity."⁹⁴ Heterogeneity of society causes the law to be internally divided and disintegrated. Also, the effects of the law are highly unpredictable. This legal uncertainty is conditional upon political, socio-economic, and technological factors. In developing countries, society is in a state of flux because relations among members of the society are changing from "status," or

qualities of the Garden of Eden and the modern (diffracted) tensions of a world compartmentalized into rainbows of competing but complementary functionalities." Fred W. Riggs, *The Prismatic Model*, at <http://www2.hawaii.edu/~fredr/welcome.htm#prism> (updated Nov. 3, 2002).

88. See generally Fred W. Riggs, *Intellectual Odyssey: First draft of an Autobiography*, at <http://www2.hawaii.edu/~fredr/autobio.htm> (updated Dec. 30, 1999).

89. FRED W. RIGGS, ADMINISTRATION IN DEVELOPING COUNTRIES: THE THEORY OF PRISMATIC SOCIETY 3 (1964).

90. *Id.* at 23.

91. *Id.* at 23-24.

92. *Id.* at 22.

93. *Id.*

94. *Id.* at 13.

where legal positions are determined by status in a social group, to “contract,” where individually acquired rights and duties determine the legal position. Prismatic societies are changing from a society based on “ascription,” the social position on the basis of birth, to “achievement,” a social position based on what you have achieved.

Another key feature of Riggs’s prismatic society is formalism. This is the degree of discrepancy or congruence between what is formally prescribed and what is effectively practiced. Formalism is the discrepancy between norms and realities.⁹⁵ In his analysis, “[a] law which is formalistic sets forth a policy or goal which is not, administratively, put into practice.”⁹⁶ In other words, “social behavior does not conform to the prescribed norm.”⁹⁷ Prismatic societies generally lack a strong rule of law because there is a gap between what is formally prescribed and what is effectively practiced.⁹⁸ In a prismatic society the laws in the statute book are one thing; the actual behavior of the individual subject to the law is another. What permits formalism to persist is the lack of pressure toward program objectives, the weakness of social power as a guide to bureaucratic performance, and a corresponding permissiveness for arbitrary administration.⁹⁹

In contrast to a highly formalistic society is one with a high degree of legal certainty. Hallmarks of a system that offers legal certainty include consistent and cognizable rules of law, observance of the law by civilians and companies, an independent judiciary, legal education and research and a free press. Legal certainty breaks down without independent dispute resolution and effective remedies for violations of the law. To maintain congruence between the formal law and practice, administrative organs must be under effective control so as to secure due enforcement of the law, and the law-making process must be restrained and realistic to ensure that policies have sufficient

95. RIGGS, *supra* note 89 at 15.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

popular support.¹⁰⁰ When the view of the general populace is incongruent with the laws on the books, enforcement problems are exacerbated.

Other features of the prismatic society include “overlapping,” the “bazaar-canteen” economic model, “poly-normativism,” and ultimately a lack of consensus. Overlapping is the extent to which formally differentiated structures of a refracted type co-exist with undifferentiated structures of a fused type.¹⁰¹ When administrative agencies or other legal structures give the appearance of autonomy, but in fact are “deeply enmeshed in, and cross-influenced by, remnants of older traditional social, economic, religious, and political systems,” then there is overlapping.¹⁰² An example would include a local law enforcement official legally obligated to shut down a factory for producing counterfeit goods. The official, however, may have overlapping interests if the factory is also the main source of income for the village.

The “bazaar-canteen” model is the prismatic counterpart of the refracted “market” in modern societies.¹⁰³ This model is marked by price indeterminacy.¹⁰⁴ A wide fluctuation in the price of a commodity depending on buyer’s identity and position in the group or society is another common feature.¹⁰⁵ Outsiders may be charged a different price or offered different goods than local purchasers.

The poly-normative perspective emerges when diffracted ways of viewing the world intermingle with traditional fused ways. When, based on experience in more refracted settings, a new set of norms, political formulae and myths are superimposed in a society which continues to adhere, in large measure, to older traditional norms, formulae and myths, then “poly-normativism” occurs.¹⁰⁶

100. *See id.* at 58.

101. RIGGS, *supra* note 89 at 15.

102. *Id.*

103. *Id.* at 105-08.

104. *Id.* at 108.

105. *Id.* at 108-09.

106. *Id.* at 174-78. Riggs proffers the example of a rural peasant who adheres to the mainly hierarchical, sacred, supernatural and ritual orientations,

This conflicting set of norms leads to a lack of consensus because neither set of norms, formulae and myths are dominant, and elements of both commingle. While counterfeiting may be legally proscribed, an accepted cultural practice of counterfeiting could lead to such a conflicting set of norms.

Another issue that developing countries face is corruption. Robert Klitgaard, Dean and distinguished professor at the RAND Graduate School, and former Yale and Harvard professor, warns that corruption is one of the foremost problems facing policy-makers and managers in developing countries.¹⁰⁷ For a successful solution to this insidious problem, several considerations must be addressed. He explains that anti-corruption policies should carefully assess the relative severity of various kinds of illicit activities, including who gains and loses from corrupt decision making.¹⁰⁸ The relative susceptibility of various corrupt activities to feasible, anti-corruption changes in policies and procedures cannot be ignored. The strategic importance of politics, in the narrow sense of bureaucratic politics as well as the wider political realities, is a pragmatic concern that must be addressed.¹⁰⁹

B. IPR & Developing Countries

The idiomatic culture in developing countries described above presents special problems for the protection of IPR. In developing countries, *using* intellectual property, regardless of who owns the property rights, is seen as a necessary element to

but through elementary school education, contact with public health clinics, community development workers, radio and other forms of mass communication, receives contrasting frames of reference. *Id.* at 176. This overlapping and mix of contrasting values creates poly-normativism. *See id.*

107. Robert Klitgaard, *Managing the Fight Against Corruption*, 4 PUB. ADMIN. & DEV. 78, 78 (1984).

108. *Id.* at 93.

109. *See generally* ROBERT KLITGAARD ET AL., *CORRUPT CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION* (2000) (discussing the significance of corruption, how to formulate a strategy to combat it, and how to implement reforms).

achieve developed status.¹¹⁰ However, in developed countries the focus is on *protecting* the rights. Professor William Alford, professor of law and director of East Asian legal studies at Harvard Law School, notes “those nations in East Asia that are the least developed economically are generally those that accord the least protection to intellectual property, while those that are highly developed economically are, for the most part, the most faithful adherents to something approaching international standards of protection.”¹¹¹ IPR protection is necessary to ensure that piracy and other IPR infringements do not undermine a developed country’s business expenditures on research and development.¹¹²

There is a clear historical precedent in developing countries to borrow from other countries’ policies, technologies and legal concepts.¹¹³ When the United States was developing in the 19th century, it adopted many technological, economic, and legal policies from England and France.¹¹⁴ Far from being unique in this approach, other countries such as Russia, Japan and Germany did likewise.¹¹⁵ Profound paradigmatic differences between developed and less developed countries with regard to IPR present friction points on the international scene. As an illustrative point of this cultural conflict we can look to the Sino-US relationship on IPR.

110. Richard J. Ansson, Jr., *International Intellectual Property Rights, The United States, and the People’s Republic of China*, 13 TEMP. INT’L & COMP. L.J. 1, 2 (1999).

111. William P. Alford, *How Theory Does – And Does Not – Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 15-16 (1994).

112. Ansson, *supra* note 110, at 2-3. Companies most affected by piracy have been those that develop computers and computer-related merchandise, entertainment merchandise, medical merchandise, and pharmaceutical merchandise. *Id.*

113. *Id.* at 4 (citing Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 300 (1996)).

114. *Id.* at 5.

115. *Id.* at 5 n.32.

IV. THE LEGAL AND ADMINISTRATIVE STRUCTURE OF THE PEOPLE'S REPUBLIC OF CHINA

A. Sino-US relations

The United States and the People's Republic of China (PRC) formally agreed to recognize each other and establish diplomatic relations in January 1979.¹¹⁶ This was a watershed event in modern political scene. China is one of the world's most ancient civilizations with a recorded history of nearly 4,000 years.¹¹⁷ It has a land area of about 9.6 million square kilometers and is the third-largest country in the world.¹¹⁸ At the last national census count in November 2000 China had a population of nearly 1.3 billion inhabitants.¹¹⁹

116. *Joint Communiqué on the Establishment of Diplomatic Relations Between the People's Republic of China and the United States of America*, January 1, 1979, available at <http://www.fmprc.gov.cn/eng/7153.html> (last visited Feb. 28, 2003).

117. *History: Ancient Times (from Antiquity to A.D. 1840)*, CHINA IN BRIEF, at <http://www.china.org.cn/e-china/history/Ancient.htm> (updated July, 13, 2000).

118. *Physical Geography: Introduction*, CHINA IN BRIEF, at <http://www.china.org.cn/e-china/geography/introduction.htm> (updated July, 13, 2000). Russia and Canada are the first and second largest countries in the world.

119. *China – Quick Facts*, CHINA INTERNET INFORMATION CENTER, at <http://www.china.org.cn/e-changshi/index.htm>, (last visited Feb. 28, 2003). There is some dispute about the reliability of China's population data. Mark Hertsgaard, a leading environmental journalist who frequently writes about China, argues that China's population figure is probably closer to 1.4 billion or even higher. Mark Hertsgaard, *China's True Population?: Take 1.2 Billion People—Then Add Brazil*, VIRTUAL CHINA, Oct. 19, 1999, at <http://virtualchina.com/archive/features/population.html>. Hertsgaard explains that by undercounting local officials are able to keep more tax revenues, rather than send them to Beijing. In one village residents were under-counted by 14 percent and if that margin were extrapolated nationally, it would amount to 185 million extra people. Such a huge population is an enormous economic burden and Hertsgaard warns that a faltering economy “raises serious questions about China's political stability, since the only thing keeping the Communist Party in power anymore, besides brute force, is its ability to keep the economy

China's economic position is still in its nascent stages. Jan Michiel Otto, professor of Law and Administration in Developing Countries and director of the Van Vollenhoven Institute at the University of Leiden, explains that China has been evolving toward a "socialist market economy" and distancing itself from strict communism since Mao Zedong's death in 1976.¹²⁰ However, such a market transition cannot occur overnight or without growing pains.

B. China's Law and Administration

China functions under a civil law system.¹²¹ In 1982, the National People's Congress adopted a new state Constitution that was designed to stress the rule of law and accountability of political leaders. The most recent amendments to the constitution were adopted March 1999.¹²² In China, the Constitution, statutes, and regulations serve as legal authority.¹²³ Distinguishable in four main categories, Chinese positive law is formed primarily through legislation.¹²⁴ The Chinese Constitution vests legislative power with the National People's Congress (NPC) and its Standing Committee (SCNPC).¹²⁵

humming." *Id.*

120. JAN MICHIEL OTTO & YUWEN LI, LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA 1 (Jan Michiel Otto et al. eds., 2000). See also XIANFA preamble, par.7 (1993), available at <http://www.qis.net/chinalaw/lawtran1.htm> (last updated Feb. 25, 1998) (noting that the country "is in the primary stage of socialism").

121. For a general overview of China's Post-Mao law-making system see MURRAY SCOT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS (1999).

122. *Political System & State Structure: Constitution*, CHINA IN BRIEF, at <http://www.china.org.cn/e-china/politicalsystem/constitution.htm> (updated July 13, 2000).

123. Weiqiu Long, *Intellectual Property in China*, 31 ST. MARY'S L. J. 63, 67 (1999).

124. OTTO & LI, *supra* note 120, at 2.

125. XIANFA art. 58 (1993) ("The National People's Congress and its Standing Committee exercise the legislative power of the state").

The highest organ in the Chinese state system is the (NPC).¹²⁶ While the NPC plenary meets only once a year for about two weeks, it also functions through its Committees.¹²⁷ The SCNPC meets every two months with roughly 150 members and attends to more routine matters.¹²⁸ The SCNPC has independent legislative competences; it can pass normal and interpret laws when the NPC is not in session.¹²⁹ Additionally, it may act in lieu of the NPC by making changes in the basic laws outside the sessions of the NPC so long as they do not conflict with the basic principles of the Constitution.¹³⁰

The administrative units in China vertically divide the republic into provinces, counties and townships.¹³¹ The country is horizontally divided into provinces, autonomous regions, municipalities, and special administrative regions that are directly under the Central Government.¹³² China is currently divided into

126. XIANFA art. 57 (1993) “The National People’s Congress of the People’s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People’s Congress.” *See also* OTTO & LI, *supra* note 120, at 2. The first main category of law is the national statutes. Constitutionally defined legislative organs produce national statutes. *Id.* The second main category is the national administrative regulations. Constitutionally designated administrative organs create these. *Id.* The third main category is regional regulations. And the fourth main way Chinese positive law is formed is from regional and local “administrative rules and orders.” *Id.*

127. OTTO & LI, *supra* note 120, at 2.

128. *Id.*

129. XIANFA art. 67, sec. 3 & 4 (1993) (The SCNPC is authorized “to partially supplement and amend, when the National People’s Congress is not in session, laws enacted by the National People’s Congress provided that the basic principles of those laws are not contravened” and “to interpret laws”).

130. *Id.*

131. *Administrative Division: Administrative Division System, CHINA IN BRIEF*, at www.china.org.cn/e-china/administrative/administrative.htm (updated July 13, 2000).

132. *Id.* Hebei, Shanxi, Liaoning, Jilin, Heilongjiang, Jiangsu, Zhejiang, Anhui, Fujian, Jiangxi, Shandong, Henan, Hubei, Hunan, Guangdong, Hainan, Sichuan, Guizhou, Yunnan, Shaanxi, Gansu, Qinghai, and Taiwan are the provinces in China. *Id.* The preamble to the Chinese Constitution states, “Taiwan is part of the sacred territory of the People’s Republic of China. It is

twenty-three provinces, five autonomous regions,¹³³ four municipalities¹³⁴ directly under the Central Government and two special administrative regions.¹³⁵ The laws of some of these subdivisions, such as the special administrative regions, may vary from the laws of mainland China.¹³⁶

The highest administrative organ in China is the State Council, or the “cabinet.”¹³⁷ It performs valuable legislative tasks even though it is not in principle a legislative body;¹³⁸ it is also empowered to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the law.¹³⁹ These administrative measures are important because of their general scope and because they are used as the legal basis for lower-level decisions.¹⁴⁰ However, Otto notes, “Chinese jurists do not view these rule-making activities as true legislation.”¹⁴¹

the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.” XIANFA preamble, par.9 (1993). This political issue is beyond the scope of this article, however the author acknowledges that this is a point that can be contested.

133. *Id.* Tibet, Inner Mongolia, Guangxi, Ningxia, and Xinjiang are autonomous regions. *Id.*

134. *Id.* Beijing, Tianjin, Shanghai, and Chongqing are the four municipalities. *Id.*

135. *Id.* Hong Kong and Macao are the two special administrative regions. *Id.*

136. XIANFA art. 116 (1993) The text of the Constitution reads in pertinent part:

The people’s congresses of the national autonomous areas have the power to enact regulations on the exercise of autonomy and other separate regulations in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. The regulations on the exercise of autonomy and other separate regulations of autonomous regions shall be submitted to the Standing Committee of the National People’s Congress for approval before they go into effect.

Id.

137. OTTO & LI, *supra* note 120, at 3.

138. *Id.*

139. XIANFA art. 89 (1993).

140. OTTO & LI, *supra* note 120, at 3.

141. *Id.*

China has a dual approach to legislative order. According to Perry Keller, a lecturer in Law at King's College London, "[p]erhaps the most interesting parallel which exists between late imperial and contemporary sources of law in China lies in the dichotomy which exists between the formalistic and symbolic use of primary legislation and the flexible and pragmatic use of sub-statutory rules."¹⁴² Keller classifies Chinese law-making authorities and their legislative products into three levels.¹⁴³ In Keller's analysis, primary legislation covers the statutes (*falü*) created by the NPC and its Standing Committee.¹⁴⁴ Secondary legislation consists of the assortment of regulations (*fagui*) produced by the State Council and the regional and local people's congresses.¹⁴⁵ Tertiary legislation covers the main bulk of the many types of regulation (*guizhang*) issued by the central and lower government organs, such as Ministries and regional and local administrative authorities.¹⁴⁶ Thus, it is this extensive tertiary category, supervised by the Communist Party (CP) and combined with the historic role of the CP in Chinese law that makes the construction of a consistent law-making system in China so difficult.¹⁴⁷

The CP is interwoven in the government structure of China. It has the highest authority over the State and society; CP is present, although waning, in all Chinese government institutions by way of a specially chosen party secretary.¹⁴⁸ The ideological orientation of China's socio-economic policy has had a tremendous impact on the content of the Republic's laws. After the Chinese adopted the Soviet doctrine, there was no place for an autonomous legal system, free from politics and policy.¹⁴⁹ Orders of party leaders

142. Keller, *supra* note 15, at 715.

143. *Id.* at 726.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 726-27.

148. OTTO & LI, *supra* note 120, at 6.

149. *Id.*

took over the role originally assigned to law.¹⁵⁰ Keller notes that because “[t]hroughout most of the Communist era, normative documents have constituted the basis of normative administration . . . China’s current legal order was in many respects developed out of the pre-existing normative document system.”¹⁵¹ How to reconcile the entrenched Soviet-style system and the reformed law-making system of today is one of the greatest politico-legal questions in China.¹⁵²

The highest court is the Supreme People’s Court (SPC) and it is the only one with the formal competence to apply NPC laws.¹⁵³ This Court may publish general interpretations and commentaries that are seen as important supplements to the law.¹⁵⁴ The SPC can explain the specific application of laws, rules and regulations in the course of a trial.¹⁵⁵ These “opinions” come close to general, binding rules, with an effect not dissimilar to that of legislation.¹⁵⁶ The SPC is responsible to the NPC and its Standing Committee and supervises the judicial work of the local people’s courts, military courts and other special courts.¹⁵⁷

China’s attempts to rule by fiat are often frustrated by its large population and geographic vastness.¹⁵⁸ A U.S. Department of State memoranda notes, “China’s leaders must increasingly build consensus for new policies among party members, influential nonparty members, and the population at large.”¹⁵⁹ These factors should not be overlooked when examining the status of IPR in China.

150. *Id.*

151. Keller, *supra* note 15, at 722.

152. OTTO & LI, *supra* note 120, at 6.

153. *Id.* at 7.

154. *Id.*

155. Renmin Fayuan Zuzhifa, art. 33.

156. OTTO & LI, *supra* note 120, at 7.

157. *Political System & State Structure: People’s Courts*, CHINA IN BRIEF, at <http://www.china.org.cn/e-china/politicalsystem/people-courts.htm> (updated July 13, 2000).

158. *Background Note: China*, U.S. DEPARTMENT OF STATE, at <http://www.state.gov/r/pa/ei/bgn/2742.htm> (updated Jan. 2002).

159. *Id.*

C. History of IPR in China

Culturally, China does not elevate IPR the same way Western nations do. In ancient China new treatises were often created by “borrowing” from the classics and other scholars’ works and without formally crediting the sources.¹⁶⁰ During the beginning of the early imperial dynastic period copying certain works was prohibited. But the restrictions on free copying were specific and limited; only copying writings by ancient philosophers, government works or banned materials, such as pornography, were prohibited.¹⁶¹

Central control over duplication of these materials had a two-fold purpose. First, to preserve conformity and sociopolitical stability, Chinese leaders sought to control the ideas of the populace.¹⁶² Politically undesirable works could be censored. And second, the leaders sought to maintain accuracy and orthodoxy of the works that were integral to the moral, social and legal structures of China.¹⁶³ To ensure that the authenticity of the works of the government and ancient philosophers, free license to copy such works was prohibited.

In modern times, the prohibition against unauthorized copying is provided for in China’s Constitution. Articles 13 and 47 of the Constitution create intellectual property rights and other private rights expressly.¹⁶⁴ China’s modern copyright law became

160. Chung-Sen Yang & Judy Y.C. Chang, *Recent Developments in Intellectual Property Law in the Republic of China*, 13 UCLA PAC. BASIN L.J. 70, 70-71 (1994).

161. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 2-23 (1995). See also John R. Allison and Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT’L ECON. L. 735, 743 (1999).

162. Alford, *supra* note 161, at 15-20.

163. *Id.*

164. XIANFA art 13 (1993) (The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects according to law the right of citizens to inherit private property); XIANFA art 47 (1993) (Citizens of the People’s Republic of China have freedom

effective September 7, 1990.¹⁶⁵ Patent law was adopted September 4, 1992¹⁶⁶ and trademark law has been in place since February 22, 1993.¹⁶⁷ Remedies for IPR infringement have also been incorporated in China's modern law. Remedies available for patent, copyright and trademark law violations include civil liability, administrative sanctions, and criminal punishment.¹⁶⁸

to engage in scientific research, literary and artistic creation and other cultural pursuits. 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). Chapter five of the 1986 General Principles of Civil Law of the People's Republic of China establishes that citizens and legal persons may hold intellectual property as private rights. *The General Principles of the Civil Law of the People's Republic of China*, (adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, and effective as of January 1, 1987), available at <http://www.qis.net/chinalaw/prclaw27.htm#5> (updated Feb. 10, 1998). Article 94 provides that "[c]itizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works, and obtain remuneration in accordance with the law." *Id.* Article 95 states that "[t]he patent rights lawfully obtained by citizens and legal persons shall be protected by law." Moreover, in Article 96 "[t]he rights to exclusive use of trademarks obtained by legal persons, individual businesses and individual partnership shall be protected by law." *Id.* Article 97 explains that "[c]itizens who make discoveries shall be entitled to the rights of discovery." *Id.* "A discoverer shall have the right to apply for and receive certificates of discovery, bonuses or other awards. Citizens who make inventions or other achievements in scientific and technological research shall have the right to apply for and receive certificates of honor, bonuses or other awards." *Id.*

165. The Constitutional basis for China's copyright laws can be found in Article 22, whereby the promotion and development of art, literature and mass media are provided for. XIANFA art 22 (1993) See also Keshia B. Haskings, Note, *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1141 (1999).

166. *Patent Law of the People's Republic of China*, available at <http://www.qis.net/chinalaw/prclaw107.htm> (updated May 1, 1998).

167. *Trademark Law of the People's Republic of China*, available at <http://www.qis.net/chinalaw/prclaw10.htm>, (updated May 6, 1998).

168. Long, *supra* note 123, at 78.

The Constitution was adopted in 1982 and IPR that emanate are still relatively new. However, Confucianism¹⁶⁹ and Communism,¹⁷⁰ which form the ideological basis of most of China's laws, never envisioned guaranteeing property-like protection to products of the individual intellect.

D. Current IPR in China

In the past several decades China has joined key international organizations and treaties that protect intellectual property. These include the World Intellectual Property Organization (1980), the Paris Convention (1984), the Treaty on Intellectual Property in Respect of Integrated Circuit (as one of the first signatories in 1989), the Madrid Agreement for the International Registration of Trademarks (1989), the Berne Convention (1992), the Universal Copyright Convention (1992), Protection of Producers of Phonograms against Unauthorized Duplication of Phonograms (1993), and the Patent Cooperation Treaty (1994).¹⁷¹ In December 2001, China acceded to the World Trade Organization (WTO) and became the one hundred and forty third member.¹⁷²

Despite the copyright laws on the books, piracy is still a problem. Lisa Movius, a freelance writer living in Shanghai, notes, “[s]tricter laws have stemmed the tide only slightly, because anti-piracy law, like most of Chinese law, is enforced haphazardly

169. Keller states that China has a “highly sophisticated Confucian based legal history which once formed the philosophical backbone of imperial law and continues to resonate in contemporary legal culture.” Keller, *supra* note 15, at 712.

170. The Communist Party came to power in 1949 and began to create a new legal order. *See id.* at 719. For the Communist Party, which holds incontrovertible authority over the determination of the content of the law, the function of law is to express, in a positive, normative form, current Party policy. *See id.* at 721.

171. Long, *supra* note 123, at 84.

172. *Trading Into the Future: The Introduction to the WTO*, WORLD TRADE ORGANIZATION, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 28, 2003).

at best, and everyone knows it.”¹⁷³ Other reasons for the persistence include that developing countries often find piracy to be profitable and therefore fail to enforce the laws enacted.¹⁷⁴ Another barrier is the relative newness of IPR laws in China, as a developing country.¹⁷⁵

IPR owners trying to enforce their rights may face both involuntary and voluntary obstacles.¹⁷⁶ Involuntary barriers include unclear legislation. Keller noted that Chinese legislation is not necessarily “the root cause of all China’s problems of legal development.”¹⁷⁷ However, he acknowledges, “any evaluation of the legislative and regulatory documents which compose China’s positive law must inevitably include reference to the equally difficult issues of legal interpretation and doctrinal development.”¹⁷⁸ Furthermore, a consistent rule of law is in fundamental tension with Chinese state administration and legal culture.¹⁷⁹ According to Keller, selective and often arbitrary law enforcement, as well as widespread public indifference to legal rights, procedures and remedies is a common feature of the Chinese legal landscape.¹⁸⁰

While some onlookers lament China’s lack of coherency in a legal system, Movius explains that it is only half of the problem. She states, “[t]he flip side is that Chinese law is relative, depending on whether you get caught and, more importantly, who you are (and who you know).”¹⁸¹ This discrepancy between norms and reality is what Professor Riggs calls “formalism.” Such voluntary resistance also includes the willful failure of officials to enforce the laws.¹⁸² Movius notes, “authorities on the local level

173. Lisa Movius, *Imitation Nation*, SALON, July 8, 2002 at http://archive.salon.com/tech/feature/2002/07/08/imitation_nation/.

174. Haskings, *supra* note 165, at 128.

175. *See id.*

176. *See id.* at 1129.

177. Keller, *supra* note 15, at 712.

178. *Id.*

179. *Id.*

180. *Id.*

181. Movius, *supra* note 173.

182. *See generally* ROBERT KLITGAARD ET AL., CORRUPT CITIES: A

will often seek to protect pirate factories that are beneficial to the area's economy."¹⁸³ Winston Zhao, a partner at Jones, Day, Reavis and Pogue law firm in China sums up the attitude with a Chinese proverb: "If everyone does wrong, no one will be punished."¹⁸⁴

There is a cultural failure to appreciate IPR. A cultural de-emphasis on individuality coupled with an economic climate that makes it impossible for the vast majority of the population to afford the genuine goods has created an environment that is indifferent to the IPR of foreigners and ripe for piracy. In 1998, a survey of 3,000 Chinese residents indicated that 68% thought piracy was acceptable.¹⁸⁵ However, only 50% thought piracy was acceptable if their per capital income of \$600 per year was doubled to \$1,200 per year.¹⁸⁶ Scholars argue that as the standard of living rises in China, the rate of piracy should decline.¹⁸⁷

V. CONCLUSION

Supporting and strengthening IPR protection is consonant with China's long-term goals. China recognizes that IPR are a byproduct of a market economy and as such, they develop along with it proportionately.¹⁸⁸ Strong and reliable IPR protection is a fundamental part of a successful participation in the international market place. Porteous explains, "protecting the rights of Chinese innovators is no idle concern," because for China to be a source of commercial innovation for the world it must implement an IP system that will foster such innovation.¹⁸⁹ IPR will only become a

PRACTICAL GUIDE TO CURE AND PREVENTION (2000) (discussing strategies to fight corruption that include institutional reforms that improve information and create new and more powerful incentives and disincentives).

183. Movius, *supra* note 173.

184. *Id.*

185. *Chinese Consumers' Perceptions of Intellectual Property Rights*, ASIA PAC. ECON. R., Feb. 1, 1998, available at 1998 WL 11888976.

186. *Id.*

187. Ansson, *supra* note 110, at 25.

188. Long, *supra* note 123, at 98.

189. Porteous, *supra* note 17. Furthermore, "[t]he need for patent protection is particularly acute in the software market where Chinese development firms

more important tool in the global economy and effective international trade depends on uniform and consistent laws in this area.

However, in spite of all the attention to IPR in China, the level of infringement is increasing, not decreasing. James Rogan, the U.S. Patent and Trademark Office chief, in April 2002 told members of a US House of Representatives subcommittee, “[t]he risks of increased piracy [in China] mount on a daily basis with rapidly increasing Internet penetration,¹⁹⁰ Napster-like file exchange systems, and involvement of organized crime.”¹⁹¹ Rogan, also the Under Secretary of Commerce for Intellectual Property, said “despite WTO commitments, there is little evidence of any prosecutions of Chinese citizens for criminal copyright theft.”¹⁹²

According to Bill Thompson, senior managing director of Pinkerton China, which investigates product fraud across the country, less than 1% of all counterfeiting cases reported are

are being ravaged by domestic counterfeiters. If the Chinese government is to encourage development in this key sector, the counterfeiters will have to be restrained.” *Id.*

190. See, e.g., Jennifer 8. Lee, *Pirates on the Web, Spoils on the Street*, N.Y. TIMES, July 11, 2002, at G1. The Internet facilitates the dissemination of pirated products. Within ten minutes of a pirated goods release, also known as “warez,” it can be copied to a few dozen central distribution centers on the Internet. According to U.S. government officials, within about six hours, lower-level couriers post copies to roughly 10,000 publicly available sites around the Web. Movies and program creep onto Usenet groups and peer-to-peer software networks, like KaZaA and Morpheus, within two to three days. Once these pirated files become public, anyone who is interested in them can find them. *Id.* See also *Report Says Software Piracy Is Rising Globally*, N.Y. TIMES, June 10, 2002, at A8 (noting that the entertainment industry is concerned about declining music sales and piracy on the Internet, as well as, reports that new music, such as rapper Eminem’s latest C.D., and new movies, such as “Spider-Man,” are available on the Internet even before they were released to the public).

191. *WTO: USPTO Director Says China’s High Levels Of Intellectual Property Theft Will Increase Due To Internet*, CHINA IT & TELECOM REPORT, Apr. 26, 2002 (on file with the author).

192. *Id.*

prosecuted.¹⁹³ Laws on the books are thin victories if not enforced. In Yiwu, a town near Shanghai, experts estimate that 90% of consumer products like shampoo and soap are fake.¹⁹⁴

Although IP laws have been enacted, enforcement is the key. Foreign pressure has proved effective in getting the laws promulgated, but pressure to enforce has not been as successful. China is now in the position of trying to create an infrastructure to catch up with the laws on the books to ensure a dependable rule of law. An emphasis on training and educating more scientists, engineers, lawyers, IPR specialists, courts, staff and judges is needed to fill the gap between the ideal written in the law and the reality of enforcement. As Professor Riggs explains, these are the infrastructures that must be strengthened in a prismatic society for it to develop an effective and consistent rule of law.¹⁹⁵

International and multinational efforts that focus exclusively on creating IP laws without considering the cultural and political forces at work within China are likely to be disappointed.¹⁹⁶ Counterfeiting and piracy are clearly a serious problem for both consumers and businesses. However, getting laws on the books is not the simple solution. While it is certainly an important step in protecting IPR, it is not the final step for enforcement. Movius suggests that one should “[b]lame Confucius, blame Mao, blame Deng Xiaoping’s trickle-down economics, or blame Western companies’ unrealistic pricing policies,” but “[i]mitation is a way of life in modern China, and it will take more than diplomatic pressure or a handful of laws to eradicate it.”¹⁹⁷

193. Ted Anthony, *Made in China, or is it?*, THE WASHINGTON TIMES, Apr. 23, 2002 at <http://www.washtimes.com/business/20020423-52602391.htm>.

194. *Id.*

195. See generally Riggs, *supra* note 89.

196. For example, Jiang Wen, one of China’s most celebrated directors and actors explains one reason for video piracy is not “that people don’t want to go out to the movies,” rather “it’s simply that the cinemas are so bad. Too often the seats smell like the toilet, and the lobbies are dirty. Some say, why will people pay for cinema when they can watch cheaper DVD’s at home?” Rick Lyman, *China Is Warming To Hollywood’s Glow; Before Big Profits, Hurdles Remain*, N.Y. TIMES, Sept. 18, 2002, at E1.

197. Movius, *supra* note 173. See Kahn, *supra* note 16 (noting that the IPR

This article offers no easy answer to the enforcement issue. The humble purpose is to help refocus the attention on some of the underlying social forces at work in developing countries, such as China. By drawing from development administration literature, hopefully the bigger picture, and where IPR fit into it, can be appreciated. By applying Professor Riggs's prismatic model to IPR in China, policymakers and analysts should recognize that enforcement behavior of Chinese officials is unintelligible without noting the interaction between fused and diffracted structures with the state's politics and administration.¹⁹⁸

For an IPR policy to have any hope of success it must strive to foster, among Chinese officials and citizens, a consensus for respecting the rule of law and individual rights generally. One wonders how a nation that is struggling to protect basic human rights be expected to protect foreigner's IPR. IPR must be addressed within the cultural and socio-economic setting, and not in a vacuum.

While this might seem to be an obvious approach, Professor Alford notes that for much of the 20th century, "American policy toward intellectual property problems in China . . . displayed a disturbing indifference both to the legacy of the Chinese past and the implications of its current political, legal, and economic circumstances."¹⁹⁹ Professor Riggs explains that the more formalistic a system, such as China, the greater the likelihood scholars and policymakers would limit themselves to "legalistic studies" rather than examine the highly contradictory and heterogeneous facts themselves.²⁰⁰ "It is simpler to test for

enforcement struggle is shifting; "[t]hroughout the 1990's, intellectual property was mainly seen as a trade dispute pitting the wealthy West against the developing East. It's now also a domestic struggle, with local stars complaining that they get little fortune from their own fame.").

198. See *supra* Part III.a.

199. William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 151 (Mark A. Cohen et al. eds., 1999).

200. Riggs, *supra* note 89, at 18.

knowledge of the formally prescribed than for an understanding of the more complex existentially real.”²⁰¹ Ignoring the existential cultural socio-economic realities that frame IPR in China is likely to produce unsatisfying results.

By not adequately considering China’s historical and cultural attributes, U.S. policymakers have fundamentally misunderstood the capabilities of the current power structure and enforcement mechanisms. Beijing has had difficulty enforcing basic sovereign rights such as collecting taxes, preventing erection of regional trade barriers, and preventing environmental pollution.²⁰² While these difficulties in no way absolve China’s lax enforcement of IPR, it does help illustrate the point that more systemic issues need to be addressed in this developing country.

There may also be other disadvantages if U.S. policymakers put too much pressure on Beijing, namely that the national government may attempt to re-concentrate central control.²⁰³ Professor Alford argues that a “democratic, law-abiding China surely will be a more stable, predictable, and dependable partner than the alternative.”²⁰⁴ Furthermore, too much emphasis on legal rights and remedies risks creating the false impression that an intricate body of law can rapidly denature the citizenry.²⁰⁵ In our own legal system, criminal behavior persists despite clear laws on the books to the contrary.²⁰⁶

Chinese legal scholar, Susan Finder reports IP infringement litigation is on the rise in China.²⁰⁷ But nine months after China’s accession to the WTO the US-China Business Council reported to a U.S. Trade Representative that “progress in improving IPR protection remains slow, and has shown no particular change in

201. *Id.*

202. Alford, *supra* note 197, at 153.

203. *See id.* at 157.

204. *Id.*

205. *See id.* at 162.

206. *Id.*

207. Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 268 (Mark A. Cohen et al. eds., 1999).

direction since WTO accession.”²⁰⁸ Joseph Kahn, a writer for the New York Times, notes China’s creative industry has been hit hard by the failure to enforce copyright laws.²⁰⁹ And according to Kahn, “[Chinese] artists and their lawyers say piracy has worsened since China joined the World Trade Organization. . . .”²¹⁰ This is a critical time to try to stem the tide of counterfeiting and piracy, both for U.S. consumers and businesses, and for China’s stability. Perhaps it is time to try a different approach.

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208. *China’s WTO Implementation Efforts: An Assessment of the First Nine Months of China’s WTO Membership*, UNITED STATES-CHINA BUSINESS COUNCIL, available at <http://www.uschina.org/public/testimony/testimony13.pdf> (September 3, 2002).

209. See Kahn, *supra* note 16.

210. *Id.*

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