Houston Law Review
Symposium 2009

Intellectual Property in International Perspective: Institute for Intellectual Property & Information Law Symposium

Sixth Annual Baker Botts Lecture

*1257 PROTECTION OF INTELLECTUAL PROPERTY IN CHINA (30 YEARS AND MORE): A PERSONAL REFLECTION

William O. Hennessey [FNa1]

Copyright (c) 2009 Houston Law Review; William O. Hennessey

Table of Contents

I. Introduction	1258
II. 1979: The Year China Finally Embraced Modernization	1260
III. The Legacy of "Old China" Lives On: Defending the Past Trumps Imagining the Future	1268
IV. We Have Built It; They Have Come: Creating a Modern Intellectual Property Regime in China	1281
V. The Rule of Law and Enforcement of Intellectual Property Rights in China: Rights Administration or Rights Vindication?	1288
VI. Conclusion: Risk-Aversion, Harmony, and Social Conformity: China's "Copycat Counterculture" Is a Creative Outlet Less Risky than True Innovation and Originality	1296

*1258 "Better that all our ancient culture disappear than our race perish by its inability to live in the modern world."

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

-- Chen Duxiu, 1915(Co-founder of the Chinese Communist Party, 1921) [FN1]

"Imagination is more important than knowledge. Knowledge is limited. Imagination encircles the entire world."

-- Albert Einstein, 1929 [FN2]

I. Introduction

Protection of intellectual property in China is a popular topic of discussion in the United States today, or so it is often said. But what should one say when asked actually to discuss the topic, which has not been said popularly-- that is, said altogether too often or too often without intellectual rigor? Therefore, when asked to deliver this year's annual Baker Botts Lecture for the University of Houston's Institute for Intellectual Property & Information Law, I was at once both challenged and intrigued. My task is complicated by the fact that while I have been engaged in thinking about Chinese language, literature, and culture for nearly forty years, and have worked as an intellectual property (IP) educator with Chinese academic and professional colleagues and graduate and undergraduate law students for over twenty, those two skill sets may overlap but are not necessarily identical, and I do not consider myself a "China IP expert." A number of real China IP experts have already covered this ground exceedingly well. Among many, many others, Professor Bill Alford produced the pioneer work on the cultural roots of "IP consciousness" (or the lack thereof) in what I will call "Old China," and on the imposition of intellectual property law "at gunpoint," as he calls it, by the West. [FN3] Professor Randy ***1259** Peerenboom has examined closely and comprehensively the ongoing reforms of China's legal system, and domestic resistance thereto. [FN4] And Professor Peter Yu raises the interesting question of when China is going to experience a "crossover" to stronger IP protection as being in its own "self-interest." [FN5]

Recently, legal counsel at a couple of large U.S. companies with strong presence in China asked my opinion on some of the same interrelated questions: Why is there still such perceived resistance to the concept of intellectual property protection in China? Is that perception accurate? Will it ever change? [FN6] If so, when? Is it changing now? Does China have a rule of law? If not now, will it ever? If so, when? Is China backsliding on IP protection?

I hope to reflect here on these American perceptions of the course of China's intellectual property development primarily from the perspective of an outside cultural observer of and frequent traveler to "greater China" over thirty years, and only secondarily from the standpoint of an intellectual property lawyer. This Essay is less about Chinese government policies themselves than about my interactions with the Chinese people I have met--IP professionals and government officials, judges, and students, of course, but also artists, scientists, innovators, entrepreneurs, and ordinary citizens (including taxi drivers)--***1260** and the influences with which they have had to cope. While this mode of exposition runs the risk of coming across as a series of loosely topical and anecdotal vignettes, I hope that some patterns will emerge that may be helpful to a more accurate understanding of what "intellectual property protection in China" means in China. China's leaders have made great strides in the past three decades in recognizing the importance of rights in intellectual property for economic development. But we need to clearly understand traditional public attitudes in Chinese society toward innovators and artistic creators (mostly indifferent if not negative), the extent to which those attitudes have changed (or not changed) over time, and how far China has yet to go in recognizing the intellectual property rights of authors, entrepreneurs, and inventors.

II. 1979: The Year China Finally Embraced Modernization

Coincidentally and fortuitously, 2009 is the thirtieth anniversary of the year when I first became aware of the concept

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

of “intellectual property” and also the year of China's first public embrace of that concept. [FN7] It was also the year the United States and China finally buried the Cold War hatchet. [FN8] Like many Americans who studied Chinese in the '50s, '60s and '70s, I began as a military trainee at the Army's Language Institute in Monterey, California, and only years later moved into academic study. When I began studying Chinese language in 1970 in Monterey, China's Great Proletarian Cultural Revolution (1966-1976) was raging furiously. [FN9] Most Americans, including us, knew virtually nothing about what was really happening in China and how horrifying conditions really were there, particularly for intellectuals. [FN10] Highly laudatory contemporary reports from the ***1261** most prominent “China watchers” proved grossly inaccurate in hindsight. [FN11] It was just about a year after Neil Armstrong had radioed, “Houston, Tranquility Base here. The Eagle has landed.” [FN12] Our teachers at Monterey were all members of a generation of Chinese professional elites, lawyers and business people mostly, that had left China either before 1949 or shortly thereafter. None were going back soon. We had a running joke in our class of twelve students in 1970: “It's easier for an American to go to the moon than to go to China.” We weren't kidding. Neither were our teachers.

Historic events rapidly overtook us. By the time I left military service in 1972, just a few months after President Nixon's visit to Beijing, I had a good working knowledge of the Chinese language but knew virtually nothing about Chinese culture or history. My brief prior stint as a high school biology teacher in the late 1960s piqued my interest in Chinese science and technology, among other subjects. I enrolled in a graduate program in Chinese language and literature with a focus on the vernacular stories and drama of the medieval period of the Song (Chinese) and Yuan (Mongol) Dynasties (980-1368).

The Song Dynasty and subsequent Mongol era marked a radical transformation in Chinese politics, literature, culture, and ideology. [FN13] That seminal medieval period was followed by five centuries of much less radical change during the Ming and Qing periods (1368-1911), culminating in China's systemic decline and repeated “national humiliation” (guochi) at the hands of the Western Powers in the late nineteenth and early twentieth centuries. The humiliation of China and its people (“loss of face”) at the hands of foreigners, actual or perceived, is an important part of this story. [FN14]

I began my formal academic study exactly as a scholar-official of Old China would have, with several extraordinary teachers of ***1262** classical Chinese, the idiom of Old China's official class, virtually unchanged from the time of Confucius, and its official written language until finally abandoned as the main medium of written communication at the end of World War I. [FN15] We were forced by our teachers to memorize rote passages of the Confucian classics and classical Chinese poetry. (Scholars preparing for the imperial examinations in Old China from 1300 until 1905 were expected to rote memorize the entire corpus of those books.) [FN16] The beginning of my dissertation research in Taiwan in 1977-1978 was memorable for the ready availability of a penurious scholar's dream, a seemingly endless supply of cheap pirated books in both English and Chinese. [FN17] My main scholarly interest was “cops and robbers” pulp fiction written--anonymously obviously, for political reasons-- during the fourteenth and fifteenth centuries in vernacular (not classical) Chinese for a popular urban readership. [FN18] In these Robin Hood-like stories, the outlaws, based in their “mountain strongholds” or shanzhai, are for the most part the “righteous” good guys while the corrupt imperial officials are the villains, with a few “righteous” officials thrown in for good ***1263** measure. Those same set-period stories about “outlaw strongholds” are still wildly popular today and are often the subject matter of TV soap operas and video games in China. [FN19]

For me, in the foreground during the 1970s was a decade-long seductive excursion into the mists of Chinese cultural history, somewhat like looking into, or for, the missing background in a Chinese landscape painting. Far in the background of my grad student experiences were the destructive events taking place within China at the same time--the Great Proletarian Cultural Revolution of 1966-1976, a “mass movement” deliberately designed and carried out at the behest of

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

China's paramount leaders to extirpate from "modern" Chinese culture any lingering influence of the very things I was learning about. [FN20] Artists, entrepreneurs, and scientists, along with "landlords" and business people, bore the brunt of supposedly "modern" China's cruel value system during that ten-year period. What was so wrong with "old" Chinese culture, anyway? Had nothing changed whatsoever? Was New China as embodied in that nightmarish cultural upheaval any different from the Old ***1264** China it had replaced? I had just spent ten years of my life trying to understand what China's rulers had worked for ten years feverishly to obliterate. "Ten years polishing a single sword." [FN21] Had it all been a waste of my time? What I did not know then was that this catenation of events would soon lead me to the study and practice of intellectual property law.

In the spring of 1979, right after the United States and China recognized each other diplomatically, I was finishing up my Ph.D. dissertation at Michigan and headed off to my first real teaching job at Oberlin College. One of my colleagues in the Michigan East Asian Languages department approached me with a proposition. He had received a call from Bill Carey, the Executive Director of the American Association for the Advancement of Science, looking for two interpreters to cover a visiting delegation of Chinese science policy officials and scientists as members of the Science and Technology Association of the People's Republic of China (STAPRC). [FN22] We met the Chinese delegation in late May in Washington, D.C. It included top science and technology policy officials, engineers, and scientists versed in Chinese and Western medicine, biochemistry, economics, computer science, and aeronautics. One of the members of the delegation, Dr. Niu Jingyi, incidentally a 1953 Ph.D. graduate from the University of Texas at Austin, had just a year earlier, in 1978, been nominated by China for the Nobel Prize in chemistry. [FN23] Another, Bao Tong, a young Chinese Communist Party cadre, went on to hold the position of secretary to Premier Zhao Ziyang and has become one of the most prominent Chinese dissidents of the early twenty-first century. We, the interpreters, shared with them an impressive and eye-***1265** opening month-long introduction to the major centers of "big science" and technology across the United States. It was just as much an education for me about my own country as it was for our Chinese guests.

When we landed in Washington in June 1979, the town was abuzz with innovation policy questions. Jordan Baruch, then Assistant Secretary of Commerce for Science and Technology in the Carter administration, had set up an Advisory Committee on Industrial Innovation in Commerce in 1978 as part of a larger initiative called the Domestic Policy Review of Industrial Innovation. [FN24] Congressman Mike McCormack on the House Committee on Science and Technology arranged some meetings for us with Commerce and Capitol Hill staffers in early June. Among the pending proposals introduced to the Chinese visitors (and me) were ones that eventually led to the Stevenson-Wydler Technology Innovation Act of 1980, [FN25] the Bayh-Dole Act of 1980, [FN26] and a third, not enacted into law until the following term, the Federal Courts Improvement Act of 1982, [FN27] establishing a specialized court for patent appeals, nationwide in scope--the U.S. Court of Appeals for the Federal Circuit. Congressman Jim Wright of Texas, then House Majority Leader, also hosted a briefing for us on energy policy. The members of the Chinese delegation peppered us (and our interlocutors) with questions about the U.S. intellectual property system and how it worked. Most of the questions were directed to patent policy--not trademarks or copyrights. (Unsurprising for a group of scientists.) Needless to say, we the interpreters spent a lot of time scrambling in our dictionaries for Chinese versions of technical IP terms in English. For many terms, accurate translations just did not exist. That certainly helped me later on to understand and appreciate the daily task of a Chinese patent agent translating a foreign application, and the value that the translation activity added for a Chinese engineer reading it. [FN28]

***1266** Over the course of the month-long trip, I had an opportunity to get to know the members of the delegation quite well. They gradually and tentatively opened up about their experiences, and it helped that I knew something, however superficial, about Chinese culture. What did my education in Chinese language and literature have to do with theirs in modern (not necessarily "Western") science and technology? They were, for the most part, survivors of the harsh suppression of "knowledge workers" and artists during the first three decades of the People's Republic, including

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

the subordination of science and technology (not to mention law) to politics and the widespread despoliation of scientific, technological, entrepreneurial, and literary elites during the Great Proletarian Cultural Revolution. [FN29] Some had spent years undergoing "self-criticism" and becoming "reeducated" in the countryside, and had only recently been rehabilitated.

Based upon their horrific stories, one could not have blamed these distinguished intellectuals for being wary and gun-shy. They had been criticized, rehabilitated, re-criticized, and re-rehabilitated, depending on the political whims of the Chinese leadership. Why take risks? Maybe what happened in the 1957 "Hundred Flowers Movement" [FN30] and the 1966 "Great Proletarian Cultural Revolution" will happen again? Then again, perhaps after 1979, respect for "intellectual property" will protect us. ***1267** Chinese history has not been kind to those who take risks unless they succeed. Failure may lead to more than just disappointment. But this crowd was anything but timid. Peter Feng correctly observes the then-perceived interrelationships between intellectuals and "intellectual property" at the time of the 1979 reforms:

> Copyright and patents in particular were proposed on behalf of the newly rehabilitated intelligentsia. The associated entrepreneurship and litigious spirit (called the "awakened rights consciousness") on the part of authors, inventors and work units (danwei) were hailed as an indication that the nation was coming out of its feudal past, the "shackles of traditional culture." [FN31]

In this Essay, I intend to pursue more closely the extent to which recognition of intellectual property protection for authors, inventors, and entrepreneurs appears to have developed organically in China in the past thirty years, rather than take the more frequently traveled road of attempting to understand IP protection as a foreign (Western) implant imposed on that great civilization. Thus, while I will address the ongoing challenge of modernity that China has grappled with for more than two centuries, I do not plan to dwell too much on whatever impact external political pressure from the United States or other developed countries has had, is, or is not having on IP developments in China over the last thirty years, though it is not insignificant. China's reaction to the demands of the West is less interesting to me than the perception of its leaders and its general public of the extent to which intellectual property protection will help China (whatever its eventual political system) survive in the modern world, whether the steps they are taking to achieve that are likely to succeed, and whether the same policies that encourage innovation and entrepreneurship are likely to conflict with other priorities China's leaders may face. The last concern requires consideration of certain "trade-offs" that we will explore. [FN32] This approach, based upon my personal experience, is a gamble. It may come across as curious ***1268** for a law school public lecture; but it may hold some other value, in that I have become acquainted (and in many cases good friends) with a large number of Chinese IP professionals, have worked with a number of Chinese IP organizations, have taught IP topics and fielded IP questions in a half-dozen Chinese universities, and have observed IP issues in Chinese society since my first formal introduction to the concept of intellectual property in 1979. So the nature of the product is captured in the only way I know it, through my familiarity with the Chinese people I have met along the way.

III. The Legacy of "Old China" Lives On: Defending the Past Trumps Imagining the Future

Let us then, for purposes of argument, set up a rhetorical divide between an Old China and a New China, and suggest that the distinction between the two, crudely posited, is that, at least ideologically, Old China's leaders looked only to the Past for cultural meaning, and New China's look Janus-faced both to the Past and to the Future. [FN33] In terms of governance, New China is as pervasively (if not more so) a bureaucratic state as the Old China it replaced. [FN34] But since 1979, at least, New China's bureaucrats ***1269** (particularly its paramount leaders and less so those at lower levels) are much more responsive to new developments in and outside China than their predecessors had been. [FN35] They, too, are looking to the Future, but they are eager in their self-interest, and the interest of the dominant political system, to preserve the Past.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

We can confidently say that “intellectual property rights” really did not exist in Old China, even though there may have been some nominal IP laws on the books from at least very early in the twentieth century. [FN36] In fact, the word, “right” (quanli) in the sense of “legal right” itself appears to have been a nineteenth century neologism in the Chinese language invented by an Englishman. [FN37] Old Chinese attitudes toward authors and inventors are important to our understanding of New Chinese attitudes. As Nathan Sivin describes, the works of other distinguished historians of Chinese science have shown that advancements such as the evolution of medicine should be seen “as a social enterprise rather than as a succession of breakthroughs by individual geniuses.” [FN38]

***1270** This phenomenon relates to an idea deeply embedded in all three of China's mainstream philosophical traditions--Confucianism, Buddhism, and Daoism--that learning must be transmitted from master to student and, consequently, that there must exist a master to be credited for the student's achievements as the student will be validated among his or her own disciples by the master's favor. [FN39] “Technology” was not the chosen vocation ***1271** of a Confucian gentleman in Old China. [FN40] “Literature,” referring only to the literary forms of the scholar-official class written in classical Chinese, was not to be confused with popular stories, novels, song, or drama in the vernacular language, which were deemed merely “entertainment.” [FN41]

In a certain wry sense, authors and inventors in traditional China were lucky: at least they weren't members of the merchant class. In the received and unchallengeable traditions of Confucian hierarchical society, the four classes of people (simin), in order of status, were scholar-officials, farmers, artisans, and--lowest of the low--merchants. [FN42] The three lower classes were considered commoners (pingmin). Sumptuary laws to keep commoners, and particularly the farmer-landowner and merchant classes, in check were famously ignored, but never abolished. The word “author” (zuozhe) in Chinese literally means “maker.” In the Confucian Analects, there were only seven of them--whom the great Chinese translator Arthur Waley calls “culture-heroes”: the originators of fire, agriculture, metallurgy, boats, carriages, the potter's wheel, and the loom. [FN43] There was one form of intellectual property that flourished in China's mercantile class--zealously guarded trade secrets, such as those on papermaking and silk weaving.

The scholar-official class had its own arts and literary forms, remote from those of commoners. From the earliest days of the formal adoption of Confucian ideology in the Western Han ***1272** Dynasty (ca. 202 BCE), the consummate “arts” of scholar-officials were poetry and calligraphy. For upholders of the Confucian order, those arts were the tools of the scholarly profession and the conduits of cultural continuity. Later on, during the Chinese Middle Ages (ca. 1000 CE), a scholarly tradition of representational painting as an extension of the brushwork art of calligraphy appeared. The imperial courts also produced, among court documents, official histories--usually of the preceding dynasties. [FN44] But neither national “Genesis-like” epics nor transcendental realms ever played a significant role in the cultural experience of traditional China's elite scholar-official class. Everything Confucian is history. [FN45]

Members of the commoner classes had their own arts, but whether in mastery of ceramics, music and song, drama, storytelling, or architecture, its practitioners were mere “artisans”--never “artists.” As China's urban society grew and flourished from the Tang dynasty onward, there developed a new form of scholarly elite lyric poetry that consisted of lyrics on a wide variety of themes set to popular songs, the music of many of them importations from the minority tribes in the western part of the country. Poet-officials, most famously Bai Juyi (772-846) and Su Shi (1037-1101), wrote poems about entertainers and popular customs they encountered among the common people. [FN46] But that popular culture was validated only after it had come to the attention of, and been channeled into the literary forms of, a miniscule class of elite scholar-officials.

From the eleventh century onward, the Mongol invasions (among those of many other tribes) brought about fundamental (indeed “topsy-turvy”) changes in the relationship between scholar-officials and commoners in China, changes

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

that have had deep repercussions for intellectuals and "new thinkers" even in the twentieth and twenty-first centuries. [FN47] The popular version of ***1273** how Chinese classical drama (zaju) came out of nowhere and reached an early zenith in the Mongol Yuan dynasty (1271-1368) holds that the ethnic Han scholar-elites, newly disenfranchised by the foreign invaders, took their knowledge of Chinese language, culture, and history into the theater and popular fiction. Whether historically accurate or not, a recent Chinese article in a popular magazine captures the conventional view of the rise of Chinese drama and its link to the precipitous fall of China's intellectual elite after the Mongol rule began:

> The Yuan Dynasty was the first ethnic minority political power to unify China. . . .
>
> . . . .
>
> The nomadic Yuan rulers despised the old traditions of the Central Plains area, and made staggeringly drastic changes, one of which was [the] institution of a complex social hierarchy in which racial discrimination dominated [with the Mongols in the highest rank and the Han Chinese the lowest]. . . . These categories were further subdivided into ten classes: government officials, functionaries, monks, Taoist priests, doctors, engineers, artisans, prostitutes, scholars, and beggars. The position of Han scholars within this hierarchy--between prostitutes and beggars--is self-explanatory. The term "Old ninth" is thus synonymous with Yuan Dynasty intellectuals.
>
> Beyond the Yuan rulers' expectations, their suppression of Han intellectuals led to the development and popularity of the Zaju dramatic art form.
>
> Zaju was popular as early as the Song (960-1279) and Jin (1115-1234) dynasties, but it was in the Yuan Dynasty that it truly emerged and brought China's performance art to its zenith.
>
> In the face of their "under-class" social status, Han scholars of the Yuan Dynasty were forced to adopt new ways of life in order to survive. Some went to remote mountainous areas to live as hermits, others became farmers, and some continued to live in the city on the proceeds of selling their calligraphic works and paintings. Among them, a particular group--playwrights or cairen--appeared. Their legacy of dramatic works has won for them a place among master dramatists in world history. [FN48]

Why is this relevant to our discussion? The term "Old Number Nine" (laojiu) or "Stinky Old Number Nine" (choulaojiu) reemerged during the Great Proletarian Cultural Revolution in ***1274** the 1960s as an epithet to refer to "intellectuals," including some of the Chinese scientists I have met over the last thirty years. The modern intellectuals had earned a status somewhere between prostitutes and beggars, in the same category as the character Kong Yiji we met earlier in our story. [FN49]

Historical equilibrium reemerged in 1368, when imperial power reverted to the ethnic Han Chinese in what was called the Ming or "Brilliant" Dynasty, which held sway for 276 years. [FN50] Jonathan Spence has recently described quite succinctly what were, in China toward the end of the late Ming Dynasty around 1600 CE, the defining characteristics of Old China:

> When Zhang Dai was born, in 1597, the Ming dynasty had been in place for 229 years. . . .
>
> As it had for so long, family life revolved around intersecting hierarchies. The young lived with their elders and were expected to obey them. . . .
>
> . . . .
>
> Technologically, too, there had been no especially dramatic shifts since the dynasty was founded [in 1368]. Silk production and porcelain manufacture already had an illustrious history in China and continued to be made to the highest standards, exceeding anything available elsewhere in the world. Hosts of artisans were skilled in metallurgy, jade carving, lanterns and lacquer ware, along with the production of more prosaic goods such as tea, salt, cotton, pottery and household furniture. Hydraulic engineering was a major preoccupation due to the massive burdens of silt carried by China's major rivers and canals, and the need for constant dredging, diking and drainage. Astronomy and geography also were widely studied . . . . But though refinements were constantly made in all these

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

areas of concern, there was no fundamental reordering of the country's basic activities. [FN51] ***1275** Much of what foreign tourists from the United States and elsewhere seek when they travel to China today is a glimpse of the remnants of that seemingly timeless and exotic world; and the current Chinese travel and hospitality authorities have worked diligently to create Old China anew for their enjoyment. [FN52]

When the "non-Chinese" chieftains of the Manchu tribes captured Beijing and established the Qing dynasty in 1644, they studiously emulated their Ming dynasty predecessors in governance and social forms, in line with Confucian ideology and the (very fragile) intimations of legitimacy it lent to their "alien" rule of the Chinese heartland. [FN53] The Emperor reigned, but, for the most part, it was the bureaucrats that ruled. In the sixteenth through eighteenth centuries, whether the Ming or Qing periods, we are comfortably in Old China, an empire of fabulous wealth, a growing population, and vibrant culture, one dominated by a variety of Neo-Confucian philosophies that pervaded every aspect of a Chinese government official's existence. "Family values" drove an entire society. It was all "top-down," starting from the emperor. An apt passage from Confucius's Analects explains what was (and maybe still is) expected of a "player" in China's bureaucratic world:

> Master Yu said, Those who in private life behave well towards their parents and elder brothers, in public life seldom show a disposition to resist the authority of their superiors. And as for such men starting a revolution, no instance of it has ever occurred. [FN54]

The entire focus of traditional China's political control was on social harmony and "top-down" (listening to elders), hardly an atmosphere conducive to stirring things up or "new ideas." In the ***1276** still-relevant words of the fifth century philosopher, Mozi, mockingly paraphrasing Confucius: "A gentleman does not make anything up; he merely transmits." [FN55]

Historians (including Toynbee) have sometimes attributed the beginning of the end of Old China to a fateful audience between the Emperor Qianlong and the British emissary Lord Macartney in Peking in 1793. [FN56] By that time, Britain had had a patent law for almost two centuries, [FN57] a copyright law for almost one, [FN58] and was well into its Industrial Revolution. [FN59] Old China had neither IP laws nor industrial manufacturing and no form of recognition for the contributions of inventors, artists, and factory builders, because all that just did not fit into the consciousness of a Chinese official, who had crammed for his examinations by reading and memorizing the ancient, musty Confucius classics in order to get his job. A (perhaps apocryphal) record of the Emperor's response to the British proposals for opening trade at that consequential meeting is as follows:

> Our ceremonies and code of laws differ so completely from your own that, even if your envoy were able to acquire the rudiments of our civilization, you could not possibly transplant our manners and customs to your alien soil. . . . Swaying the wide world, I have but one aim in view, namely to maintain a perfect governance and to fulfill the duties of the state . . . I set no value on objects strange or ingenious, and have no use for your country's manufactures. [FN60] ***1277** While Emperor Qianlong did not use the word "inventions" or the word "novels," "objects strange or ingenious" is a pretty good stand-in for those concepts. By Emperor Qianlong's era, evidence of the ossification of the ruling Confucian ideologies, and the resistance or inability of China's leading thinkers to change their incurious ways or influence "the system" were readily apparent, but the seeds had been sown at least two centuries earlier. [FN61] The scholar-official class by Qianlong's era was rife with corruption, hypocrisy, and despondence.

Arguably, some of the most famous Chinese novels of the eighteenth and nineteenth centuries vividly express the plight of the Chinese author in Old China and reflect those inwardly dark times amid outward splendor. One strategy for such expression is illustrated by the life and works of Cao Xueqin (1724-1763), author of the most famous Qing dynasty novel, The Dream of the Red Chamber. Cao was the scion of one of the wealthiest, most distinguished and well-connected Han families in the early Qing (Manchu) period. His family's lavish estate in Nanjing was confiscated in a

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

political purge following the death of its imperial patron when he was a very young boy. Virtually everything known of his own life is anecdotal. His sad personal story ended in poverty, his family near starvation, selling traditional paintings for pennies in the western suburbs of Beijing. His novel is at once a religious allegory about Chinese views of impermanence and destiny, a remarkable social commentary on the manners of China's wealthiest social stratum, and a political allegory on how fragile and dangerous life at the top really is. [FN62]

***1278** Pages full of idle words Penned with hot and bitter tears: All men call the author fool; None his secret message hears. [FN63]

> A second, healthier strategy of Qing authors writing on the decay of the bureaucratic culture of Old China was to satirize the Confucian scholar-elite in delicious detail. [FN64] Wu Jingzi (1701-1754), Li Boyuan (1867-1906), and Wu Jianren (1866-1910) are only the most notable Qing authors to poke fun at the pettiness, venality, corruption, and self-absorption of the ruling Mandarins. Their "novels" (xiaoshuo, literally "small talk") were written under the guise of "unofficial history," a genre that conveniently fit Confucian attitudes and yet served as a vehicle for popular fiction. [FN65] For the Confucian scholars satirized by such writers, only what was old had value--never what was new--because the road to success was found in parroting the works of the Confucians.

In addition to many popular literary works we would call "novels" (and "plays"), Old China also produced many technological advances we would call inventions and innovations. But there were no named inventors or innovators. Inventors of technological advances received no recognition, much less reward. From the traditional standpoint of Confucian ideology, technological advances and popular literary creations did not merit cultural or legal recognition, and were either not worth mentioning or could not be discussed in official society, at least among the bureaucratic elite during working hours. The Old ***1279** Chinese bureaucrat could express no interest (and particularly no self-interest), or recognize value in such "nonsense," even though he might savor such works (or even write them) and attend dramatic performances and operas in his leisure time.

The Chinese may not have thought that they had use for British manufactures (or opium), but the British certainly had a desire to sell them in China. Two decades after Macartney's mission, in Lord Amherst's famous account upon visiting St. Helena in 1816, Napoleon Bonaparte surveyed a map and pointing to China, is quoted as saying "China is a sickly, sleeping giant. But when she awakes the world will tremble." [FN66] "East is East and West is West," perhaps, but the twain were about to meet, and the "giant" was about to experience a rude and jarring awakening. [FN67]

Far from marking the beginning of New China, Macartney's audience and the Opium Wars of 1842 and 1860 merely signaled the public onset of the century of China's "national humiliation"--Old China in decline, as the Western powers (lieqiang) increasingly sought extraterritorial prerogatives within its borders. [FN68] But the domestic roots of that humiliation had become deep and systemic within Chinese civilization by the eighteenth century. History may judge the official ideology of Old China--not "Confucianism" as a personal value system per se, but "Confucian bureaucratism" as the foundation of statecraft as it had evolved over a period of two millennia--ultimately to have been a catastrophic failure when China had to confront the modern world. [FN69] Creative artists and innovators (especially if ***1280** they are young or contrarian) are a threat to the Past. The prospect of Confucianism's "living heritage" in today's China (perhaps as a replacement for, if not an evolutionary development from, Chinese communism) is not necessarily good news for Chinese innovators and artists. [FN70] Remnants of the bureaucratic culture of Old China still linger on and inform the attitudes of New China toward those who contribute to technological development, entrepreneurship, and literary and artistic expression, and so also still color New Chinese attitudes toward intellectual property protection.

Yet the dynamic forces, internal and external, impelling China toward real modernization (but not necessarily "Westernization") that have been unleashed over the past thirty years are unlikely to remain contained for much longer

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

by the weight of China's long history. [FN71] Recent statements and actions at the highest levels of the Chinese government make it clear that technological innovation is their stated number-one priority. [FN72] ***1281** Whether in government agencies, private law firms, professional associations, or the judiciary, the modern Chinese intellectual property bureaucrat's job is self-consciously to conduce intellectual and entrepreneurial forces into stable, rapid, and sustained economic development. [FN73] China must make up for "lost time" but avoid any more "mass movements." Gradualism is to be the hallmark of China's "peaceful rise." And the continued primacy of the current Chinese leadership in the achievement of those goals is to remain unquestioned. [FN74] A great number of my Chinese acquaintances (many of whom have become good friends over the years) have devoted their entire lives to bringing modernity to China by helping to lay the groundwork of a modern intellectual property system. How successful have they been in creating such institutions?

IV. We Have Built It; They Have Come: Creating a Modern Intellectual Property Regime in China

China's creation of an intellectual property regime from scratch over the past thirty years has been nothing short of astounding. On the first day the Chinese Patent Office opened, April 1, 1985, 3,455 patent applications were filed--apparently a world record. [FN75] From that day until the end of 2008, over 4.8 million patent applications were filed (including 1.7 million applications for invention patents). Seventeen percent, or approximately 825,000, of those were filed from abroad. [FN76] Twenty-three years later in December 2008, the All-China Patent Agents Association (ACPAA), a "national nonprofit organization," celebrated its twentieth anniversary. [FN77] Patent applications reached 717,144, and 352,406 patents were issued in 2008. [FN78] In ***1282** 2004, China passed the German Patent Office in number of patent filings, becoming the fourth largest patent office in the world, after Japan, the United States, and South Korea. [FN79] The number of patent applications in China is expected to surpass the number of applications in Japan in 2012. The largest filer of Patent Cooperation Treaty (PCT) applications in 2008 was a Chinese company, Huawei, with 1,737, surpassing Japan's Panasonic (formerly Matsushita). [FN80] Since 2005, China has been the annual recipient of the largest number of designations for international registration of trademarks by the World Intellectual Property Organization (WIPO). [FN81] The patent agent profession, as evidenced by ACPAA membership, is impressive. Until 1993 there were only three patent and trademark agencies, in Beijing, Shanghai, and Hong Kong. ACPAA in 2008 had 5,293 member agents working in 674 patent agencies and law firms, with over 15,000 total employees. [FN82] It was announced at the ACPAA's anniversary meeting in 2008 that it has been granted permanent observer status at WIPO. [FN83] China now has a cadre of highly competent and well-organized intellectual property professionals. It has its own chapter of the Licensing Executives Society under the auspices of the China Council for the Promotion of International Trade (CCPIT), and working groups in many other IP professional associations. [FN84] With a few notable exceptions, China's intellectual property laws enacted pursuant to its entry into the World Trade Organization in 2001 are compliant with the minimum standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). [FN85]

***1283** International IP cooperation started slowly in China (for good reason), but the trajectory has been nothing short of astonishing in its acceleration. Thirty-six years ago, in 1973, CCPIT's Director of Legal Affairs, Ren Jianxin, with the approval of Premier Zhou Enlai, first visited WIPO as a very quiet observer. It was the first time since the founding of the People's Republic that the Chinese government allowed an official to visit an international intellectual property institution. [FN86] Ren later went on to become the Chief Justice of China's Supreme People's Court. [FN87] The first evidence of the People's Republic of China's formal international intellectual property activity appeared in 1974 with the signing of an exchange of notes on the mutual registration of trademarks between the governments of China and Australia. [FN88] This was politically very dangerous within China, given that the Cultural Revolution was still raging. Efforts toward the establishment of a Chinese patent law were overwhelmed by the "Criticize Confucius, Criticize Lin

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Biao" movement then underway and perpetrated by the "Gang of Four." Ren Jianxin may have been discussing intellectual property in Geneva, but intellectuals were still being hounded (sometimes to death) at home. The carnage did not end with Mao's death in 1976. [FN89] Years later, intellectual property law was still not immune from attack: "[R]esistance from various quarters ***1284** [was] encountered in the process of preparing for the establishment of the patent system, and a major debate as to whether the patent system should be installed . . . raged on right up to the eve of the birth of the Chinese Patent Law [in 1984]." [FN90]

From the time China formally opened up to the outside world in 1979, its intellectual property cooperation with Europe was more active than with the United States, and has remained so ever since. [FN91] That year, the first European Patent Office (EPO) President Johannes Bob van Benthem visited Beijing. China acceded to the WIPO Convention in March 1980, and in 1981, WIPO Director-General Dr. Arpad Bogsch personally convened the first two-week patent agents course at the CCPIT Headquarters in Beijing for 120 Chinese officials.

My current employer came to my attention through a retired administrator at Brown, my alma mater, who was working with (the late) Franklin Pierce founder Bob Rines, and knew of my interest in China's patent system. I discovered that Rines had had an abiding interest in China going back to the 1930s. His father, David Rines, had taken him to Shanghai when he had worked as an adviser to the Nationalist government shortly before the Japanese occupation, and he had written a short book in the 1960s at National Jiaotong University in Taiwan highly critical of the dismissive attitude of American policymakers at that time toward patents and innovation. [FN92]

I moved to Franklin Pierce in 1983. In March 1984, China's National People's Congress passed the first Chinese patent law. In 1985, China acceded to the Paris Convention and the Chinese Patent Office signed its first agreement for international cooperation--not with the U.S. Patent and Trademark Office (USPTO) but with the EPO. [FN93] It joined the Madrid Agreement ***1285** Concerning the International Registration of Marks in 1989 and the Berne convention in 1992. [FN94] As many of my Chinese friends and colleagues would later attest, there was a thirst for knowledge of how the U.S. intellectual property system worked. But at least until recently, they found relations with Europe's official intellectual property establishment always more cordial and supportive (particularly financially) and less confrontational than was the case with the United States. [FN95] In 1984 I participated in a one-month China exchange program for American law students led by former University of Pennsylvania Law Dean Covey Oliver and Professor Bob Lubic at American University. We took lectures at Peking University and visited IP agencies in Beijing, and then moved to Fudan University in Shanghai. The atmosphere at Peking and Fudan in 1984 was cordial but very formal. We had a stellar list of lecturers on both the U.S. and Chinese sides, including Peking University Professor Wang Tieya, the doyen of Chinese scholars of international law, and later Judge of the International Criminal Tribunal for the Former Yugoslavia. Our meetings with Chinese faculty and students were closely monitored by the administration, and every activity had to be approved by a faculty committee in advance. I also became familiar (if not very comfortable) with such school habits as "informing the authorities" (jubao) and "interminable meetings" (kaihui) that are the daily regimen of New China's official culture. Our Chinese classmates talked more openly about their experiences in the Red Guards than the scientists ***1286** and intellectuals of the prior generation had spoken to me about what they had suffered. Some were quite proud to talk about having been part of that fateful period of Chinese history, even if the part they had personally played had been so destructive. [FN96]

I returned to Franklin Pierce that fall and reported back to Bob Rines. He was quite visionary in foreseeing the importance of technology to China's future economic development, and he wanted to take the initiative. Early in 1985, he participated in a "People to People" tour of China upon which he visited the brand new Patent Office. Immediately on his return, he arranged a visit of about a dozen Chinese Patent Office officials to come to Franklin Pierce that summer for a three-week program, and asked Professors Bob Shaw and Homer Blair to conduct two courses--one on U.S. patent pro-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

secution and the other on U.S. licensing and IP management. The program, later repeated with a number of WIPO and USPTO delegations from developing countries, was called "Intellectual Property in the Private Sector." Rines asked me to coordinate the visit of the Chinese delegation for the school. In some ways it was a rerun of the American Association for the Advancement of Science program we had done in 1979, only this time with officials from the Chinese Patent Office. Homer Blair, who had just joined the faculty, had had some dealings with Chinese officials as President of the Licensing Executives Society (LES USA/Canada) and the International Trademark Association (INTA), and as a delegate from the United States on the technology transfer negotiations for the UN Convention on the Law of the Sea in the early 1980s. The level of knowledge among the Chinese participants was very impressive and the program seemed to be a big success. Rines was also able to get seed funding from three prominent MIT professor-entrepreneurs who were clients of his law firm: Harold "Doc" Egerton (the inventor of the strobe and side scan sonar technology), Kenneth Germeshausen (holder of some fundamental patents on radar technology), and Dick Bolt (founder of the MIT Media Lab), who was born in Peking in 1911. Egerton and Germeshausen were two of the three principals in the consulting firm of EG&G. Bolt was one of the three principals in the consulting firm of Bolt, Beranek & Newman. All of them had made their fortunes on their patents. Upon those donations, ***1287** Franklin Pierce decided to set up a radically new interdisciplinary program in intellectual property for engineers, examiners, and patent professionals who were not lawyers. I was asked to assist in organizing the program.

The first Franklin Pierce "Master of Intellectual Property" class began in August 1986 with ten students, five of whom were from China. The professional profile of China's IP professionals sent to law schools in the United States (including schools like GWU and John Marshall, among others) is probably well captured by the early students coming to Franklin Pierce. The program was deliberately interdisciplinary rather than a law degree. Virtually none of the early students were trained in law. The vast majority was comprised of engineers of one sort or another who were preparing for careers as patent examiners or agents. Those that had little or no formal training in technology or law had worked for patent and trademark agencies and firms in China translating patent applications from English into Chinese. More recent Chinese classes show the same demographic trends as students from Taiwan, South Korea, and Japan: in addition to examiners and agents, they work in the patent, trademark, or licensing departments of large or mid-sized corporations with a significant interest in protecting their IP rights in the United States. This indicates to me, in line with the views of some IP experts mentioned earlier, that China's intellectual property system is following the same track, if more slowly, as Japan's and later Taiwan's and Korea's have, toward a sound IP system. [FN97]

The drivers of this training initiative appear to have been the leaders of the Chinese Patent Office, later renamed the State Intellectual Property Office (SIPO), directly under the administration of the State Council. For thirty years, SIPO's leaders have been unwavering in their vision of the bright future of China's IP system and their persistent drive to get there. China's leaders want it to join the first ranks of the world's patent systems. SIPO also has been the lead organization for international cooperation on intellectual property matters for China. Of all the government IP agencies, it is the most outward looking. By contrast, the National Copyright Administration (NCA), established in 1985, was originally the "mandarin Janus" face of the State Administration responsible for monitoring and ***1288** censoring publications. [FN98] Its regional bureaus remain directly under the local governments. The Chinese Trademark Office is part of the State Administration of Industry and Commerce (SAIC), which is also responsible for administrative enforcement of intellectual property rights through its regional offices all over China. [FN99] From the standpoint of bureaucratic culture, it appears that SIPO is a very tightly managed agency steadily focused on international trends, while the Copyright Bureau and Trademark Office are busy with (indeed, overwhelmed by) domestic concerns. In 2004, China set up an IP "czar," the high-level National Working Group on Intellectual Property Protection. [FN100]

In sum, China's IP laws on the books are nearly, if not completely, in conformity with its WIPO treaty obligations. That may be thanks to the increasingly high priority the Chinese central leadership places on technological development.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

In any event, the Chinese government's record of achievement in institution-building for a modern intellectual property regime has been outstanding, and for this achievement, its leaders should be deservedly proud. It was time for the next step. In 2006, the Chinese government set ambitious goals for China to become an "innovative nation" and to reduce reliance on foreign technology to below thirty percent. [FN101] Can China succeed in translating its past achievements in creating an IP system and its present wider innovation goals into future social reality?

V. The Rule of Law and Enforcement of Intellectual Property Rights in China: Rights Administration or Rights Vindication? [FN102]

Intellectual property protection in China today is not perceived to be about the rights of authors and inventors--it is all about "economic development." [FN103] But economic development is ***1289** not just about intellectual property. Officials in the countryside need to promote whatever economic development they can get, and so have the incentive to ignore (and get others to ignore) intellectual property violations in their districts until they percolate upward or become so egregious that they get exposed in the national media. There is a pervasive (but rarely directly expressed) belief among local government officials I have met that China can protect and enforce intellectual property rights in high-tech industries while continuing to ignore completely the counterfeiting of famous and luxury brands or piracy in media industries. "Uneven development" is, to them, a positive virtue--not a drawback. [FN104] Widespread trademark counterfeiting and copyright piracy are exacerbated by the growing affluence in urban areas, providing entrepreneurial opportunities for workers migrating to the cities. One insight that seems to be missing at the level of local government is recognition of the extent to which self-reliance in the creation of knowledge-based products requires integrity of market information across the board, including market information concerning branded and copyrighted goods.

Take counterfeit pharmaceuticals as an example. The recent tainted milk scandal is illustrative of the problem of enforcement of all economic regulations affecting public health, including fake drugs. In that case, some local officials in the city of Shijiazhuang knew of the problem of melamine-laced milk products at least as early as last spring, but failed to report it. [FN105] Of course, if they had reported it then, they would have been in trouble for embarrassing the country just prior to its "showcase performance" as host of the Beijing Olympic Games in July. After that event, the same officials were punished for failing to publicize it earlier. [FN106] What's a bureaucrat to do under the circumstances? You are "damned if you do and damned if you don't." Probably the best advice is to "lay low" and hope the problem goes away or remains undiscovered. One television ***1290** report I heard after the incident quoted a local official as saying, "This scandal is not just a threat to public safety; it also has consequences for economic development." If the public safety takes second place to economic development in such a mindset, one need not wonder why counterfeit pharmaceuticals are such a serious problem both within China and from China. We do not even preliminarily get to the question of the legal rights of authors, inventors, and entrepreneurs if the right of the public to be free from dangerous products (including counterfeit medicines) is "balanced" against a local "quick buck." [FN107]

The single-minded focus on patents as the engine of technological development may explain why intellectual property enforcement may vary more in trademark and copyright cases from region to region than it does in patent cases. [FN108] High-tech industries are clustered around the main urban centers where specialized regulatory agencies have considerable autonomous authority to perform their own missions. In the interconnected bureaucratic society of the rural areas, official corruption is unavoidable. [FN109] Clan-centered organized crime meshes with family-run businesses, often with ready ties to the overseas Chinese diaspora in Southeast Asia, North America, and now Europe. Moreover, there is the "elephant in the room" question--social stability. As one observer recently put it:

> Why does China need this super fast economic growth? While the country has made huge progress from the

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

> 1970s, when they had 250 million people living in extreme poverty, they still have 29 million or so who are barely subsisting. ***1291** Additionally, the Chinese had a baby boom in the early 1960s and an echo boom in the early 1980s, creating demand for 25 million jobs or so a year, while the economy is only creating about 10 million per year. . . . [“]China is facing a very severe unemployment problem, says Labour Minister Tian Chengping. He said 20 million new workers entered the labour market each year, chasing only 12 million jobs.[”] [FN110]

The economic crisis now spanning the globe has the potential to make the problem in China much worse. China has almost one hundred cities of more than one million people each. [FN111] But the rural population is still probably over 800 million people. [FN112] From an urban planning perspective, building out many of those one hundred cities to five million people each makes sound urban policy. Until recently, migrants had been streaming into urban areas from the countryside. There is well-founded fear that if such a large population of migrants cannot find work--any work--there will be “mass movements” reminiscent of those sad events in the past I mentioned earlier. The McKinsey consulting firm predicts that China's urban population will expand from 572 million in 2005 to one billion by 2030, [FN113] including at least a half-billion living in the “middle class.” [FN114] Why not keep them busy by allowing them to be “local entrepreneurs”--that is, small-time sellers of pirated and counterfeit goods? [FN115] What is the harm? (Another way to put it is: “What is the alternative?”) [FN116]

***1292** China's intellectual property system is still a “top-down” enterprise, working its way along two trajectories. The first is geographic, from the policy-generating bureaucracy centered in Beijing--and, to a much lesser extent, Shanghai--beginning in the 1980s and continuing through the 1990s, to a few provincial capitals in wealthier regions near the seacoast in the last few years, with very little effective reach into the countryside or the hinterlands of the interior. In the latter regions, the “blowback” is from “local protectionism” because government officials are hard pressed to promote any enterprise whatsoever (infringing or not) and there are few national organs or agencies that can challenge them. [FN117] The power of local officials varies greatly from province to province. The Chinese proverb says tiangao huangdiyuan (“Heaven is high and the emperor is far away”). The farther one is from Beijing, the greater the authority of local officials.

The second, and to a great extent parallel, trajectory is from sophisticated domestic manufacturing sectors with strong brands at the forefront of the formal economy--companies like Lenovo, Huawei, and Haier that regularly and effectively deal, compete, and cross-license on an equal basis with foreign multinationals--to the “local entrepreneurs,” so feared by foreign brand owners, earning a living at the fringe of the informal economy and flooding the cities with counterfeit brands.

China enforces intellectual property rights through both administrative proceedings and judicial proceedings, the so-called “dual track.” [FN118] One Chinese scholarly authority, distinguishing the two by calling administrative proceedings “rights control” and judicial proceedings “rights vindication,” claims that while the administrative track for public IP enforcement has proven a remarkable success, the judicial track for private enforcement is “in crisis.” [FN119] In terms of state ***1293** structure, the Chinese Supreme People's Court is not a co-equal branch of the Chinese government. [FN120] The judiciary is supervised directly by the National People's Congress (NPC), and indirectly through the promulgation of regulations and guidelines by the State Council. [FN121] The phrase yifa xingzheng literally means “administration on the basis of law.” [FN122] But there is as of yet no mechanism for judicial review of regulations or guidelines from the State Council to determine if they have been drafted “on the basis of law,” as opposed to having been incorrectly applied in a particular case. [FN123] One apparently widely held interpretation asserts that regulations promulgated by the State Council have all the force and effect of law in the courts merely by virtue of their promulgation. [FN124] A more liberal interpretation is that the term yifa xingzheng places a self-imposed duty on government officials (albeit nonreviewable by the courts) to assure that such regulations are, indeed, “in accordance with the law.”

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Judicial review of administrative decisions is discussed widely among legal scholars, but is not likely to become widely practiced very soon. (In an apparent exception, in compliance with TRIPS, administrative decisions of the IP agencies are now reviewable by the courts.) [FN125] Provincial governments can also ***1294** enact laws and regulations that may have almost the same effect as those issued directly by the State Council in that particular province. [FN126] But it is not entirely clear what happens if provincial legislation conflicts with central regulations. Since 2001, particularly in intellectual property cases, the Supreme People's Court has issued a series of "judicial interpretations" that are presumably binding on the lower courts. [FN127] Published judicial opinions, of course, carry no precedential weight whatsoever in a continental legal system such as China's. [FN128] However, the decisions of the most important courts, such as the Intermediate People's Courts in Beijing, that hear numerous cases may be influential. [FN129] In early 2009, the establishment of China's first research base on IPR judicial protection in Suzhou, Jiangsu province was announced:

> The research base will carry out various research activities in IPR judicial protection, integrate all resources of IPR judicial investigations, extend research fields, make innovation[s] in research mechanism[s] and provide effective support for strengthening judicial IPR protection . . . .
>
> Xi [Xiaoming, Supreme People's Court vice-president] said he hoped the base could make [a] unique contribution to building [a] theoretical system of IPR judicial protection with Chinese characteristics, exerting the role of judicial protection and constructing an innovation-oriented country. [FN130]

Local judicial officials are only theoretically independent of the local government. A judge in a Chinese court is not theoretically higher in rank than a prosecutor from the local branch of the Supreme People's Procuratorate, even in her own court. The procuratorate performs "legal supervision over the ***1295** judicial proceedings" among other tasks. [FN131] The collection of evidence in criminal cases often depends on the willingness of the local Office of Public Security to participate in a raid. Moreover, the professional qualifications of judges, while advancing quickly, vary widely with distance from the sophisticated urban centers. The quality of judicial officials may be extremely high in Beijing or Shanghai, but lower in less developed regions. And, as everywhere, there are "home court" advantages, and some recent evidence indicates that corruption of judicial officials may be more prevalent (or at least more noticed by foreigners) in China than in either Russia or India. [FN132] The very good news is that intellectual property cases, being economic in nature, are more amenable to "neutral principles" than some other, more politically charged disputes. As the U.S. Embassy in Beijing admits on its own website, "intellectual property is at the forefront of Chinese jurisprudence and there have been substantial efforts to train judges in the intricacies of intellectual property disputes." [FN133] Improvements in public awareness are moving to the provinces. Last year, on a trip to the Jiangsu Provincial Patent Office to talk about outsourcing, I was struck by the benchmarks set for local companies (danwei or "units") to raise their workers' consciousness of patents. The emphasis is still on sheer quantity of filings. Performance is to be measured by how many applications had been filed by a particular unit. While the trend is a welcome one, the Financial Times quotes one commentator as saying "at the moment, you could patent a wheel in China, and get it through." [FN134] An interesting utility model case was decided in September 2007 in the Intermediate People's Court in the coastal city of Wenzhou. The court held that a ***1296** French company, Schneider Electric, infringed the utility model patent of a local company, Chint, but that the Chinese patent was allegedly a copy of one that Schneider held in France. [FN135] The "defendant," Schneider, was ordered to pay damages to the Chinese company in the amount of US$48 million. [FN136] More recently, a local company in Hangzhou, Holley Communications, was successful in a patent infringement case against the Korean company Samsung Electronics for GSM/CDMA dual-mode communication products. [FN137] Samsung was ordered to pay US$7 million and enjoined from production and sales of the product in China. [FN138] But the rapidly growing recourse to the courts is a welcome trend. Even Confucius, that great promoter of harmony, righteousness, and benevolence, was not averse to lawyers as advocates. [FN139] Perhaps the courtroom will be some day be (or already is) poised to replace "mass movements" in China's streets.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

VI. Conclusion: Risk-Aversion, Harmony, and Social Conformity: China's "Copycat Counterculture" Is a Creative Outlet Less Risky than True Innovation and Originality

China's drive to modernization through improving intellectual property protection has been impelled by consistent efforts to improve formal intellectual property laws and institutions for acquiring, maintaining, and enforcing intellectual property rights. Chinese policymakers and government officials have worked diligently for thirty years in a consistent, unwavering drive to create and improve the country's public intellectual property institutions. Improvements in judicial enforcement are accelerating, and intellectual property rights, ***1297** based on neutral principles and rarely having political ramifications, are at the forefront of improvements in China's judicial system as a whole. The importance of intellectual property law may also have broader implications for the establishment of a true rule of law in China.

The policymakers are determined. Institution-building may be necessary for technological innovation. [FN140] But it is insufficient to bring about real innovation. IP protection is still viewed by many Chinese officials as little beyond an engine of economic development, and one that can run with some of its "working parts" missing. There is still not much demonstration of an inclination to recognize the needs of artists, inventors, and entrepreneurs to benefit directly from enforceable intellectual property rights, or a realization of how that plays into the economic development cycle. [FN141] Ingrained attitudes of China's main political ideologies, past and present, do not reveal much of a track record toward recognizing the major contributions of its most creative and innovative people, because "thinking outside the box"-- the essence of what artists, inventors, and entrepreneurs do--is still not a recognized value in the prevailing political environment. Basic technological innovations still appear to come mostly from abroad, and then are "creatively" adapted to local circumstances. [FN142]

China's "copycat counterculture" and its attendant reputation are in no way inherent in, or derived from, Chinese culture directly, but are rather a self-preserving response to the dominant model of economic development in an authoritarian ***1298** bureaucratic state. The energetic mindset of creative, intellectually curious individuals in China seeking new ways of looking at the world may be disruptive of China's bureaucratic and economic models and, consequently, finds its less risky expression channeled into the "copycat counterculture" of shanzhai mentioned earlier. [FN143] And so-called "R&D shortcuts" will remain attractive. [FN144] That is not to say that there can be no accommodation between the values of China's prevailing political traditions and policies that promote individual or collective creativity, entrepreneurship, and innovation. But any effort to achieve such an accommodation must be a self-conscious and preferably public one. [FN145] Denying that there is a structural problem will not make the problem go away. [FN146]

Perhaps an incipient Chinese "tradition of innovation" is already taking shape that will, beyond mere gestures or lip-service, truly open the policy space for recognition of the contribution artists, inventors, and entrepreneurs can make to ***1299** China's future and give them the moral and economic recognition they are due, under whatever is the prevailing political system--Communist, Confucian, a combination of the two, or something else entirely. If so, the Chinese people have the human and cultural resources to stand proudly among the most innovative on earth. [FN147] But the sheer weight of China's official history of antipathy, if not open disdain or hostility toward "new ideas" and "disruptive technologies" does not indicate this is a sure thing. New China's artists, motion picture directors, inventors, programmers, writers, brand-builders, and entrepreneurs need to take risks in order to play their intended role to the fullest. [FN148] They need effective recognition of their legal rights. They need not to fear failure itself, because risk of failure is the nature of the creative enterprise. But far beyond that risk, they need to be free from fear of reprisals and social opprobrium that come with traditional Chinese, particularly Confucian, resistance to ***1300** innovative ways of thinking. [FN149] The emergence of new innovators in China depends on the ability of the country's leaders to allow them to take risks, make mistakes, and change direction. The measure of success of sound innovation policy is not found in reports of final scores, but in respect for and confidence in the integrity of the innovative enterprise. No matter how much money it

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

spends betting on proven winners, a society that devalues risk-taking by innovators in the name of social conformity and that penalizes those who take risks, not only when they fail but sometimes even when they succeed, is not as likely to lead itself confidently into the future as to remain a follower of new ideas made elsewhere.

[FNa1]. B.A., Brown (Biology). Ph.D., Michigan (Chinese Language and Literature). J.D., Franklin Pierce Law Center. Professor of Law, Franklin Pierce Law Center, Concord, N.H. Co-Director, Franklin Pierce Law Center/Tsinghua University School of Law Intellectual Property Summer Institute. The Author expresses his deep gratitude to Craig Joyce, Xiaobing Feng, and Meg Boulware for comments on the draft. This Essay is dedicated to the memory of Dr. Niu Jingyi, Ph.D., UT-Austin, the first scientist to synthesize bovine insulin, and Robert H. Rines, founder of Franklin Pierce Law Center.

[FN1]. Chen Duxiu, quoted in R.G.H. Siu, Ch'i: A Neo-Taoist Approach to Life 45 (1974).

[FN2]. See George Sylvester Viereck, What Life Means to Einstein: An Interview, Saturday Evening Post, Oct. 26, 1929, at 17.

[FN3]. William P. Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization 30-55 (1995).

[FN4]. Randall Peerenboom & Weitseng Chen, Developing the Rule of Law, in Political Change in China 135, 135-36 (Bruce Gilley & Larry Diamond eds., 2008) (pointing out the “slow but steady progress in strengthening institutions and building a corps of professional judges, lawyers, prosecutors, and police” in China following the East Asian Model (EAM)); see also Randall Peerenboom, China Modernizes 197 (2007) (explaining some of the difficulties China faces in establishing a rule of law).

[FN5]. See, e.g., Peter K. Yu, Intellectual Property, Economic Development, and the China Puzzle, in Intellectual Property, Trade and Development 173, 202 (Daniel J. Gervais ed., 2007) (exploring the “crossover point” when the “overall benefits of [intellectual property] protection begin to outweigh its overall costs”). Gradual attainment of a “crossover point” is also the official policy of the Chinese government: “Implementing the national intellectual property strategy to greatly promote China's capacity in creation, utilization, protection and administration of intellectual property will help improve China's capacity for independent innovation and aid in efforts to make China an innovative country.” State Council of the P.R.C., Outline of the National Intellectual Property Strategy, at para. 4 (June 5, 2008), http://www.gov.cn/english/2008-06/21/content_1023471.htm.

[FN6]. The State Council's Outline stresses the importance of gradualism. A 2008 poll of 405 American companies actually doing business in China reported that 51% of companies perceived improvement in China's overall IPR enforcement, 47% indicated “no change,” and only 2% said that enforcement had deteriorated. See Am. Chamber of Commerce in the P.R.C., Am. Chamber of Commerce in Shanghai & Am. Chamber of Commerce in S. China, 2008 White Paper: American Business in China 54, 55 fig.24 (2008) [hereinafter White Paper], available at http://www.amcham-china.org.cn/amcham/show/content.php?Id=3159 (follow “Part One: The Business Climate for American Firms in China” hyperlink).

[FN7]. At the Third Plenum of the Eleventh Chinese Communist Party Central Committee in December 1978, the new policies of reform and opening up were formally endorsed, officially rejecting the policies of “class struggle” and “dictatorship of the proletariat” that had held sway during the Cultural Revolution. See Roderick MacFarquhar, The Suc-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

cession to Mao and the End of Maoism, 1962-82, in The Politics of China 278, 315-20 (Roderick MacFarquhar ed., 2d ed. 1997).

[FN8]. See Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China (Dec. 15, 1978), reprinted in Dep't St. Bull., Jan. 1979, at 25.

[FN9]. See, e.g., Modern China: An Encyclopedia of History, Culture, and Nationalism 126-27 (Wang Ke-wen ed., 1998).

[FN10]. Recently released U.S. government intelligence reports from the period indicate the scope of the destruction suffered by China's elites. See Richard Helms, Dir. of Cent. Intelligence, National Intelligence Estimate No. 13-7-67, The Chinese Cultural Revolution (1967), available at http://www.dni.gov/nic/PDF_GIF_declass_support/china%20conference/pdfs/nie_13_7_ 67.pdf.

[FN11]. When the dust settled on that period, a form of “cultural amnesia” set in. For example, Han Suyin (most famous for her English-language novel A Many Splendoured Thing) went from high praise for the Cultural Revolution during its heyday in the 1960s (China in the Year 2001 (1967)) to sadness and regret for what happened in her writings from 1977 onward (My House Has Two Doors (1980)). “The sole constant factor in her work is the faithfulness with which events have confuted her analyses and forecasts at every turn.” Simon Leys, The Double Vision of Han Suyin: On the Character of a Trimmer, Encounter, Nov. 1980, at 79, 84.

[FN12]. John Noble Wilford, A Powdery Surface Is Closely Explored, N.Y. Times, July 21, 1969, at A1.

[FN13]. The Song transformation of China from a primarily rural agricultural to an urban commercial culture is excellently presented in a recent historical study. See generally Dieter Kuhn, The Age of Confucian Rule (2009).

[FN14]. Omar Saleem, The Spratly Islands Dispute: China Defines the New Millennium, 15 Am. Univ. Int'l L. Rev. 527, 555-56 (2000).

[FN15]. The “May Fourth Movement” (1919) was one of a series of mass movements in the twentieth century (culminating in the Cultural Revolution) that attempted to change the inbred values of Old China. In reaction to the “humiliation” of China at the Versailles Peace Conference where the Great Powers granted “civilized” Japan control over the German concessions in Shandong province, China's intellectuals (mostly students) demanded the adoption of a modern written language understandable to any Chinese speaker and a modern culture no longer based on the ancient Confucian classics. See Milena Dole•elová-Velingerová, The Origins of Modern Chinese Literature, in Modern Chinese Literature in the May Fourth Era 17, 20-25 (Merle Goldman ed., 1977).

[FN16]. See John W. Chaffee, The Thorny Gates of Learning in Sung China 4-6 (1985).

[FN17]. The title of Professor Alford's book, To Steal a Book Is an Elegant Offense, was taken from a line in a 1919 short story by the modern writer Lu Xun, Kong Yiji. See Alford, supra note 3, at 1, 127. Alford's discussion is thorough and authoritative, but the attribution of his book's title, unfortunately, is both inaccurate in a sense and consequently, as I discovered, offensive to some Chinese readers. See, e.g., Charles R. Stone, Comment, What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property, 92 Marq. L. Rev. 199, 207-08 (2008) (explaining the misrepresentations). Ironically, the perceived slight has an IP “twist.” Alford misattributes the line to the famous author of the story, but it is actually spoken by the title character, a pathetically slovenly “traditional Confucian scholar” who happens to be a direct descendant of Confucius himself. Lu Xun, The New-Year

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

Sacrifice and Other Stories 38 (Yang Xianyi & Gladys Yang trans., 2002). The character Kong Yiji is a parody of virtually all of the bad habits (including book theft) of Old China's scholar-elite. Lu Xun, the early twentieth-century author and literary historian, is still considered a paragon of all that is best in a public intellectual in New China. The case demonstrates how important proper attribution is to an educated, modern Chinese audience. (Maybe Shakespeare actually thought to himself, "The first thing we do, let's kill all the lawyers" when he wrote Henry VI, Part 2, but it was Dick the Butcher who actually said it!) See William Shakespeare, The Second Part of King Henry the Sixth act 4, sc. 2.

[FN18]. See, e.g., Univ. of Mich. Center for Chinese Studies, Proclaiming Harmony (William O. Hennessey trans., Mich. Papers in Chinese Studies No. 41, 1981).

[FN19]. The parlance of those stories is part of the mythology of modern Chinese IP counterfeiting. The word shanzhai that once referred to the robbers' "mountain stronghold" in popular fiction has now become a way of describing a rebellious "copycat counterculture" parodying the dominant commercial culture.

In China mainland, "Shan-Zhai" means "small size, small scale, or underground factory." It represents "copycat, fake"; "quick, rapid manufacturing"; the "Democracy of Goods." Shan-Zhai started in year 2003 from copycats of mobile phone[s] and soon expanded to [the] fake and knockoff consumer electronic manufacture industry[.] [It] became an economic phenomenon, but nowadays, almost everything can be Shan-Zhai-ed, ranging from pharmaceuticals[] to the Olympic Bird's Nest; from persons who mimic celebrities to comedies that parody well-known films and TV sitcoms; therefore, there are "Shan-Zhai" laptops, "Shah-Zhai" soap operas, "Shan-Zhai" stars, and even a "Shan-Zhai" Spring Festival Gala. "Shan-Zhai" spreads everywhere.

Posting of Sarah Xu, Innovation or Imitation? "Shan-Zhai" Phenomenon in China, to Students Space Blog (Feb. 28, 2008, 5:46 GMT), http:// blog.studentsspace.com/?p=232.

A property developer in Nanjing, hoping to lure business and buzz, set up storefront facades with logos such as "Haagon-Bozs," "Pizza Huh," "Bucksstar Coffee," "KFG" and "McDnoald's." Images of what became known as "Shanzhai Street" spread rapidly online.

Once a term used to suggest something cheap or inferior, shanzhai now suggests to many a certain Chinese cleverness and ingenuity. Shanzhai culture "is from the grass roots and for the grass roots," says Han Haoyue, a media critic in Beijing, who sees it as a means of self-expression. "It gives people another choice and the possibility of resisting dominant cultural values."

Sky Canaves & Juliet Ye, Imitation Is the Sincerest Form of Rebellion in China, Wall St. J., Jan. 22, 2009, at A1; see also Evan Osnos, A Chinese Pirate Unmasks, Letter from China (Mar. 5, 2009), http:// www.newyorker.com/online/blogs/evanosnos/2009/03/a-chinese-pirat.html (describing a Chinese graduate student's critique of shanzhai culture).

[FN20]. Modern China, supra note 9, at 126-27.

[FN21]. The Chinese proverb shinian mo yijian, "to spend ten years polishing a single sword," comes from the poem "The Swordsman" by the Tang dynasty Buddhist monk-poet Jia Dao (779-843):

For a decade I polished this one sword;Its edge, gleaming like frost, has never been tested.Let me demonstrate it for you today;Tell me, who has suffered an injustice?

[FN22]. The Author served as an interpreter for the visit of the first delegation from China's State Science and Technology Commission to the United States in May and June 1979. Joan Wrather, Chinese Scientists Visit United States, Science, July 6, 1979, at 34.

[FN23]. For reviews (in English) of a recent work documenting Dr. Niu's achievement as the first scientist to synthesize

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

crystalline bovine insulin in the early 1960s, see Cong Cao, Chinese Science and the 'Nobel Prize Complex,' 42 Minerva 151 (2004); Sigrid Schmalzer, Book Review, 99 Isis 231 (2008) (reviewing Weimin Xiong & Kedi Wang, Synthesize a Protein: The Story of Total Synthesis of Crystalline Insulin Project in China (2005)). Most of Dr. Niu's research results were destroyed in 1966 during the Cultural Revolution, along with his laboratory at the Shanghai Institute of Biochemistry. He was charged with being a "reactionary academic authority."

[FN24]. The House Committee on Science and Technology issued a comprehensive report in December 1980 entitled Analyses of President Carter's Initiatives in Industrial Innovation and Economic Revitalization. Staff of Subcomm. on Sci., Research & Tech. of the H. Comm. on Sci. & Tech., 96th Cong., Analyses of President Carter's Initiatives in Industrial Innovation and Economic Revitalization (Comm. Print 1980).

[FN25]. Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311 (codified as amended at 15 U.S.C. §3701 (2006)).

[FN26]. Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015.

[FN27]. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[FN28]. The importance of "new language" to address "new ways of thinking" is critical to an understanding of what an inventor is talking about and thus to the process of innovation. The courts recognize this: "The dictionary does not always keep abreast of the inventor. It cannot. Things are not made for the sake of words, but words for things. To overcome this lag, patent law allows the inventor to be his own lexicographer." Autogiro Co. of Am. v. United States, 384 F.2d 391, 397 (Ct. Cl. 1967). The proposition that "new words" are necessary for "new ways of thinking" is fundamentally incompatible with Confucian logic. If a concept or principle cannot be traced or ascribed somehow to a source somewhere in the ancient canon of Confucian classics, it cannot enter the lexicon of Confucian discourse.

[FN29]. H. Lyman Miller, Science and Dissent in Post-Mao China 70 (1996) ("The Party Central Committee decision launching the Cultural Revolution in August 1966 identified the sciences as one of several intellectual fronts that required the establishment of a 'proletarian' outlook...."). Deng Xiaoping challenged this decision at a pivotal science conference in March 1978 in two declarations. Id. at 74 ("[S]cience and technology were to be counted in Marxist political economy as 'forces of production,' not elements of the 'superstructure.' The significance of this revision...was that science as a human activity no longer had a 'class nature.'").

[FN30]. See Roderick MacFarquhar, The Secret Speeches of Chairman Mao, in The Secret Speeches of Chairman Mao 6, 12-13 (Roderick MacFarquhar et al. eds., 1989). In late 1956, Chairman Mao declared the "Hundred Flowers Movement" with the exhortation "Let a Hundred Flowers Bloom, Let a Hundred Schools of Thought Contend" (Baihua qifa, baijia qiming) encouraging dissenters to express themselves freely and to provide the Party with "healthy criticism." By July 1957, Mao found the outpouring of criticism "unhealthy" (and probably threatening) and ordered a crackdown. It was later believed by many that the entire campaign had been a ruse to flush out Mao's opponents in order to destroy them. See Mao Zedong, Talk at the Forum of Heads of Propaganda, Culture, and Education Departments from Nine Provinces and Municipalities (Mar. 6, 1957), in The Secret Speeches of Chairman Mao, supra, at 193, 210 ("People are still guessing at our intentions, thinking we are 'luring the enemy in deep.'").

[FN31]. Peter Feng, Intellectual Property in China 4 (2d ed. 2003).

[FN32]. See Kristina Sepetys & Alan Cox, Nat'l Econ. Research Assocs., Intellectual Property Rights Protection in China: Trends in Litigation and Economic Damages 3 (2009), available at http://www.nera.com/image/PUB_IPR_ Pro-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

tection_China_0109_final.pdf ("A country may face conflicts and challenges while making the transition to a more developed IPR regime. Achieving the benefits of a strong IPR regime may involve incurring short-run costs. These costs include short-term and regional unemployment as labor shifts from infringing activities, and higher prices for consumer goods.").

[FN33]. This approach has been sharply criticized by some historians. For a revisionist interpretation of China's struggle to find its own "modernization" without Western "modernity," see Paul A. Cohen, Discovering History in China 57-96 (1984). Yet, Alford's first chapter is aptly entitled "Don't Stop Thinking About...Yesterday." Alford, supra note 3, at 9. The famous anecdote of the "Madman of Chu" in The Analects of Confucius recounts the story of a critic of Confucius, who berated the Great Sage for his obsessive focus on the "Wisdom of the Ancients." The Analects of Confucius 18:5 (Arthur Waley trans., 4th ed. 1956) [hereinafter Analects]. This Essay proposes that since Confucianism in its various guises was the doctrinal basis of virtually every aspect of Old China's governing ideologies, the writings of Confucius and his followers can be taken as authoritative on Old Chinese public values. See Peimin Ni, On Confucius 2 (2002) (calling the book of the Analects "the 'Bible' of Confucianism"). Of added interest is the fact that the government of the People's Republic of China is now engaged in the establishment of "Confucius Institutes" in other countries to promote understanding of Chinese culture. As of 2007 there were twenty-seven such institutes, with plans for one hundred, at an annual cost of $200 million. Peerenboom, supra note 4, at 9. The continuing viability of Confucianism in China is considered, among many other places, in the recent work of Peter Bol. See, e.g., Peter K. Bol, Neo-Confucianism in History (2008); Robert P. Weller, Responsive Authoritarianism, in Political Change in China, supra note 4, at 117. Peerenboom recently asserted that China's authoritarian system may be more conducive to modernization than India's democratic one. See Randall Peerenboom, Searching for Political Liberalism in All the Wrong Places: The Legal Profession in China as the Leading Edge of Political Reform? (La Trobe Univ. Sch. of Law, Legal Studies Working Paper No. 2008/7, 2008), available at http://ssrn.com/abstract=1265080; Randall Peerenboom, Law and Development in China and India: The Advantage and Disadvantages of Front-Loading the Costs of Political Reform (La Trobe Univ. Sch. of Law, Legal Studies Working Paper No. 2008/15, 2008), available at http://ssrn.com/abstract=1283209.

[FN34]. This was observed by the eminent historian Fred Wakeman in a 1973 essay:

> The People's Republic...may adamantly reject its Confucian past, but it is still deeply influenced by that old order....
>
> [One] disposition from the past is evident in the recurring Maoist emphasis on ideology rather than on technical expertise. Scholars have often related this bias to the Confucian elevation of the ethical generalist over the professional specialist. To be sure, historians are now arguing that there were many more bureaucratic specialists in imperial China than the usual image of the well-rounded literatus admits; but there certainly is a similarity between the Confucian ideal of sincerity of motive in public service and the Maoist emphasis on the sincerity of proletarian consciousness in the cause of revolution.

Frederic E. Wakeman, Jr., The Chinese Mirror, 31 Proc. Acad. Pol. Sci. 208 (1973), reprinted in Frederic E. Wakeman, Jr., Telling Chinese History 44, 51 (Lea H. Wakeman ed., 2009).

[FN35]. See John King Fairbank, China: A New History 406-09 (1992) (describing Deng Xiaoping's efforts to modernize China's political system following the Mao regime).

[FN36]. See Jianqiang Nie, The Enforcement of Intellectual Property Rights in China 179 (2006).

> [I]ntellectual property rights protection arrived in China "with such inventions and novel ideas as the gunboat, opium, 'most favored nation' trading status, and [the] extra-territor[ial] system." These treaties represented a first attempt to build a Western [IP] regime in China. The Qing Government, accordingly, issued the first trademark law...in 1904 [and] China's first copyright law...in 1910. However, neither of them was put into practice.

Id. (footnotes omitted) (citing Alford, supra note 3, at 30).

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN37]. Lydia H. Liu, The Clash of Empires 125-26 (2004). According to Lydia Liu, Professor of Chinese Literature at Columbia, there was no word remotely parallel to the word "right" in the Chinese language until the term quanli was invented by an English translator in the 1840s, and even then the term referred only to the sovereign rights of nations--not individual human rights. See id. at 124-31.

[FN38]. Nathan Sivin, Introduction to 6 Joseph Needham, Science and Civilisation in China, pt. VI, at 1, 1 (Nathan Sivin ed., 2000). Of course, there were recognized individual geniuses, such as the great Ming dynasty naturalist, Li Shizhen (1518-1593), but they are remembered more for their writings than their discoveries. See Joseph R. Levenson, The Problem of Intellectual Continuity 13 (1968). Levenson stated:

> There was important scientific achievement in China before the modern period; recent research has begun to show us just how extensive it was. But on the whole the Confucian literati were consistently uninterested, and the intellectual affinities of science were mainly Taoist and unorthodox. As Needham says, science had no social prestige, and it would never have occurred to traditional Chinese scholars that kudos were to be gained from claiming discoveries or inventions.

Id. (footnotes omitted).

Dr. Needham's magisterial multi-volume review of the remarkable advances in science and technology that took place in traditional China is only the most widely known. A very accessible popularization of Needham's opus is Robert Temple, The Genius of China (1986). For a fascinating early twentieth-century history in English of the social enterprise of technological innovation among "China's masses," see generally Rudolf P. Hommel, China at Work (1937).

[FN39]. Scientists, inventors, and artists flourish on the interplay of rigor and freedom. Creative artists and inventors (at least in my fourteen years in IP practice) tend to be self-made and spontaneous, and do not necessarily heed other voices or negative criticism. This social phenomenon, the "upstart" with a "different" idea, is not unfamiliar in China--never appearing in Confucian writings, but rather in Buddhist and Daoist lore. An example appears in the famous Buddhist story in the Platform Sutra (seventh century). Hung-jen, the Fifth Patriarch, was the Enlightened Master, scion of the first Zen patriarch, Bodhidharma. Shen-hsiu was the Learned Senior Monk, experienced in gradual meditation. Hui-neng was the illiterate woodcutter from the barbarian south who claimed to have been "suddenly enlightened."

> Shen-hsiu presents [to his Master] the following verse which Hung-jen characterizes as incomplete in understanding.
>
> The body is the bodhi tree,The mind is like a clear mirror.At all times we must strive to polish it,And must not let the dust collect.
>
> This can be understood as advocating a gradual process of achieving and maintaining the purity and clarity of the mirror-like mind, the mind of emptiness or empty awareness, of the oneness of reality. The emphasis is on the form of practice required of the body and the mind to cultivate and sustain this awareness.
>
> Hui-neng offers the following alternative verse:
>
> Bodhi originally has no tree,The mirror(-like mind) has no stand.Buddha-nature (emptiness/oneness) is always clean and pure;Where is there room for dust (to alight)?
>
> ....
>
> Hui-neng, the illiterate woodcutter who comes from outside of the rigid hierarchical structure of gradual meditation practices [and had never studied under a Master], achieves the instantaneous awareness of the oneness of all reality in the here-and-now. Nevertheless, he [not Shen-hsiu!] inherits the religious authority of the Fifth Patriarch Hung-jen and eventually becomes the Sixth Patriarch, the head of the Chan/Zen Buddhist order in China.
>
> Mark Unno, Notes on the Verses by Shen-hsiu and Hui-neng, http://www.uoregon.edu/~munno/OregonCourses/REL4400002/HuinengVerse.htm (last visited Oct. 15, 2009) (citations omitted).

This quintessentially early Daoist or Zen meme ("the secret is that there is no secret") was recently employed with

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

playful irreverence in the Hollywood film Kung Fu Panda, much to the chagrin of some Chinese critics complaining about foreign appropriations of Chinese culture. See Li Datong, China's Digital Nationalism: Kung Fu Panda Under Fire, openDemocracy, July 17, 2008, http://www.opendemocracy.net/article/china-s-digital-nationalism-kungfu-panda-under-fire.

[FN40]. See Levenson, supra note 38, at 13 (noting that traditional Chinese scholars did not consider scientific discovery prestigious).

[FN41]. See Patrick Hanan, The Chinese Vernacular Story 3-5 (1981) (describing differences between the highly standardized written forms used by the government and the written vernacular used for performances).

[FN42]. John King Fairbank, China: A New History 108-09 (1992).

[FN43]. See Analects, supra note 33, at 14:40 n.2. The government of China has been energetically building monumental statues of the traditional "culture-heroes" and famous historical figures around the country, very reminiscent of the statues of Mao (or Abe Lincoln). An enormous statue of Hou Ji, the mythical discoverer of agriculture, graces a roundabout in Yangling, home of China's new Agricultural Research Center that I visited outside the city of Xi'an.

[FN44]. See Arthur F. Wright, Introduction to Confucianism and Chinese Civilization vii, xii-xiii (Arthur F. Wright ed., Stanford Univ. Press 1975) (1964).

[FN45]. See Benjamin Schwartz, Some Polarities in Confucian Thought, in Confucianism and Chinese Civilization, supra note 44, at 9, 11 ("Confucius' good society was not like Plato's Republic--an ideal construct....His good society had been realized in the flux of history."); see also Joseph R. Levenson, The Suggestiveness of Vestiges: Confucianism and Monarchy at the Last, in Confucianism and Chinese Civilization, supra note 44, at 302, 304 ("A creator...is alien to Confucian thought as the literati came to profess it.... Philosophically, no Creator meant no 'in the beginning,' hence no progressive concept of time threatening the Confucian ideal of equilibrium....").

[FN46]. Bai Juyi's poems are beautifully translated in Arthur Waley, Translations from the Chinese 126-273 (1941).

[FN47]. See Fairbank, supra note 35, at 122-26 (listing profound changes the Mongol regime made to clerical and administrative agencies).

[FN48]. Huo Jianying, Yuan Dynasty Zaju, China Today, Feb. 2003, at 48, available at http://www.chinavoc.com/magicn/yzaj.asp.

[FN49]. See supra note 17.

[FN50]. See Fairbank, supra note 35, at 128.

[FN51]. Jonathan D. Spence, Return to Dragon Mountain 1-3 (2007). Professor Levenson earlier noted:

> While the alien Mongols ruled in China...Confucian literati were at one of their relatively low points of social importance. The Ming dynasty raised them high again, and as a ruling intelligentsia they naturally cherished an ideal of social stability. As a corollary, in matters of taste they deprecated the idea of change and the quest for originality. By and large, the literati were classicists, like Jonathan Swift in England, and in Swift's defence of the ancients against the moderns, in his vast preference for the humanities over the natural sciences, and in his patrician uneasiness with material utility as the touchstone of value, we see the pattern of literati culture with significant clarity.
>
> Swift died in savage indignation and derangement. The moderns were taking his world and he knew it. Science, pro-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

gress, business, and utility, the combination he deplored, would soon be leading themes in modern western culture. But in Ming and early [Q]ing China...science was slighted, progress denied, business disparaged and (with possibly increasing difficulty) confined....

Levenson, supra note 38, at 15-16 (footnotes omitted).

[FN52]. James Hilton's famous novel Lost Horizon is reminiscent in theme to a short story in classical Chinese written by T'ao Ch'ien (365-427 CE), called "The Peach Blossom Spring (Taohuayuan Ji)." See T'ao Ch'ien, The Peach Blossom Spring, in The Columbia Anthology of Traditional Chinese Literature (Victor Mair ed., James Robert Hightower trans., Columbia Univ. Press 1994) (n.d.). There is a resort in Yunnan Province catering to Western tourists called, evocatively, "Shangri-La." See Sino Hotel Guide, http:// www.sinohotelguide.com/zhongdian/index.php (last visited Oct. 19, 2009); see also Posting of Sky Canaves, Dang, Dang, Dang Went the Chinese Trolley, to China Real Time Report (Jan. 2, 2009, 09:28 EST), http:// blogs.wsj.com/chinarealtime/2009/01/02/dang-dang-dang-went-the-chinese-trolley (describing a part of the return of old Beijing).

[FN53]. See Mark C. Elliott, The Manchu Way 26-28 (2001) (attributing the successful occupation of China by Manchu invaders to their adoption of preexisting Confucian practices and political values).

[FN54]. Analects, supra note 33, at 1:2 (footnote omitted).

[FN55]. Id. at 7:1-3 n.1. Ray Huang, commenting on Ming dynasty intellectuals, observes:

The traditional standard was that a gentleman must let his virtue exceed his talent, never allowing the latter to eclipse the former. And what was it that defined the two? It had to be convention and past standards. This discouraged personal initiative. What had not been done before should never be attempted. Not infrequently, a technical innovation simply incited charges of immorality.

Ray Huang, 1587, A Year of No Significance 215 (1981).

[FN56]. See, e.g., W. Travis Hanes III & Frank Sanello, The Opium Wars 16 (2002).

[FN57]. See, e.g., Christine MacLeod, Inventing the Industrial Revolution 10-12 (2002).

[FN58]. 0See, e.g., L. Ray Patterson & Stanley F. Birch, Jr., A Unified Theory of Copyright (Craig Joyce ed., 2009), printed in 46 Hous. L. Rev. 215, 249 (2009).

[FN59]. See, e.g., Kate Clark, The Workshop of the World: The Industrial Revolution, in The Archeology of Britain 280, 281 (John Hunter & Ian Ralston eds., 1999).

[FN60]. John Tomlinson, Globalization and Culture 73 (1999) (alteration in original) (emphasis omitted) (citing Arnold J. Toynbee, Civilization on Trial 72 (1948)); accord Alford, supra note 3, at 30 (quoting a similar passage from Emperor Qianlong). Spence remarks on Zhang Dai's completely unselfconscious scholar-elite perception of fictional stories as merely something odd or strange--a form of unreliable history rather than entertainment or literary art. Popular fiction was "escapism." The novelist as a literary artist was an unknown concept:

Any kind of history had its problems, Zhang Dai knew: "Political history," he had written, often "suffers from factual errors; whereas family histories are distorted by flattery." The third basic genre of history, what was termed "untamed" or "unofficial history," often consisted of "nothing but fabrications."

Spence, supra note 51, at 255.

[FN61]. In his classic study of the tragic decline of the Chinese bureaucracy and its inability to self-correct, Ray Huang

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

states:

Official reliance on the [Confucian classics] as the legal guide and code of ethics for at least two hundred years had resulted in the absence of any effort to develop an intermediate zone of legality, which, capable of adjusting to changing circumstances, would have increased the flexibility of the government and broadened what was socially acceptable in the conduct of an individual, thus extending the range of creativity of both....

...[M]ediocrity was encouraged in the name of morality and intellectual dishonesty remained a fixed characteristic of bureaucratic life, to the point where "benevolence and righteousness became the yang and the accumulation of wealth and scrambling for rank the yin."

Huang, supra note 55, at 210. The sheer length of time it took for the "Old Bureaucratic" ideology to collapse (if it ever did) is an indication of how deep-rooted it was (and perhaps is).

[FN62]. See David Hawkes, Introduction to Cao Xueqin, The Dream of the Red Chamber 15, 22-24 (David Hawkes trans., Penguin Books 1973) (n.d.).

[FN63]. Cao, supra note 62, at 51. I often pose the question in classes of Chinese students as to whether Cao Xueqin's life story would have been different if China, like England at that time, had had a copyright law. No Chinese author has surpassed Cao Xueqin in constructing a "parallel universe" of Old China in slow, inexorable decline. Self-pity and raw sentimentality are ubiquitous authorial poses in later such works, generally treated gently by the readership but caricatured by Lu Xun as mostly phony. See Three Author Types (Wentan sanhu) (1935), available at http:// wenhua5.bokee.com/viewdiary.34542205.html (last visited Nov. 1, 2009)). The end of the Cultural Revolution saw the reemergence of the phenomenon in what came to be called "Wounded Literature" (shanghen wenxue) in the early 1980s, recounting the suffering endured by its authors during the Great Proletarian Cultural Revolution. See Leys, supra note 11, at 81-83.

[FN64]. See F.W. Mote, Imperial China, 900-1800, at 935 (First Harvard Univ. Press 2003) (1999).

[FN65]. Wu Ching-Tzu, The Scholars (Yang Hsien-yi & Gladys Yang trans., Columbia Univ. Press 1992) (n.d.) is a send-up of China's scholar-elite that looks back to the paragons of a mythical Golden Era when China's government officials were (supposedly) honest and incorruptible. Wu Jianren, Vignettes from the Late Ch'ing (Shih Shun Liu trans., Chinese Univ. of Hong Kong 1975) (n.d.) is an exposé of official corruption and the seamy side of official life that could easily be written in today's China. Li Boyuan, Officialdom Unmasked (T.L. Yang trans., Hong Kong Univ. Press 2001) (n.d.), based on true stories, is about a government of corrupt officials, rotting from within.

[FN66]. William Safire, Safire's Political Dictionary 666 (Oxford Univ. Press 2008) (1968).

[FN67]. As Tomlinson noted:

[Qianlong's] attitude might be said to occupy a sort of transitional place between the self-assured ethnocentrism of pre-modern "world empires" existing in relative isolation from and ignorance of one another, and a world of global modernity in which the assertion of claims to cultural superiority take on a different, more self-conscious and deliberate ideological form. [Qianlong] of course misjudged the military and technological power of the British (to him, the "South Sea Barbarians") to impose their presence--as they were to do fifty years later in the Opium wars.

See Tomlinson, supra note 60, at 73-74.

[FN68]. Over the objections of the Chinese government, British sales of opium from India into China in 1838 had reached 1,400 tons. Cathleen Schine, Adventures in the Opium Trade, N.Y. Review of Books, Jan. 15, 2009, at 39; see also Letter from Lin Zexu, Imperial Comm'r of Customs, to Queen Victoria of England (1839), available at http:// www.international.ucla.edu/eas/documents/linzexu.htm (protesting Britain's "free trade" policy in favor of shipping opi-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

um to China).

[FN69]. See Huang, supra note 55, at 221 (“A highly stylized society wherein the roles of individuals were thoroughly restricted by a body of simple yet ill-defined moral precepts, the empire was seriously hampered in its development, regardless of the noble intention behind those precepts.”).

[FN70]. Peter Bol notes what he sees as the continuing relevance of Confucianism in post-Mao (indeed post-Communist) China:

> The general Confucian interest in how the social system, government, economy, and culture can be made to further human community and welfare speaks to China today....The irrelevance of Communist Party ideology, the corruption of the bureaucratic apparatus, participation in a shared world order, and the extraordinary growth in private wealth have opened the way for a new search for a shared [Chinese] intellectual foundation.

Bol, supra note 33, at 278. For such modern proponents of a return to Confucian principles of governance in China (and there are many), the “shared intellectual foundation” they foresee is the return of a renewed Neo-Confucian ideology (“The Succession of the Way”) still looking to a mythical constructed Past, uninterested in, if not downright hostile to, innovation and individual creativity. As a personal philosophy, Confucian values may be a great source of wisdom and humanity. As a foundational system for government, China's history is the best teacher that they decidedly are not. For a positive spin on Confucianism's role in modern Chinese popular culture, see, for example, Daniel A. Bell, China's New Confucianism 68-69 (2008). Also, Peerenboom notes that the positive values of modern Confucianism as an expression of “Asian values”--“an emphasis on education, hard work, high levels of personal savings, a nationalistic desire for a strong state, and a willingness to sacrifice personal interest in the name of the overall good”--have been keys to success of the East Asian Model (EAM) of development. Peerenboom, supra note 4, at 295.

[FN71]. Miller observes:

> In step with the increasing impact of science and technology on economic production...the importance of “mental labor” versus manual labor increases in all societies; and as economic production becomes increasingly complex and sophisticated, manual labor increasingly involves mental activity. Therefore the value of intellectuals, both as researchers and as teachers, increases as society develops under the impact of the new scientific and technological revolution. On this basis, as subsequent reformist commentary stressed in elaborate theoretical detail, intellectuals came to be regarded as the key social group in China's modernizing future.

Miller, supra note 29, at 75.

[FN72]. See Ministry of Sci. & Tech. of the P.R.C., National High-Tech Program (863 Program), http://www.most.gov.cn/eng/programmes1 (last visited Oct. 29, 2009) (describing a program designed to achieve “leap-frog” development in key high-tech fields).

[FN73]. See David D. Li, Changing Incentives of the Chinese Bureaucracy, 88 Am. Econ. Rev. 393, 393-94 (1998).

[FN74]. An interviewer once asked Deng Xiaoping, “Is China a Communist country?” He is alleged to have responded, “Well, it's ruled by the Communist party.”

[FN75]. Ping Lin & Jing A. Zhang, R&D Incentives, Industrial Structure and Technology Transfer in China, in China's Science and Technology Sector and the Forces of Globalisation 47, 49 (Elspeth Thomson & Jon Sigurdson eds., 2008).

[FN76]. 2 Alan S. Gutterman & Robert L. Brown, Going Global: A Guide to Building an International Business §33:72 (2009).

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN77]. All-China Patent Agents Association's 20th Anniversary Celebrations Successfully Held in Beijing (Dec. 18, 2008), http://www.acpaa.cn/list_ xhhd.asp?news_id=1706&catid=149.

[FN78]. State Intellectual Prop. Office of the P.R.C., Applications for Three Kinds of Patents Received from Home and Abroad (2008), http:// www.sipo.gov.cn/sipo_English/statistics/gnwsznb/2008/200904/t20090409_ 450035.html; State Intellectual Prop. Office of the P.R.C., Grants for Three Kinds of Patents Received from Home and Abroad (2008), http:// www.sipo.gov.cn/sipo_English/statistics/gnwsqnb/2008/200904/t20090409_ 450141.html; see also Albert Guangzhou Hu, Propensity to Patent, Competition and China's Foreign Patenting Surge 2-3 (Oct. 22, 2008) (unpublished manuscript, on file with Houston Law Review) (offering four explanations for the growth of patent applications in China).

[FN79]. Frances Williams, China Passes Germany in Patent Rankings, FT.com, Oct. 16, 2006, http://www.ft.com/cms/s/0/69b274b4-5c77-11db-9e7e-0000779e2340.html.

[FN80]. James Nurton, Chinese Company Tops PCT Application List, MIP Week (Managing Intellectual Prop., London), Jan. 27, 2009, available at http:// www.managingip.com/Article/2089633/Chinese-company-tops-PCT-application-list.html.

[FN81]. WIPO, Record Number of International Trademark Filings in 2007, PR/2008/537 (Feb. 27, 2008), available at http:// www.wipo.int/pressroom/en/articles/2008/article_0007.html.

[FN82]. APCAA, Brief Introduction to All-China Patent Agents Association, http://www.acpaa.cn/english/e_default.asp (last visited Oct. 21, 2009).

[FN83]. See, e.g., Guangzhou Dearfriend Trademark Agency Co., ACPAA Becoming the Permanent Observer of WIPO (Jan. 6, 2009), http:// www.dearfriendip.com/news_show.asp?id=19.

[FN84]. See China Council for the Promotion of Int'l Trade, About CCPIT, http://ipr.ccpit.org/lzh-2.asp (last visited Oct. 23, 2009).

[FN85]. See Guo Shoukang & Zuo Xiaodong, Are Chinese Intellectual Property Laws Consistent With the TRIPS Agreement?, in Intellectual Property and TRIPS Compliance in China 11-12 (Paul Torremans et al. eds., 2007) (discussing amendments to Chinese IP laws to comply with TRIPS); see also Panel Report, China--Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, PP7.72-.139 (Jan. 26, 2009) (concluding that China's copyright law violates the TRIPS Agreement because it did not protect “prohibited works”). After the WTO panel decision, China “pledged...to cooperate with other countries to strengthen its protection of copyrights and trademarks.” China Vows Copyright Cooperation After WTO Case, Reuters, Jan. 27, 2009, http://www.reuters.com/article/technologyNews/idUSTRE50Q1NX20090127. A second ruling of the panel was that China's regulations on the release of seized counterfeit goods were not compliant with TRIPS Article 46. Panel Report, supra, P7.395. The compulsory licensing provisions of China's new patent law, scheduled to take effect in October 2009, have not gone unchallenged as to their compliance with Article 5 of the Paris Convention and Article 28 of the TRIPS Agreement. See Ronald A. Cass, Op-Ed., Patent Reform With Chinese Characteristics, Wall St. J. Asia, Feb. 10, 2009, at 12, available at http://online.wsj.com/article/SB123419814824764201.html?mod=googlenews_wsj.

[FN86]. Supreme Court President Inspects Shenzhen Office of China Patent Agent (H.K.) Ltd., China Patents & Trademarks, Apr. 1989, at 16, 16.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN87]. Id.

[FN88]. Exchange of Notes Constituting an Agreement Concerning Registration of Trade Marks, Austl.-P.R.C., Oct. 12, 1974, 975 U.N.T.S. 75. China did not enact a trademark law until 1982. Jing "Brad" Luo & Shubha Ghosh, Protection and Enforcement of Well-Known Mark Rights in China: History, Theory and Future, 7 Nw. J. Tech. & Intell. Prop. 119, 125 (2009).

[FN89]. See generally Richard Baum, Burying Mao (1994) (providing an authoritative account of the constant factionalism of the Deng Xiaoping post-1976 era).

[FN90]. Supreme Court President Inspects Shenzhen Office of China Patent Agent (H.K.) Ltd., supra note 86, at 16. Calls for a return to the values of the Cultural Revolution are not unheard of in China today. See, e.g., Posting of Ma Bin, Only Mao Zedong Thought Can Save China, Part 1, to Mei-Zhong Guan-Xi (Jan. 12, 2009, 09:43 EST), http://feeds.feedburner.com/Mei-ZhongGuan-Xi (criticizing Deng Xiaoping for saying, "Watch out for the right, but the most important thing is opposing the left").

[FN91]. See, e.g., China Educ. & Research Network, China, Europe to Shape Future Patent Cooperation (Dec. 6, 2005), http:// www.edu.cn/20051206/3164502.shtml (proclaiming the twenty-year cooperative working relationship between the SIPO and the EPO); Song Zhe, The EU-China Syndrome, New Europe, Sept. 6, 2009, http://www.neurope.eu/articles/95960.php (discussing the special working relationship between China and the EU to improve intellectual property protection).

[FN92]. Robert H. Rines, Create or Perish (1964).

[FN93]. See European Patent Office, China and Korea, http:// www.epo.org/about-us/office/international-relations/projects/china.html (last visited Oct. 22, 2009) (discussing the June 1985 agreement between the EPO and "the former Chinese Patent Office"); WIPO, Paris Convention for the Protection of Industrial Property: Accession by the People's Republic of China (Dec. 19, 1984), http://www.wipo.int/edocs/notdocs/en/paris/treaty_paris_114.html (denoting China's date of accession to the Paris Convention).

[FN94]. See, e.g., WIPO, Status of Madrid Agreement Concerning the International Registration of Marks (Jul. 15, 2009), http:// www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf (recognizing China as a party to the Madrid Agreement as of October 4, 1989); WIPO, Berne Convention for the Protection of Literary and Artistic Works: Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp? lang=en&treaty_id=15 (last visited Oct. 22, 2009) (recognizing China as a party to the Berne Convention as of October 15, 1992).

[FN95]. For example, the European Commission established a •5.5 million fund for cooperation in 1996 and entered a new •16 million agreement on technical assistance for IP enforcement in 2008. Press Release, EPO, Twenty Years' Co-Operation Between the European Patent Office and the Chinese Patent Office (Dec. 5, 2005), http://www.epo.org/about-us/press/releases/archive/2005/05122005.html; Press Release, EPO, IPR Protection & Enforcement in China: A New EUR 16m EU-China Co-Operation Gets Underway (Apr. 17, 2008), http://www.epo.org/about-us/press/releases/archive/2008/20080417.html. China's Patent Office, as in the case of its patent law, follows the German model. China adopted the EPO's EPOQUE search system in 1997, with the EPO providing most of the computers. See European Patent Office, Annual Report 1997, at 10 (1998). The EPO also hosts some sixty Chinese patent examiners for training every year. EPO, China and Korea, http://www.epo.org/about-us/office/international-relations/projects/china.html. The USPTO has never to my knowledge

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

had any similarly focused (or funded) exchange programs with China.

[FN96]. The Director of the American Studies Section of the Chinese Academy of Social Sciences recently lamented the fact that some former Red Guards are still lionized today for their "achievements." See Posting of David Bandurski, Can China Afford to Forget Its Own History?, to China Media Project (Feb. 4, 2009), http://cmp.hku.hk/2009/02/04/1468 (translating an excerpt of Zi Zhongyun, Only a Nation That Can Reflect on Its Past Can Have a Bright Future (Feb. 2, 2009), http://view.news.qq.com/a/20090202/000014.htm).

[FN97]. See Yu, supra note 5, at 202 ("At some point in the near future, the development of the Chinese economy will reach a crossover point at which the country will gradually abandon its infamous pirate past to become a champion of intellectual property protection."); see also Peerenboom, supra note 4, at 76 (describing the United States' influence on China's efforts to punish and deter IP violations).

[FN98]. Feng, supra note 31, at 18.

[FN99]. See Int'l Trade Admin., U.S. Dep't of Commerce, Protecting Your Intellectual Property Rights (IPR) in China (Dec. 2005), available at http:// beijing.usembassy-china.org.cn/protecting_ipr.html (illustrating the various areas of administrative enforcement of Chinese IP by SIPO municipal offices).

[FN100]. Ministry of Commerce of the P.R.C., Status Regarding China's Enforcement of IPR (June 6, 2006), http://www.chinaipr.gov.cn/policy/documents/233204.shtml.

[FN101]. China Sets Goal for Developing Science, Technology in 15 Years, People's Daily Online, Feb. 9, 2009, http://english.peopledaily.com.cn/200602/09/eng20060209_241328.html. The third amendment of the Patent Law enacted recently is supposed to reflect this policy.

[FN102]. See Nie, supra note 36, at 218-20 (providing an overview of the administrative enforcement of patent law in China).

[FN103]. In 1978, "Deng refuted the Maoist assertion that science and technology possessed distinctive class characteristics....Instead, Deng advanced the claim that science and technology were 'productive forces' (shengchan li) that were inherently class-neutral and universal in nature, that is, 'a kind of wealth created in common by all of mankind.'" Baum, supra note 89, at 57; see also Miller, supra note 29, at 74 (discussing Deng's "declaration that science and technology were to be counted in Marxist political economy as 'forces of production'").

[FN104]. Professor Yu notes that China's uneven development is a factor in making China's "crossover" to self-interested IP enforcement difficult to predict. Yu, supra note 5, at 220.

[FN105]. See Jim Yardley & David Barboza, Despite Warnings, China's Regulators Failed to Stop Tainted Milk, N.Y. Times, Sept. 27, 2008, at A1.

[FN106]. See More Officials Punished Over Sanlu Scandal (Mar. 20, 2009), http://www.china.org.cn/government/central_government/2009-03/20/content_ 17477922.htm.

[FN107]. The interface between drug regulation and intellectual property protection in China is discussed in an excellent recent Comment. See Gregory H. Fuller, Comment, Economic Warlords: How De Facto Federalism Inhibits China's Compliance with International Trade Law and Jeopardizes Global Environmental Initiatives, 75 Tenn. L. Rev. 545, 556-69 (2008).

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN108]. See Ronald S. Fernando, Understanding Judicial Patent Enforcement in China, China Patents & Trademarks, Apr. 2008, at 24, 25-27 (noting that efficacy of patent enforcement reflects China's policy of encouraging innovation to sustain economic growth).

[FN109]. Professor Yasheng Huang of the Sloan School of Management at Massachusetts Institute of Technology, discussing the transformation of Xiushui Street Market close to the U.S. Embassy in Beijing famously (or infamously) popular among foreign tourists for its counterfeit brands, harshly calls it "crony capitalism built on systemic corruption and raw political power." Yasheng Huang, Capitalism with Chinese Characteristics 234, 236 (2008). Beijing city officials evicted the independent sellers on the street and relocated the market to a new building under a private management arrangement. Id. at 234-36. "A politically connected entrepreneur, with the full backing of the coercive power of the state, could simply expropriate the value of the Xiushui brand from hundreds of entrepreneurs who had created the brand." Id. at 236. For an equally critical and pessimistic assessment of the prospects of gradualism in China's current modernization, see Minxin Pei, China's Trapped Transition (2006).

[FN110]. Posting of Jeff Bernstein, China Update--Olympian Challenges, to Urban Digs (Apr. 14, 2008, 07:52 EST), http://www.urbandigs.com/2008/04/china_ update_olympian_challeng.html. One author estimated that the number of people engaged in manufacturing, distributing, and selling products that infringe copyrights and trademarks in 2006 at twenty million. See Sepetys & Cox, supra note 32, at 3 n.6 (citing Harley I. Lewin, The Future of Intellectual Property in China, Law360, Mar. 16, 2006 (on file with Houston Law Review)).

[FN111]. Peter Navarro, The Coming China Wars 47 (2007).

[FN112]. See Judith F. Kornberg & John R. Faust, China in World Politics 23 (2d ed. 2005).

[FN113]. McKinsey Global Inst., Preparing for China's Urban Billion 14 (2008) (on file with Houston Law Review).

[FN114]. Timothy E. Wirth, A Way Forward on Climate Change, 2 Harv. L. & Pol'y Rev. 313, 324 (2008).

[FN115]. Or maybe just copycats. I once complimented a Beijing taxi-driver on the elegant simplicity and beauty of the brushed chrome vacuum bottle he used for drinking tea all day. He responded nonchalantly, "Oh, this? My brother-in-law had one sent to him from Sweden, where it was made, and he makes them in his machine factory over in east Beijing."

[FN116]. America's early knowledge of textile manufacturing was spirited illegally out of England, much to the glee of Alexander Hamilton. See Anthony F.C. Wallace & David J. Jeremy, William Pollard and the Arkwright Patents, 34 Wm. & Mary Q. 404, 421 (1977) ("Scottish looms and hosiery weavers [were] brought over...as a result of the...adventure in industrial espionage financed by Alexander Hamilton."). The first textile factory was established in Pawtucket, Rhode Island by Samuel Slater. Id.at405,409. The British Parliament had passed legislation making the exportation of textile machinery a serious misdemeanor in order to preserve its monopoly on spinning and weaving technology. See id. at 409. Richard Arkwright bragged that he deliberately disclosed his 1769 and 1775 British patents as revenge because Parliament had invalidated his patent rights in a suit for infringement. Id. at 404.

[FN117]. See Daniel C.K. Chow, The Legal System of the People's Republic of China 224 (2d. ed. 2009) (discussing the problem of local protectionism in China).

[FN118]. Feng, supra note 31, at 16.

[FN119]. See Nie, supra note 36, at 217-18. Nie notes:

> [C]ompared to the impressive achievements that have been made in intellectual property law-making, the en-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

forcement of intellectual property laws may well be described as unsatisfactory if not dismal or in crisis....Given [China's] authoritarian tradition and the statist conception of rights, enforcement of private rights usually emphasizes rights control rather than rights vindication.

Id.

[FN120]. Id. at 244-45.

[FN121]. See Chow, supra note 117, at 198-99 (describing the hierarchy of the Chinese government).

[FN122]. A 2007 report published by the Legislative Affairs Office of the State Council opens with the admonition, "As a country with a feudal tradition of several thousand years, the process of China moving toward the rule of law has been an extremely slow one." The 59-page report mentions the court system only eleven times. Legislative Affairs Office of the State Council, Administration on the Basis of Law in China: A Review and Future Prospects (2007) (on file with Author).

[FN123]. Nie, supra note 36, at 245. "In October 2002, the Supreme People's Court issued an interpretation on adjudicating civil copyright disputes." U.S. Embassy Beijing, IP Toolkit, http://beijing.usembassy-china.org.cn/copyright.html (last visited Oct. 26, 2009). Peter Feng notes that China promulgated implementing provisions on interpretation of the Berne and Universal Copyright Conventions as gap-fillers on how the courts would interpret the treaties. See Feng, supra note 31, at 11.

[FN124]. See, e.g., Feng, supra note 31, at 14 (discussing the importance of administrative implementing rules).

[FN125]. For example, in Merck & Co., Inc. v. Patent Reexamination Board of SIPO of China, the Beijing Higher People's Court in 2008 upheld a finding of invalidity on a patent concerning the administration and dosage of the compound finasteride owned by Merck. Li Jianwei & Yu Yong, Local Drug Maker Shatters Merck Patent Ambush, China Intell. Prop. Rep., Dec. 17, 2008, http:// www.sipo.gov.cn/sipo_ English/ news/ChinaIPNews/2008/200904/P020090408579899861525.pdf. Pfizer won an earlier administrative appeal in September 2007 on the Viagra patent, when the same court upheld the judgment of the Beijing Intermediate People's Court, which had overturned the SIPO's decision invalidating the patent. Suong Nguyen et al., International Intellectual Property Law, 42 Int'l Law. 463, 467 (2008).

[FN126]. See Nie, supra note 36, at 246 ("The court has no judicial power to interpret the local regulations, or the administrative regulations and rules.").

[FN127]. As Feng notes:

Law is a diluted concept in China and comes from a variety of sources. An IPR can be instituted by a national law, its ancillary administrative regulations or related judicial interpretations--all of which are proper legal rules.... [T]he Constitution is not a direct source of enforceable rights, but rather constitutes programmatic or ideological declarations.

Feng, supra note 31, at 9-10.

[FN128]. See id. at 33 ("As in most civil law jurisdictions, judgments of the People's Court are not precedents.").

[FN129]. See id. (observing that the publication of exemplary cases serves as judicial guidance, supervision, and further training for judges).

[FN130]. Across China: Jiangsu, China Daily, Jan. 19, 2009, at 9, available at http://www.chinadaily.com.cn/bw/2009-01/19/content_7407633.htm.

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN131]. Supreme People's Procuratorate of China, News Guangdong, May 14, 2003, http://www.newsgd.com/government/govdepart/200305140343.htm.

[FN132]. In three recent reports on bribery in China, India, and Russia, Trace International reported that 11% of 148 bribery reports it received on China from July 2007 to June 2008 involved judicial officials. TRACE Int'l, Business Registry for International Bribery and Extortion: China Report 1 (2008), available at https://secure.traceinternational.org/news/pdf/China_PR_ and_Report.pdf. Among 96 bribery reports in India and 286 in Russia during the same period, judicial bribery is not mentioned by Trace International. See TRACE Int'l, Business Registry for International Bribery and Extortion: India Report 2 (2009), available at https:// secure.traceinternational.org/news/pdf/IndiaReportNarrative011009.pdf; TRACE Int'l, Business Registry for International Bribery and Extortion: Russia Report 2 (2009), available at https:// secure.traceinternational.org/news/pdf/RussiaBRIBElineReportPressKit.pdf. The Communist Party of China publishes its own reports of anticorruption measures on its website at http://www.chinapeace.org.cn.

[FN133]. U.S. Embassy Beijing, supra note 123.

[FN134]. Patti Waldmier, The Value of Branding Becomes Patent, Fin. Times (London), July 3, 2008, at 6.

[FN135]. See Freshfields Bruckhaus Deringer, Largest Damages Award for Patent Infringement, Int'l Law Office, Dec. 15, 2008, http:// www.internationallawoffice.com/Newsletters/Detail.aspx?g=0b0a92e6-3305-4d9a-8469-02ee61a0db79.

[FN136]. Id. SIPO had ruled that the local Chinese company's patent was valid, and Schneider eventually settled for US$23 million. French Electrical Firm Pays $23m for IPR Violation, China Daily, Apr. 16, 2009, http:// www.chinadaily.com.cn/china/2009-04/16/content_7682242.htm.

[FN137]. See China Piracy Reports, Samsung Infringed on Holley Cellular Phone Patent and Was Ordered to Pay Damages in the Amount of RMB 50 Million, http://www.chinapiracyreports.com (May 13, 2009, 20:03 EST).

[FN138]. Id.

[FN139]. See Analects, supra note 33, at 12:13 (“The Master said, I could try a civil suit as well as anyone. But better still to bring it about that there were no civil suits!”); see also Sepetys & Cox, supra note 32, at 4 n.10 (“Article 57 of the Patent Law and Article 53 of the Trademark Law both call for the parties to attempt to settle a dispute through consultation before taking a complaint to the administrative authority for patent affairs.”).

[FN140]. See Paul M. Romer, Beyond Classical and Keynesian Macroeconomic Policy, Policy Options, July-Aug. 1994, at 15, 21, available at http:// www.gsb.stanford.edu/research/faculty/news_releases/Romer.Paul/London_ Speech.html (“The most important job for economic policy is to create an institutional environment that supports technological change.”).

[FN141]. “Traditional Chinese legal doctrine places IPR infringement in the category of ‘violations of the socialist market economic order’ rather than ‘property’ crimes. In effect, this allows infringers to steal from those who innovate while at the same time reducing inventors' incentives.” White Paper, supra note 6, at 56. A recent econometric study demonstrates the degree to which IP enforcement in China varies from province to province, and how important that enforcement is for economic development in China. James Ang, Yingmei Cheng & Chaopeng Wu, Does Enforcement of Intellectual Property Rights Matter? Evidence from Financing and Investment Choices in the High Tech Industry 2-3 (Fla. State Univ. College of Law, Law, Business & Economics Paper No. 09-12, 2009), available at ht-

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

tp://ssrn.com/abstract=1357045.

[FN142]. Yu Zhou notes:

China continues to rely greatly on external technology to this day, and Chinese enterprises continue to rely on cheap labor rather than technological prowess. While no one can accuse the Chinese state of not trying, it is clear that it has yet to find a workable model for technological development.

Yu Zhou, The Inside Story of China's High-Tech Industry 24 (2008).

[FN143]. See Alice Xin Liu, Hu Yong Interview: The Digital Age, Orwell's "Newspeak" and Chinese Media, Danwei, Apr. 16, 2009, http:// www.danwei.org/media/hu_yong_interview.php.

"Shanzhai" is about skill: it reveals a kind of China-style innovation....

Culturally the phenomenon of "shanzhai" has a much deeper, and weightier, meaning. It is fashionable to maintain a façade in Chinese public life. This has caused a sort of "public lies" and "private truths": a strange phenomenon, and the two facets are not mutually exclusive. "Shanzhai" is a typical manifestation of this phenomenon. This is of course because power has controlled public understanding, and people are forced to make a reality for themselves. At the same time there is pressure to guarantee that even if people are cynical towards power, they still have to show themselves to believe in it publicly.

Id.

[FN144]. See Silicon Hutong, Dissecting the National People's Congress: The PLA and Independent Innovation, http://siliconhutong.typepad.com/silicon_ hutong/ 2009/03/dissecting-the-national-peoples-congress-the-pla-and-independent-innovation.html (Mar. 16, 2009, 20:14 EST).

[FN145]. According to Chinese Ministry of Education statistics, 700,200 Chinese students went abroad to study between 1979 and 2003, but only 172,800 of them have returned. Ministry of Educ. of the P.R.C., Work Related to Students and Scholars Studying Abroad, http:// www.moe.edu.cn/english/international_2.htm (last visited Oct. 24, 2009). Admitting to the "brain-drain" problem, the Chinese government announced in March 2009 that it would offer bonuses of roughly $146,000 to senior company officials, and possibly entrepreneurs and patent holders, to apply their skills in China. See Posting of Carlos Tejada, Help Wanted: China Offers Bonuses for Know-How, to China Real Time Report (Mar. 22, 2009, 21:49 EST), http:// blogs.wsj.com/chinarealtime/2009/03/22/help-wanted-china-offers-bonuses-for-know-how.

[FN146]. While noting the structural problem associated with the way enforcement "campaigns" are conducted in China, Professor Van Rooij of Leiden University qualifies it by analogizing to structural problems in enforcement of laws in western countries like the United States, such as the "drug wars" and "zero tolerance" campaigns in response to school violence. Benjamin Van Rooij, The Politics of Law in China: Enforcement Campaigns in the Post-Mao PRC 48-54 (Mar. 25, 2009) (unpublished manuscript, on file with Houston Law Review).

[FN147]. China is projected to move from 54th place in 2004 (between Ukraine and Serbia) to 46th place by 2013 in the Economist ranking of the world's most innovative countries based heavily on government spending for R&D and education. Economist Intelligence Unit, A New Ranking of the World's Most Innovative Countries 8 (2009), available at http://graphics.eiu.com/PDF/Cisco_ Innovation_Complete.pdf. The report cites "weak protection of intellectual property" as one of China's major barriers to innovation. Id. at 9.

[FN148]. This may be toughest for media industries:

The Chinese government does not see media and ideas and the rest as a "market." They see it differently. They see it as an impediment to government control. Accordingly, they have no intention of ever opening this "market." Consistent with this basic viewpoint, China makes no attempt to seriously protect its own media. Chinese film, TV, books,

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

magazines, music, visual arts and the rest are routinely pirated and the associated businesses and artists are left undeveloped and in poverty. That is changing in small increments, but not in any serious way. Chinese film directors and actors, for example, have grown rich, but only from their earnings on foreign releases. They still complain that they make no money in China, primarily due to piracy. With that as a base, how can China protect foreigners? It simply cannot happen. If foreigners are protected, then China has to protect its own citizens first. In this area, a two tier system simply cannot work. So the whole discussion is pointless.

The fact that this is not a pure intellectual property issue can be seen by the alternative fate of patents, trademarks and trade secrets. Of course, piracy in these areas is rampant in China. However, both administrative and court based protections are also very effective in China. As I often say, the courts are good at these cases because they have so much practice. Protection of IP in this area is successful because the Chinese government views it as entirely a commercial matter. The attitude is not the same for media, with predictable results.

Posting of Steve Dickinson, The WTO, China's Media, Copyrights and Other IP. It's a Control Thing, to China Law Blog (Feb. 9, 2009, 22:35 EST), http:// www.chinalawblog.com/2009/02/the_wto_chinas_media_copyright.html. Peter Yu asks the pertinent question: "Would the United States be interested in promoting the distribution and reproduction of censored information in China?" His answer is: "You bet." See Peter K. Yu, Three Questions That Will Make You Rethink the U.S.--China Intellectual Property Debate 10 (Drake Univ. Law School, Intellectual Prop. Law Ctr., Occasional Papers in Intellectual Property Law No. 2, 2008).

[FN149]. Blogger David Bandurski notes "the direct relationship between political good behavior and commercial well-being," and he calls it "Control 2.0." See Posting of David Bandurski, Shenzhen Reiterates Media Control as It Pushes for Change, to China Media Project (Mar. 19, 2009, 16:03 HKT), http:// cmp.hku.hk/2009/03/19/1515.
46 Hous. L. Rev. 1257

END OF DOCUMENT

© 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.