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Abstract

This thesis explores Intellectual Property, and how it relates to the People’s Republic of China. It takes a multi-directional approach to the topic, exploring the history of intellectual property in China, the United States and Europe. It examines it in the frame of respective legal traditions, and looks at why policies differ in different countries. The aspect of economic impacts are also explored, along with the issue of how well those who quantify IP infringement are able to gauge a difficult figure. Finally, the broad cultural and political reasons behind Chinese IP infringement are addressed, and suggestions are provided for why the current IP landscape in China exists as it does.
Preface

The idea for this project came to me in September 2012, while I was living in Beijing as a language student at Peking University. Beida, as the university is affectionately known, is located in the Zhongguancun neighborhood of Haidian district, in north-west Beijing. Not only being home to two of China’s most prestigious Universities, the other being Tsinghua University, Zhongguancun is also home to a dense concentration of high-tech industry, and is referred to as “China’s Silicon Valley.” The neighborhood is thusly home to several massive electronics malls, each with hundreds of vendors, large and small, selling nearly every kind of technological device and apparatus imaginable.

As I wandered through these cavernous malls, I eventually happened upon a large, glossy poster advertising a mobile device called “Iphone 6,” a sleek android-powered cell phone with high cosmetic similarity to the iPhone 4S, the newest Apple phone available at the time. For about $280, I could own one, and (potentially) be the coolest student on the block! But this really raised a few questions in my head: how could something like this, a blatant infringement of Apple’s trademark, design, and logo, be so readily displayed in the largest electronics district in the world’s largest country? Was this purely a function of a developing, rapidly industrializing society, or was there a deeper, cultural element?

Several months later, I moved on to briefly study the Japanese language in Kyoto, Japan. One day, as we were shopping, I remarked to a professor of the college that we were visiting that there didn't seem to be any "counterfeit" goods plainly for sale in the way that there was in China. He concurred, and replied that it hasn't always been this way and that up until the early 1990's, counterfeiting occurred at a much higher level. Culturally, Japan and China share some common foundational elements, but contemporary customs are vastly different.
With these ideas firmly in mind, I started asking questions about how intellectual property worked on the practical level. What is the history, and why do we deal with intellectual property as we do? Is China’s experience with intellectual property similar to Europe and the United States? Why is the state of intellectual property as it is? The answers that I found were as enlightening as they were informative.
Introduction

For the past two decades, if there has been any mention of copying, plagiarism, software piracy or intellectual property rights violation on the international stage, the subject invariably turns to that of the People’s Republic of China. Reported ad nauseam in broadcast media and on the internet are images and stories of every consumer product and industrial design imaginable being reproduced and copied illicitly in China. From fake designer handbags, to illegitimate copies of popular American television programs, to cooking stoves nonsensically emblazoned with the logo of Apple, Inc., pop culture has exploded with the idea that many things in China are direct copies, illegitimate, or uncannily similar to that of something from the United States or Europe. But how well does this pop culture stereotype hold true? We find that the actual economic impact of Chinese IP infringement is extremely difficult to measure, and hard to estimate in any certainty. Also, perhaps more importantly, is the question of whether China deserves its reputation as the poster-country for IP infringement. Most stereotypes have some sort of basis in reality, and in this case it is not a stereotype undeserved.

The questions that could be asked are as numerous as the alleged IP infringements themselves. At the core of trying to understand “why” is that the entire concept of intellectual property law in China developed much, much later than in European or North American countries. But the reasons for such a latent development of IP regulation are not so much temporal as they are political, cultural, and most importantly philosophical. Indeed, the notion of intellectual property rights in the People’s Republic of China is swimming upstream in a river of nearly four thousand years of culture.

As our laws understand it, we have three types of property: real property, such as a buildings and land; tangible property: the physical items which we own; and intangible property: our bank accounts, stocks, insurance, and other financial instruments. Intellectual property falls under the umbrella of tangible property. In and of itself, it contains has several sub-categories. The three that which this essay
addresses are patent, copyright, and trademark. These are the most common types of intellectual property, and virtually any country engaged in world trade today recognizes these three categories. Some countries take it further, and expand to four or five categories of protected IP, which usually are expanded to explicitly protect trade secrets and manufacturing processes. Each of these categories poses unique challenges for enforcement, and the amount of hard, quantifiable data about each varies widely as well. While it’s easy to think of IP infringement as a very modern, internet-based phenomenon, and certainly a large amount of infringement does take place digitally, this by no means encompasses the entirety of IP infringement, even if it perhaps the most visible in the present day.

There three types intellectual property than this thesis discusses, but for the purposes of discussion, this will focus on three facets. The first and oldest type of intellectual property is the patent. The patent is simply the right granted by a state to an individual or group for exclusive production and utilization of a technology for a set period of time. The second two types of IP infringement are closely related to the first. Copyright is similar to a patent, except it grants exclusive rights to reproduce written works, and the duration granted in most territories is significantly longer. The third is the trademark. Think of it in terms of Mickey Mouse. The trademark protects Mickey Mouse’s name, and designates it as being property of the Walt Disney Company. It is also officially registered with the government. Copyright protects the content, text, video, and sound recordings of the stories that Mickey Mouse stars in. Patents could, in theory, cover the unique and proprietary methodology of assembling the steel support structure of the giant mouse ears at Disney World. While all three of these cover different aspects of intellectual property, the concept is the same: intellectual property laws reserve the use of techniques, technologies, and text to the creator of the work and the individuals who he chooses.

Of course, one cannot have intellectual property without first having property. One of the bases for this notion was expositioned by John Locke.
Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whosoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.¹

Thus, one origin of property is the notion that it is granted onto men by the work that they perform. As Locke says, if one has a farm, and one’s work thereby produces crops, he, and only he, has the right to obtain profits from the crops that his work has created. Locke’s philosophy is not narrow; it is the idea that everyone is able to profit from what they create, which motivates all debates about IP rights worldwide.

If money were not an issue, or essential to the argument, far fewer companies would care who infringed upon their rights. The stakes are much higher than just a simple farm. It is money, and an enormous amount of it, that drives the global IP conversation. When two tech giants like Apple and Samsung dramatically and publically carry out IP litigation on the global stage, and the ideal outcome for either party is a judgment in their favor for not for hundreds of millions of dollars, but for tens of billions, the importance of IP rights can simply not be underscored.

Intellectual Property Origins in Europe and the United States

The idea of intellectual property as a concept in Europe and North America is quite old. It is advantageous to think about the history of intellectual property in two spheres: those countries of the world which have been traditionally considered “Western” and “Eastern.” The development of intellectual property in “Western” areas has a much longer and significant lineage than “Eastern” areas. It is a tradition that spans thousands of years and many countries.

It has been widely agreed upon that the first recorded example of intellectual property protections being enacted was in Classical Greece. In approximately 500 B.C.E., colonists in the Greek land of Sybaris were encouraged to create new culinary treats for the population to enjoy. In exchange for this innovation, they were granted new protections under the law: the ability to create their new treats without fear of others producing them for the duration of one year.\(^2\) Literary Piracy was also an issue during later Greek and Roman eras, and indeed this is the genesis of the term “plagiarism.” In Rome, where there was not yet a legal concept similar to those being enacted in Greece, playwrights and poets relied upon public opinion as a measure against copying. The poet “Martial … is credited with the first use of the term *plagium*, which had the previously denoted kidnapping or man-stealing, to include literary piracy, and from this originated the word ‘plagiarize.’”\(^3\) From there, the notion of being able to seek protection from plagiarism, copying, and unauthorized use began to take cerebral traction.


\(^3\) Ibid.
Nearly fifteen hundred years later, as the world expanded and became in many ways smaller, the first English patent law came into force. It had become custom at the time for the reigning English monarch to give patents to favored individuals for fantastically long durations with the intention of increasing production and encouraging foreign investment, and that is exactly what it did: foreign investors brought new industries such as silk and metalworking and related processes to England. But the English monarchs began to abuse this power, granting unlimited-duration patents for increasingly trivial mining processes and rudimentary, long-established industrial practices.\footnote{Ibid.}

Therefore, when this first modern patent law, \textit{The Statute of Monopolies}, became law in 1623, it had two goals. First, it invalidated all patents past, present, and future. Every patent given by the current monarch, or those before him became null and void. Secondly, it codified English patent regulations for the first time ever: no longer could patents be arbitrarily awarded. In order to be awarded a patent, one had to have been the originator or inventor of the process in question. Patent lengths were now explicitly regulated as well. A simple patent could no longer have an unlimited duration, as a limit of fourteen years was placed on each filing.\footnote{Ibid.}

The idea of intellectual property then began to accelerate quickly, with the first copyright law introduced less than one hundred years later. \textit{The Statute of Anne} in 1710 allowed publishers of written works in England exclusive rights for publishing and distribution.\footnote{Meredith L. McGill, “Copyright and Intellectual Property: The State of the Discipline”, \textit{Book History} 15 (2013): 388.} Following influence from across the Atlantic, United States intellectual property law was then similarly codified over one hundred years later,
following the lead of the English statute. *The Patent Act of 1790* established the same fourteen year protections like in Britain, with the option to renew the patent for another fourteen years.

By 1880, with international commerce now regular and routine, there was clearly a need for international agreement on intellectual property. The previous decade has begun to see a curious trend in international patent law: in an international exhibition of inventions in Vienna, numerous international innovators refused to take part in the exhibition due to concerns over the legal protections available to protect their inventions from copying. As a result later that year, the Austrian government passed a law to specifically address these concerns. Shortly thereafter in 1878, an international organization convened in Vienna to design an agreement on international intellectual property. The resulting 1883 *Paris Convention for the Protection of Industrial Property* brought together eleven countries, mostly those from Europe and South America, in mutual agreement to honor any patent granted under each of their respective laws in every other territory.\(^7\) It must be made clear that, while the treaty regulated mutual recognition of patent law, it did not create or imply a *de facto* unified international patent system. Each member country maintained its own patent system, and the agreement explicitly stated that each system should be separate. That is, the status of a patent in one country must not affect the status of the same patent in another, meaning that a patent in the Netherlands would be recognized as valid in Spain under the terms of Dutch law.\(^8\) In 1886 the *Berne Convention for the Protection of Literary and Artistic Works* was adopted for the international recognition of copyright. More than just a simple international agreement on copyright,

\(^7\) This initial version of the law included a number of European IP heavyweights such as France, Spain, and The Netherlands, but curiously did not involve England.

Berne codified a new way of thinking: intellectual property and the protection of its rights became to be a new measuring stick upon which a country was measured on the international stage.

IP law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with each other in regions beyond Europe. The early period of European contact through trade with non-European peoples thus was characterized predominantly by the extension of IP laws to the colonies for purposes associated generally with the overarching colonial strategies of assimilation, incorporation and control. It was also characterized by efforts to secure national economic interests against other European countries in colonial territories.  

Not to be left out, the United States then enacted an international-looking copyright law soon after in 1891. That law, the plainly-titled *International Copyright Act*, extended protections of copyright in the United States to foreign nationals for the first time. Again allowing fourteen-year duration of copyright, the act allowed the President of the United States, at his discretion, to offer copyright protections to nationals of those countries who had substantially similar copyright laws to the United States. Thus, nationals of much of Europe were able to apply for copyright.

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However, by 1893, a specialized international group was needed to handle increased intellectual property tasks. Both the Berne and Paris conventions created separate international bureaus for the administration of international intellectual property law. These bureaus then merged to create the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectualle, or BIRPI.\(^\text{12}\) BIRPI administered international IP relations until 1970. “Administer” can be a frustratingly vague term in the arena of international politics, but BIRPI did much more than just issue periodic communiques and take up space in an office block in Geneva. After 1945, when the United Nations founded, BIRPI’s Deputy Director-General, Arpad Bogsch, took it upon himself to preach to developing countries about the significant advantages of adopting strong IP laws. Several conferences were organized to that effect in the 1950s and 1960s.\(^\text{13}\) Ultimately, BIRPI was unable to widely convince developing nations to enact strong IP laws. But Bogsch did not stop pushing for stronger enforcement and international cooperation.

In 1970, with Bogsch’s involvement, a newly-enacted resolution came into effect which effectively eliminated BIRPI, and created a new agency called the World Intellectual Property Organization.\(^\text{14}\) WIPO became a full UN agency in 1974, whose organizational objectives are:

(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,

(ii) to ensure administrative cooperation among the Unions.\(^\text{15}\)


\(^{14}\)Ibid.

Being a UN-chartered organization, WIPO is highly transparent, and works closely with other international agencies, and State agencies throughout the world to promote IP issues. According to WIPO, its activities fall into several broad categories. There is an enforcement and dispute arm that actively seeks to protect IP interests throughout the world, and offers its mediation services to organizations involved in international IP disputes; a policy arm which is home to a series of committees that act as think tanks on a variety of IP issues; and a political arm which works with developing nations to effectively build strong IP and IP enforcement infrastructure domestically.\textsuperscript{16}

As part of that domestic enforcement, the United States relies on a rich legal tradition of common law as part of its’ judicial history. Precedent and case law go a long way in defining the modern American legal landscape. For example, when the law as written was unclear in a recent high-profile IP case, \textit{Association for Molecular Pathology v. Myriad Genetics}, the decision and lawmaking ability rose all the way to the US Supreme Court. In this case, Myriad Genetics patented two genes that Myriad believed were indicators of cancer. The issue at hand was that these two genes were naturally occurring, and not created by Myriad. Therefore, their usefulness had been discovered, and not created. The Supreme Court ruled that in such a case, even though Myriad had gone through expense to discover them, the genes themselves were ineligible for patent protection. The methods used to find them, and synthetic versions, should those be created later, were able to be patented, but not the genes themselves.\textsuperscript{17}

The law in the United States is not all precedent, of course. The United States Copyright Act of 1976 significantly strengthened copyright protections in the United States, and, as amended since then, stands as our current copyright law. It specifically defines what is copyrightable, how long, and under what terms. Weighing in at a hefty 366 pages, it is elaborate, thorough, and a veritable tome of definitions, provisions, and regulations.18 But by no means has this law remained static in the nearly forty years since its inception. It has been revised over a dozen times since being written. Most notable in these are the repeated and seemingly perpetual extensions on copyright term limits, which are currently seventy-five years past the year of the author’s death.19 Not all of these revisions have been about the extensions of copyright terms, however. More recently we have come to see Digital Millennium Copyright act of 1998, legislation designed to address issues of copying and digital circumvention in the 21st century. The DMCA was essentially born out of necessity of the fact that the meaning of copyright was ill-defined in the fast-moving world of the internet, a cause championed by WIPO.20

19 Ibid.
Intellectual Property Law in The People’s Republic of China

While there is a strong, nearly 2500-year tradition of Intellectual Property protections in Europe, China is the exact opposite. Intellectual Property protections, and especially modern, robust intellectual property law and applied enforcement have been codified relatively recently in the People’s Republic of China. There are three plainly-titled laws that comprise the entirety of Chinese IP regulations: *Copyright Law of the People's Republic of China*, *Trademark Law of the People's Republic of China*, and *Patent Law of the People's Republic of China*.21 The oldest of these by conception is *Patent Law*, which came into force in mid-1982, making it, in some cases, hundreds of years more recent than similar laws which existed in Europe and America. It has been amended three times, in 1992, 2000, and 2008. In all three cases, the law was amended to enable China to keep pace in a modern, international community, and was amended mostly by necessity: as China became more integrated with the international systems, membership into them mandated modern, robust, IP infringement protections, especially for international organizations wishing to do business in an industrializing China.

The idea of intellectual property was first introduced during the Qing dynasty in China by foreign traders, but did not “stick” as an idea until much later in the 20th century. In the mid-to-late 1980’s, China had dreams of industrializing and becoming a major contributor to the world’s economy. International organizations, such as the UN’s World Bank, emphasize the idea of “good governance” as a requirement

21 This is not to say that these are the only laws involved in IP enforcement in China. Rather, they lay down the ground rules. There are quite a few other specific laws such as *The Tort Law of the PRC* and *The Customs Law of the PRC* are used in concert in enforcement scenarios.
for a developing country to be successful. “Good governance” can be variably described as a strong set of laws which are congruent with international norms, the means and a will to enforce those laws consistently and fairly, combined broad anti-corruption initiatives, transparency policies, and meaningful and honest dialogue about progress through the development process.\textsuperscript{22,23}

As part of this spirit of good governance, China’s laws regarding international trade and commerce had to be brought into line with accepted international standards. Thus, in 1982, the first IP law was enacted in The People’s Republic of China, the *Trademark Law of the People's Republic of China*. Going into full effect in 1983, this was the first time that China, a traditionally and strongly collectivist society, had recognized the domestic right to intellectual property rights.\textsuperscript{24} The right to patent an invention came not long after, in 1984 from *The Patent Law*, and by 1991, China had a similar *Copyright Law*, as well.\textsuperscript{25}

I can be clearly seen that the drive for IP reform seems driven by international pressure. For example, the *Patent Law* has been revised three times, with the forthcoming fourth revision each time upon the PRC’s ascension to various agreements, be it the WTO or TRIPS. But even after all of this, the three laws weigh in at no more than a few dozen pages each. So, considering their relative brevity, these laws do not comprise the entirety of all IP regulation and promotion activity in China. As defined in the *Patent Law*, there are agencies at the city and provincial level to mediate and enforce IP activities.


The source of law in the People’s Republic of China is different than the lawmaking process in the United States, but not vastly so. Chinese laws are introduced into the National People’s Congress, a nearly 3000-member parliament, where they are then voted upon and approved or denied. The vast majority of laws put before the NPC are approved, but there is a significantly amount of intra-party negotiation beforehand, and lawmakers often come to an agreement to pass a particular law before the measure is put to the NPC for a vote. In the case of intellectual property, Chinese law allows for provisions for local IP agencies. These agencies enhance existing laws and regulations via trial programs and promotion activities, but are unable to criminalize actions. Such an action is exclusively reserved for the NPC. This is a significant difference from American and European laws, as IP infringement in China is not what in those countries would be considered a civil matter. A civilian can initiate a complaint, but the route they take through the court system is always criminal, even if they initiate the complaint to the court. This makes for an interesting ideological point. In China, technically all law is what we would consider criminal, but referred to as civil. In a state that is communist by definition and capitalist in practice, the lines between personal property and state property are often blurry. As previously mentioned, the difference in length between Chinese and American IP law is substantial, which in part can attributed to the relative maturity of their respective legal systems, but it also underscores a different style of government. The People’s Republic of China does not have a regimented system of checks and balances that the United States government has. In effect, the only responsibility that judges within the legal system have is to the law, and thus to the Communist Party of China. In this case, since the law is very sparsely written, the judges must look to society, the Party, and accepted community standards to pass down appropriate judgment.

But having such a sparse law, a large and economically powerful country such as the PRC must be able to remain nimble and try new methods of enforcement without disrupting the entire system. While
perhaps not being effective, as there is no level of transparency in the process and thus no way to measure, the Chinese legal system is at least trying, or pretending to try. Below, in the Appendix, is provided a translation of a pilot program: a patent protection program in Tianjin, a large metropolis in the north of China near Beijing with significant export interests. It is clear that the Tianjin IP office wants to initiate a voluntary patent protection program, but does not do a very good job at explaining exactly what this will entail. It speaks broadly about ideologies, but when it comes to making mention of the various methods to be used, it purports to describe them, but again says almost absolutely nothing besides a few vague references to early warning systems and newly designed reporting systems. Therefore, it is likely phrased this way as to not rock the boat, so to speak, or cause any widespread problems or confusion.
International IP Infringement: What the Numbers Do Not Say

Trying to quantify IP infringement with any precise amount of certainty is extraordinarily difficult. Black and grey market transactions, and especially those which involve the internet, are immensely difficult to measure. An examination of research on the quantification of more traditional black markets reveals a few interesting points. In an article about the amount of money involved in Peru’s illicit drug trade in the late 1980s, there are two separate estimates presented, each from a different source: about $1 billion from a Peruvian academic team doing research on the topic, and $1.08 billion from Peru’s government. The article implied that these numbers yielded from a variety of factors—for example, the average international market price for the yield of cocaine from the estimated size of the fields in Peru, less domestic consumption. All these numbers are “easy” to estimate, since they fall into clear-cut categories. Large-scale coca growing operations are difficult to hide, and the outcome of the cultivation process is powdered cocaine, which is distinctly packaged and easy to recognize when found.

Conversely, trying to quantify IP infringement is a comparative nightmare. To tell if something infringes on IP rights is by no means straightforward. Certain categories of IP infringement, such as counterfeit Louis Vuitton bags and Rolex watches, are sometimes easy to quantify and to discern from legitimate goods. Others, such as a fake pre-installed GE-branded light bulbs in a lamp assembly, are less easy, since they (ideally) accomplish the same task. In this same vein, there is anecdotal evidence that up to 30% of SanDisk-branded SD memory cards that are sold throughout the world are counterfeit. Since to the average consumer there is no reliable mechanism that enables them to differentiate between real

and fake cards, they are, unfortunately, forced to rely on the production quality of the packaging as a
gauge, which is arguably the easiest step of the counterfeiting process. Most consumers, however, will
never notice that they’re using a counterfeit SD memory card, and more troublingly, won’t care.

Software is an even murkier endeavor, since it is almost always distributed through the internet,
and even the most cutting-edge technological countermeasures are defeated by determined individuals and
organizations. But a few organizations have actually tried to actually quantify software infringement. The
most prominent of them, The Business Software Alliance, or BSA, attempts to quantify the effects of
mitigating and eliminating software piracy worldwide. Instead of concentrating on a total figure of all
software being infringed, they instead make an attempt to determine the broader economic effects of
pirated or unlicensed software use. Their most current formal study, “Competitive Advantage: The
Economic Impact of Properly Licensed Software,”27 claims that for every one percent of decreased
software piracy worldwide, $15 billion of value will be added to the United States economy. What’s
really fascinating is that according to the BSA, the countries that see the greatest economic impact of using
properly licensed and paid for software are low-income countries and emerging markets. For example,
the United States sees a return of $117 for every $1 spent on properly licensed software, while countries
that fall into the low-income category see that figure jump to an astonishing $413 per every dollar.28

In 2010, the United States Senate Committee on Finance instructed the United States International Trade
Commission to attempt to quantify the scope of IP infringement by Chinese organizations. The
commission took a rather interesting approach to gathering this data: the USITC sent an IP questionnaire

28 Ibid.
to its members considered to have a high likelihood of their IP infringed upon. The results were fascinating: approximately 58% of those who responded reported that their IP had definitely been infringed upon, but the remaining 42% were either unable to measure the level of infringement, were not affected, or did not know if their IP had been infringed upon in any material way. This total sample size reflected a few over 5,000 businesses. There are approximately 168,000 businesses in the United States. Of that 58% of 5,000, trying to quantify infringement is really not much more than an educated guessing game. The result of the USITC study indicates a staggering infringement range of $14.2 billion to $90.5 billion, with a “best guess” of $48.2 billion.

The International Chamber of Commerce’s Crime Services Division, or ICCCSD, prepared a report in 2011 which attempted to quantify all counterfeiting worldwide. In their introduction, they discuss their methodology:

The publicly available data is from reputable sources such as national governments and the OECD, and is supplemented where necessary with data and analysis from industry associations, businesses and academia. We have based the assumptions used in the analysis on existing data and analysis where possible and have in all cases made the assumptions used as conservative as possible. For instance, in projecting the value of counterfeiting and piracy to 2015, we have assumed growth rates considerably below those observed between 2005 and 2008. The main body of the report sets out in detail the assumptions used in the analysis, the basis of those assumptions, and the impact that they have on our analysis. If we break down this disclaimer, the ICC is attempting to say one thing very clearly: they base their numbers off of other researchers’ studies, assign conservative weights onto them, and then combine them

to obtain an aggregate figure. Thus, their information is still based off the same techniques that were previously discussed: best guesses and “hard” data based on shaky grounds. That being said, the ICC calculates the total value of all counterfeited and pirated products in 2008 as being between $1.22 trillion and $1.77 trillion.\textsuperscript{31} 

\textsuperscript{31} Ibid.
The Reason: A Collectivist Tradition

Confucian ideals permeate all levels of Chinese society from bottom to top. One of the core tenants of Confucianism is humanness, or 仁. 仁 is a combination of two Chinese characters. The portion on the left is the radical for the Chinese character 人, which means person. On the right is that is the Chinese character for the number two, 二. Thus, to be humane, you need two people. There can be no humaneness by oneself, and to be a good and just person, you must have interconnections to other people. The core text of Confucianism is titled the Analects, and it contains verses that Confucius is purported to have said. Within the Analects there are numerous examples of Confucian teachings which extol the collectivist nature of Chinese society and politics.

Duke Jing of Qi asked Confucius about government. Confucius replied, “Let the ruler be a ruler; the minister, a minister; the father, a father; the son, a son.” “Excellent,” said the duke. “Truly, if the ruler is not a ruler, the subject is not a subject, the father is not a father, and the son is not a son, though I have grain, will I get to eat it?”32

In a Confucian society, ideally, everyone strives to be the archetype of his role. The role of the subject or citizen in Chinese society is entirely a communal one. So, for example, a citizen who engages in large-scale protest is one very much outside of the norm, unless such an action is extremely widespread.

Conversely, in the United States, we have a very strong tradition of individualism, with the citizens vocally, sometimes violently, and almost always publically opposing the government. Indeed, one could argue that Americans have no long-term shared history or customs, being entirely a nation of immigrants. The only thing that unites Americans is their short history, and tradition of political dissent, as either they

32 Analects 12:11.
or their ancestors by and large actively chose to come here in search of a better life. The Chinese state, like many of the other nations on earth, is not easily separable from the Chinese ethnicity. There are certainly ethnic groups in China that do not fit perfectly within the Han majority’s version of Chinese-ness, but overall, the Chinese people are the Chinese government are the Chinese civilization. That has certainly not always been the case, as China has for almost none of its history been completely unified. Even today, The Republic of China, commonly known as Taiwan, is separate from The People’s Republic of China. Since almost as far back as we can trace the idea of China, there has been conflict and in-fighting amongst various clans and dynasties over who controlled “China.”

There is a saying in China: “天高皇帝远,” or “Heaven is high, and the Emperor is far away.” This phrase well represents the fact that even in brief moments of unification or semi-unification, the central government of China has never been powerful compared to local and provincial officials. In China’s traditional domestic sphere, a minimal state structure effectively controlled a massive society by making only limited demands on it, expecting society to control itself through its strong family system. It endured for so long because it involved a carefully constructed division of labor and a balance of power and authority among society.33

This same rule essentially applies today. The central government is more powerful to a certain degree than it was during dynastic times, but there is still immense power held by the provincial governors and the mayors of large cities. Thus, while the Chinese central government can dictate national IP policy, enforcement of regulations varies highly. The Communist Party of China, in its quest for economic growth,

values nothing more highly than stability, as they believe that only through and after stability does growth occur. Heavy-handedly applying IP enforcement onto the lower echelons of government when their support is by no means guaranteed is a risk and confrontation that is often avoided by today’s Chinese government. China’s populace does not have a strong tradition of a central power and lawfulness; in fact, Confucianism was born from this conflict. It is, though, an ideal that is changing as China acclimates to being a world power. But with softly-worded laws and the fear of retribution as a contributing factor in the mind, especially considering their rapidly increasing quality of life, dissent, even when “significant” is not widespread. An example of this is the Three Gorges Dam, a massive industrial project in Hubei province. In 2008 it became operational after a planning phase of roughly fifty years and nearly twenty of construction, at a cost thought to surpass 100 billion US dollars. Constructed across the Yangtse River, over a thousand miles upstream from Shanghai, the dam satisfies a need for massive electrical generation in a rapidly growing and industrializing region of China. However, when one constructs a dam, one almost always creates a reservoir in the process. The Three Gorges Dam is no exception to this reality of physics. Located in a hilly part of the country, the reservoir created by the construction of the dam raised the water level by nearly six hundred feet, and flooded over 60,000 acres of land.34 In the process, nearly one million people, mostly those who were farmers or citizens in small villages or cities, were displaced and relocated by the Chinese government. This was no example of Confucian altruism at play, but rather an order given to citizens, in essence saying “you will be helping your country by your sacrifice, please relocate,” with the expectation of obedience. By and large, this order was followed, the motivation being first a collective

notion, but on another level it was unwillingness to challenge a powerful regional governments eager for electricity.

In stark contrast, within the United States, to commence upon such a gigantic and land-altering project, especially in 2014, is lengthy and difficult. Upon the mere mention of a large public works project, many parties directly involved, and many not, would instantly threaten and commence lawsuits on every ground imaginable, from imminent domain, to environmental, to everything in between. Since the United States has a notion of private property, such lawsuits would be allowed to proceed and they would likely remain in the courts for years. For example, a major project, the Keystone XL project, an oil pipeline that carries oil from Canada to the Gulf of Mexico was proposed in 2008, as of 2014 is still encountering legal challenges on several fronts. The entirety of the pipeline could have been built three times in the amount of time the project has been debated. However, in the People’s Republic of China, such issues are practically non-existent. There are certainly those who resist the construction of a project such as this, but they are largely in the minority, and the construction of mega-projects such as this commence with all deliberate speed. This is an example of the strong collectivist tradition which is alive within the Chinese state, something that the United States does not have. It is not a mega-project without purpose, it serves a very real need to improve the lives of many more citizens than it displaces. Though this example is recent, it is not united. Both the recent communist state and the Confucian dynasties of the past share this ideal, as it is imbued deeply in the fabric of China. Again, the Analects speak to this effect:

Zigong said, “What would you say of someone who broadly benefited the people and was able to help everyone? Could he be called humane?” The Master said, “How would this be a matter of humaneness? Surely he would have to be a sage? Even Yao and Shun were concerned about such things. As for humaneness — you want to establish yourself; then help others to establish
themselves. You want to develop yourself; then help others to develop themselves. Being able to recognize oneself in others, one is on the way to being humane.”

So, in this example, by helping others, one helps oneself. This can be applied to the example of the Three Gorges Dam. This large scale project, while negatively impacting a few, provides an immense electrical generation capacity to many, many others. If you think about that in the context of Confucian humanness, it makes sense. For Keystone XL, the objections are purely individualistic: “the pipeline will take my land,” or “the pipeline could negatively impact my environment.”

Certainly Chinese officials do not carry around Confucian texts with them daily, or think about and quote specific passages of Confucius at every chance. China also more recently has another strong tradition in Communism. In the first half of the 20th century, China was engaged in a civil war. The Nationalists, or Kuomintang fought bitterly with the Communist Chinese forces for control of mainland China. The KMT ultimately lost, and were forced to retreat to the southern island of Taiwan. Mao Zedong and the Communist Party of China had united mainland China under the banner of the People’s Republic of China.

Confucian ideals are collectivist in nature, but the harshly leftist views of Mao and the PRC were much more severe than anything that had previously been seen in China. Under Chinese dynastic rule, for example, the concept of private property and open markets were ideals that flourished. In the PRC, all property became that of the state. Mao’s revolution took place in 1949, just as most “western” countries had already industrialized, and had mature IP legislation, both domestic and international. But Mao’s rule

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35 Analects 6:18.
has been described in many ways, and the most articulate of which can be described as absolute. It was Mao’s revolution, his Communist Party of China, and his PRC. Mao was the Emperor, and China began down an initially successful path of Marxist transformation. In this world the idea of Intellectual Property was literally and figuratively very foreign. How could one own property, and much less an idea if there were no individual property rights, and every person is an employee of the state?

Mao, while creating a void in which IP was nonexistent, inadvertently also created the circumstances for its introduction. Immediately after the revolution in 1949, the policies of the PRC government were successful in creating a Marxist China. However, nearly a decade later, Mao put the country onto the path of rapid industrialization, under a program titled The Great Leap Forward. It was an absolute disaster. Unrealistic production targets combined with the harsh collectivization of land in the countryside led to widespread food shortages and ultimately famine. The PRC was heavily demoralized, and the government and even Mao himself lost credibility as a result. Mao would regain credibility later during the Cultural Revolution, but it would be short lived. The widespread social chaos in the aftermath of The Cultural Revolution combined with Mao’s aging and fade from power complimented his downfall, and finally culminated five years later upon his death.

Deng Xiaoping succeeded Mao Zedong in 1976, and immediately began a period of reforms. “Society was so weakened and fractured by Mao’s repeated campaigns … Government institutions had been broken or suspended … the National People’s Congress had not met in full since 1964.” In addition

37 Ibid, 76.
38 Ibid, 105.
to reforming the fabric of the Chinese government, Deng Xiaoping put sweeping reforms into motion
which allowed some market competition in agriculture: community farms were allowed to compete with
the larger state-owned farms. Small privately-owned businesses were officially allowed again after almost
thirty years.\textsuperscript{39} As China began in earnest to industrialize, and begin down the road of capitalism, the world
took notice.

\textsuperscript{39}Ibid, 111.
Modern IPR Realities in The People’s Republic of China

Along with industrialization came international investment, and the immense amount of capital that follows it. In the 1980s, just as we saw China beginning to open its markets, we saw IP reforms: but only as mandated prerequisites for participating in the international economy. Indeed, mandated is the correct word because China has largely not innovated technologically in any significant way.

In 2005, when the Chinese firm Lenovo wished to design and manufacture laptop and desktop computers, rather than set up its’ own operations from scratch, they outright bought American computer vendor IBM’s entire personal computer business. Nine years later, in 2014, they are the largest computer manufacturer in the world by volume. In 2013, Lenovo wished to build a mobile phone. Again, rather than innovate, they purchased. In this case, Motorola Mobility, freshly itself acquired by Google. That combined with their previous smartphone assets made them the number three smartphone manufacturer in the world. 40

But now that Chinese firms have begun to amass an IP portfolio of their own, the number of IP claims domestically have swelled. At the local level, 114,075 IP cases were filed: 9,159 patent cases, 23,272 trademark cases, 51,351 copyright cases, and the remainder in miscellaneous trade practice and cooperative agreement cases. 41 In terms of trademark cases, this represents a 17% increase over 2012’s

41 This figure includes all accepted cases. Usually, these Chinese courts will make an attempt to mediate the dispute and encourage a settlement before proceeding into the full-trial phase.
data. Many of these cases make it all the way to the Supreme People’s Court, which, unhindered by precedent, accepted 457 IP cases alone, a 92% increase over the previous year.\footnote{“Intellectual Property Protection by Chinese Courts in 2013,” Judicial Protection of IPR in China, accessed May 12, 2014, http://www.chinaiprlaw.cn/file/2014042732499.html.}

When compared to the American law, as stated earlier, Chinese law is relatively brief. Take these two brief excerpts from the Chinese copyright law, articles 7 and 29, which discuss the administration of copyright, and

\begin{quote}

\textbf{Article 7:} The administrative department for copyright under the State Council shall be responsible for the administration of copyright nationwide. The administrative departments for copyright under the people’s governments of provinces, autonomous regions and municipalities directly under the Central Government shall be responsible for the administration of copyright in their respective administrative regions.
\end{quote}

\begin{quote}

\textbf{Article 29:} No publishers, performers, producers of sound recordings and video recordings, radio stations, television stations, etc. that exploit another person’s work in accordance with the relevant provisions of this Law may infringe upon the authors’ rights of authorship, revision or protection of the integrity of the works, or their right to remuneration.\footnote{“Copyright Law of the People’s Republic of China (As Amended up to the Decision of February 26, 2010, of the Standing Committee of the National People’s Congress On Amending the Copyright Law of the People’s Republic of China),” WIPO Lex, accessed May 12, 2014, http://www.wipo.int/wipolex/en/text.jsp?file_id=186569.}
\end{quote}

These articles lay down regulations, but are not specific. The actual administration of copyright is mostly reserved to officials at the local and provincial level, who are given wide latitude to interpret the legislation as they see fit.\footnote{Ibid.} As a counter-point, consider the following excerpt from American Copyright law.

\begin{quote}

\textbf{§ 1004} Royalty payments
\end{quote}

\footnote{Ibid. Again, for an example of this, please see the Appendix.}
(a) Digital Audio Recording Devices.— (1) Amount of payment.—The royalty payment due under section 1003 for each digital audio recording device imported into and distributed in the United States, or manufactured and distributed in the United States, shall be 2 percent of the transfer price. Only the first person to manufacture and distribute or import and distribute such device shall be required to pay the royalty with respect to such device.46

This section very clearly states what the royalties of digital audio devices are, who shall pay them, and under what circumstances they shall be paid. Obviously intended to make sure copyright law is enforced equally everywhere, this is an element not seen in Chinese law as a whole. The Chinese must have some sort of guidelines for those who infringe upon IP, however, and those guidelines are elaborated upon in circulars and official guide documents.

A copyright administrative department may impose on the infringer the following administrative penalties: (a) to order him to discontinue the infringing act; (b) to confiscate the unlawful gains; (c) to confiscate or destroy the infringing copies; (d) to impose a fine on him; (e) to confiscate the material, tools, equipments, etc mainly used to produce infringing copies if the circumstances are serious; and (f) to impose other administrative penalties provided in laws or regulations.47

This is a large degree more specific than the law itself; but again leaves judges and judicial administrative officials an enormous amount of breathing room to officiate how they see fit.

With such a meteoric rise in cases, the majority of which are for very small claims, this is a clear indication that the Chinese IPR engine is “gassed up” so to speak, and may show signs of running. It is likely though that it will only begin in earnest, and on the international stage once Chinese firms have significant amounts of global IP to protect; a process that has clearly started, but is a long way from being complete.

47 Ibid, Copyright Law of the PRC.
Conclusions

China is in many ways unique amongst Asian countries, in population, scale, and modern political tradition. It is also vastly different, philosophically, than European countries and the United States. For thousands of years, China has understood the world through a fundamentally different philosophical lens that has valued collectivism and community well-being, be it through Confucian dynastic rule, or the more recent authoritarian communist regime. The collectivist ideal is so deeply interwoven into the Chinese civilization that the concept of intellectual property is foreign to China. History provides us with some clues as to where China will go from here. Japan and South Korea industrialized rapidly under the banner of Democracy and capitalism, and IP rights infringement issues take place at a lower rate in those territories. Others, like Vietnam, have followed the Chinese model and face similar near-term issues, albeit with not nearly as favorable of an outlook.

Sensationalized accounts, media exposure, and guesstimates will not do anything for finding a solution to rampant IP infringement in China. The solution is already baked-in to the world in which we live. Japanese and South Korean firms are able to innovate with significant amounts of success because they no longer have to industrialize and worry about building up a solid industrial base. Their design staffs no longer have to worry about underlying technologies, and can afford to spend time thinking about new ones. Once Japan industrialized, and was able to do so with great help after World War II, they became an economic powerhouse. In the late 1980s, as their economy began to wane, they looked overseas for salvation. The answer was culture and innovation, and the US and European markets.48 Of

course, Japan is different than China in many ways, but their example can provide us with clues as what is to come. As China creates more IP of its own, it will be more eager to protect it. To be able to protect it, it will likely begin to enact stricter IP regulations of its own accord. This could all certainly be thrown off by the Chinese government’s obsession with stability, but as China’s manufacturing base cools off from its current red-hot state, there will be a demand for something to manufacture, and that something has a good chance of being domestic. All of these reasons and nuances of the IP situation do not provide conclusive proof, but rather suggest that the reason that intellectual property is being infringed upon is because it is tolerated by a country with a philosophical predisposition against it, and a political and judicial system just beginning to address it. The culture, philosophy, and politics of China have yet to guide it through industrialization, wherein we will likely see not just significant levels of Chinese IP, but IP designed for export. Thusly, when viewed side-by-side with the traditions and customs in Europe, and especially the United States, it is easy to see why intellectual property protections as Americans, Europeans, and other more individualistic societies view them are lax. Going forward we can look to other areas in Asia, such as Japan or South Korea as an example of what can happen after rapid industrialization, but in many ways it’s hard to tell. We must rely on the suggestions, patterns, and ideals of China’s past in order to understand its present and future. Therefore, the best that can be done at the moment is to encourage better enforcement, but the world will likely just have to wait and see.
Notice in Reference to the 2013 Report on Tianjin’s Patent Protection Pilot Program.

Elements of concern:
For the purposes of implementing practical city-wide initiatives to “promote development, improve the people, while being completely on the level”, making plans and requirements to promote the city’s economic development, thoroughly implementing intellectual property strategy, strengthening and solidifying progress in promoting small and medium-sized tech businesses, feasibly increasing patent enforcement capabilities, strengthening international competitiveness, obtaining a superior position in the marketplace, all under the “Tianjin Patent Protection Pilot Trial” program. The municipal patent office has begun this patent protection task. Please take notice of the following items:

1. The Objective of the Pilot Program
A thorough and practical IP rights strategy using “Tianjin Patent Promotion and Protection Regulations” to achieve “Twelfth Five-Year Plan” objectives, promote small and medium-sized tech firms, to lead businesses to improve patent protection mechanisms, to increase responsiveness in dispute resolution, to cultivate top-tier patent protections, and to strongly foster market competitiveness by promoting IP rights enforcement on the municipal level.

2. The Pilot Program Details and Goals
To carry out test program work, to select key points belonging to the city, to have preferable IP foundations for tech firms, to re-evaluate and reassess patent protection capabilities, to balance IP rights with the increased ability to protect IP, and to obtain a dominant position in the market. The pilot program will comprise of the following details:

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Appendix: 关于申报 2013 年天津市专利试点（保护类）的通知.
天津市知识产权局主办
各有关单位：
为了贯彻落实市委市政府“促发展、惠民生、上水平”工作部署和工作要求，促进我市经济发展，深入实施知识产权战略，扎实推进科技型企业健康发展，切实提高专利保护能力，增强国际竞争力，取得市场竞争优势地位，根据《天津市专利试点（保护类）实施办法（试行）》，市知识产权局决定启动 2013 年度天津市专利试点（保护类）工作，现将有关事项通知如下：

一、试点工作的目的

深入落实知识产权战略和《天津市专利促进与保护条例》，实现“十二五”规划任务目标，促进科技型企业健康发展，引导企业建立完善的专利保护机制，提高应对纠纷的能力，培育一批专利保护能力突出，具有较强市场竞争能力的领军企业，促进知识产权强市建设。

二、试点内容和目标

开展保护试点工作，选择属于我市重点发展领域，具有较好的知识产权工作基础的科技企业，重点提高专利保护能力，兼顾
a. Move further to improve the patent protection system in the following areas: IP rights management systems, powerful IP development, manufacturing, operating key patent enforcement provisions, investments in import and export activities, and the development of regulation systems to handle patent disputes.
b. Develop patent analyses beforehand, and to establish patent violation risk early warning systems. The principle details of which are: domestic and international technological trends in patent development, main competitors’ patent situations, the extent of that protection, the possibility of patents conflicting with the rights of others, and the execution of these specific measures to be taken, etc.
c. The Implementation of patent protection. Taking into account the reports of early warning systems, to improve our patent composition, risk assessment capabilities, and to take the initiative to defend underlying ideals and rights.
d. During the pilot program, we should actively and intensively be training businessmen, researchers, and marketing staff in patent protection.

3. The length of the pilot shall be a period of three years.

4. What shall be reported:
   a. As part of the city’s important development areas: to possess decent working knowledge of IP rights, have crucial technological IP rights secured, have a strong authority on research and development, have high levels of IP creation, the
A useful capability to understand patents and technologies on all levels for businesses big or small.

b. To be declared by the person in charge of a work unit who is well-versed in IP protections, and who has a high level of work ethic in IP protection: to determine and strengthen IP protections if such a need is recognized, and to ensure the underlying conditions needed to attain that level.

c. With the understanding that tech exports are a priority, the economic benefits of IP reporting.

d. Tianjin City patent demonstration units are no longer to report.

5. The manner in which there will be reports.

a. On the county level: 1-2 businesses per industrial sector.

b. They shall fill out an application and submit them in a timely manner.

c. On the county level: there will be a unified audit submitted to the IP protection office by May 10th.

d. The Tianjin IP protection office will determine the end of the pilot program.

6. Application materials:
（一）《天津市专利试点单位申报书》（见附件，相应位置加盖申报单位及主管部门公章）。
（二）《专利保护试点工作实施方案》（企业基本情况、知识产权管理机构和人员情况、试点工作基础、试点工作内容和目标、进度安排、保障措施、发展前景分析等，4000 字左右）。
（三）单位组织机构代码证复印件，企业工商营业执照复印件；
（四）重点产品中关键技术的发明专利法律状态证明（专利登记证副本）复印件 1-2 件；
（五）其他相关证明材料。
以上材料一式五份，《天津市专利试点单位申报书》、《专利保护试点工作实施方案》需同时提交电子文档。
附件：《天津市专利试点单位申报书》

联系人：李学诚 张军
电 话：23039863(fax)
邮 箱：law@tjipo.gov.cn
地 址：天津市华苑新技术产业区华天道 6 号海泰信息广场 G 座 2 楼 218 室 300384
2013 年 4 月 27 日

a. A declaration of intent.
b. 4000 words on the basic operations of your enterprise, and existing IP protections in place.
c. A copy of your business license.
d. Copies of your important products’ important technologies.
e. Any other relevant data.

Five copies of the above materials to be submitted electronically.

Contact Person: Li Xuechang
Telephone: 23039863 (fax)
e-mail: law@tjipo.gov.cn
Address: Tianjin Magnificent Park New Tech Industrial Zone, Magnificent Sky Road, Block G, Number 6, Hi-Tech Square, 2nd Floor, Room 218, 300384.
April 27th, 2013.
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