

**The Evolution of Intellectual Property Rights in China:  
Moving Beyond Legislative Reform to the Challenges of the New Millennium**

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## **Introduction**

Intellectual property rights issues in the People's Republic of China have exploded in the last thirty years with the opening of the Chinese economy. As a result, foreign nations and multinational corporations made establishing strong intellectual property protections in China a priority in the late twentieth and early twenty-first centuries. The growth and development of intellectual property rights in China has not been smooth. A historical and cultural legacy that has not embraced intellectual property, combined with political and economic systems undergoing radical and rapid changes, have resulted in an intellectual property environment that is sometimes caustic and adversarial. However, issues of intellectual property rights in China cannot be ignored; they are essential to China's continued economic growth and essential for outsiders eager to enter the booming Chinese market. This paper will provide an overview of the historic development of intellectual property rights in China, as well as offer suggestions about future directions for the continued development of those rights.

Part I will provide a historical background, including the impact of intellectual property rights development under China's dynasties, the impact of Confucian philosophy on attitudes towards intellectual property, and the impact of the Communist revolution.

Part II will explore the development of intellectual property rights in China after the devastating effects of the Cultural Revolution, the impact of economic reforms and openness under Deng Xiaoping, and China's increased participation in multinational bodies such as the World Intellectual Property Organization and the World Trade Organization.

Part III will explore the current limitations of intellectual property rights enforcement in China, including the exhaustion of WTO mechanisms, as well as the administrative enforcement and judicial enforcement problems that plague China today.

Finally, Part IV will examine the future of intellectual property rights in China, examining various administrative and judicial reforms, the impact of development on Chinese domestic enterprises, and the new role for foreign powers and multinational corporations in shaping intellectual property rights in China for the future.

### **Part I: Historical Background**

Debate surrounding Intellectual Property Rights (“IPR”) in modern China cannot be properly discussed without historical context regarding the role of intellectual property in Chinese history and culture. This section provides a limited background regarding the development of cultural attitudes towards intellectual property in one of the world’s oldest continuous civilizations. More than 5,000 years of societal development have left a cultural legacy that has an impact felt today, and is too often ignored by critics of China’s intellectual property development.

#### **Intellectual Property in Dynastic and Imperial China**

Ancient Chinese principles of governance may be broadly divided into two predominate philosophies, the Legalists and the Confucians. Chinese Legalism revolves around the concept of *fa*, or laws, consisting of the formal regulations, statutes and codes adopted by the government.<sup>1</sup> A central concept in the Confucian philosophy of governance is the notion of *li*, which amounts to rules of proper conduct based on societal and social norms.<sup>2</sup> The Chinese place a great deal of

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<sup>1</sup> Pat K. Chew, *The Rule of Law: China’s Skepticism and the Rule of People*, 20 Ohio St. J. on Disp. Resol. 43, 49 (2005).

<sup>2</sup> *Id.* at 49-50.

emphasis on harmonious societal interaction, to the point of subjugation of individual interests to the interests of society and the state.<sup>3</sup>

The role of the state has been central in the development of IPR in China. The first trademarks in China are credited to around 2698 BC,<sup>4</sup> and the discovery of early Chinese pottery. Trademarks were also promoted in the Han Dynasty (206 BC–AD220), as a form of consumer protection.<sup>5</sup> Limitations on copying certain written works were enforced by Chinese rulers who wanted to influence and control the beliefs of the literate population, and to protect the accuracy of copied works.<sup>6</sup> These government control mechanisms are not the equivalent of what we may consider intellectual property rights today, but they do show that throughout Chinese history there has been an acknowledgement of the value of intellectual property, with most of the value being allocated to society versus the individual creator.

The Chinese are not strangers to the development of technology, either. The focus on control of written works in China is likely the result of printing, which China developed hundreds of years before the West.<sup>7</sup> This, combined with the emphasis on society over the individual, contributed to notion that works should be copied and shared. Copying and sharing the work of others has long been viewed in Chinese culture as a tribute to the worth of the original work and viewed with esteem.<sup>8</sup> The historical record does not reflect measures to protect the rights of inventors, but given the cultural emphasis on sharing knowledge and the role of the

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<sup>3</sup> Brent T. Yonehara, *Enter the Dragon: China's WTO Accession Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA Ent. L. Rev. 389, 399-400 (2002).

<sup>4</sup> Ke Shao, *Look At My Sign! – Trademarks in China from Antiquity to the Early Modern Times*, 87 J. Pat. & Trademark Off. Soc'y 654 (2005).

<sup>5</sup> *Id.* at 657.

<sup>6</sup> John R. Allison and Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. Pa. J. Int'l Econ. L. 735, 743 (1999).

<sup>7</sup> *Id.* at 744.

<sup>8</sup> Chew, *supra* note 1, at 58.

individual as a contributor to the betterment of society, it is likely that the idea of contribution would prevail over any individual rights.<sup>9</sup>

Western notions of intellectual property came to China largely with the increase in foreign investment in the mid-1800s. China's attempts to address the growing foreign influence led to military conflicts, such as the Opium Wars with Britain.<sup>10</sup> The influence of foreign powers continued to grow, and in 1903, China entered into a treaty with the United States to grant limited patent protection to Americans.<sup>11</sup> The effects of the treaty, if any, were short lived. Following the 1911 Republican Revolution, China adopted a new patent law which provided patent protection only for Chinese nationals, and American's did not end up receiving any kind of patent protection in China until 1923.<sup>12</sup> The 1923 law was also short lived. Following the rise of the Guomindang party in 1928, new copyright, trademark, and patent laws were passed which afforded protection only to Chinese nationals.<sup>13</sup>

#### **Chinese Intellectual Property and People's Republic of China**

Following the period of turmoil during World War II and the Japanese occupation, fighting between the Nationalist Chinese government and the Chinese Communists intensified. The Nationalists ultimately lost to the Communists and fled to Taiwan in 1949, leading to the establishment of the People's Republic of China (PRC).<sup>14</sup>

Under the leadership of Mao Zedong, the Communists repealed all previous intellectual property laws and enacted the *Provisional Regulations on the Protection of Invention Rights and*

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<sup>9</sup> Allison, *supra* note 6, at 744-745.

<sup>10</sup> *Id.* at 745.

<sup>11</sup> *Id.* at 747.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 748.

<sup>14</sup> *Id.*

*Patent Right of 1950*.<sup>15</sup> These regulations allowed inventors to be issued a certificate of invention that provided recognition for their contribution and some limited monetary compensation.<sup>16</sup> However, control over dissemination and use of the invention was still strictly controlled by the state. The regulations did provide an option for patent protection. Subject to approval by the Commission of Finance and Economics, foreign entities which had a physical presence in China could receive patents.<sup>17</sup> However, the program was not a success with fewer than ten inventions being issued certificates or patents.<sup>18</sup>

The Great Leap Forward in 1958, followed by the Cultural Revolution in 1966-1976, obliterated any notions of intellectual property protection in China.<sup>19</sup> After the Great Leap Forward, the previous patent regulations were abolished in 1963 and replaced by the *Regulations to Encourage Inventions* and the *Regulations to Encourage Improvements in Technology*, both of which granted exclusive rights to the state in all inventions.<sup>20</sup> The Cultural Revolution led to a huge backlash against intellectuals: scientists, inventors, lawyers and even the judiciary were condemned for not upholding Communist ideals,<sup>21</sup> and the 1963 regulations were also abolished.<sup>22</sup> The Cultural Revolution came to an end in 1976 with the arrest of the “Gang of Four,”<sup>23</sup> and set the stage for radical change in China’s approach to economic reform, intellectual property reform, and foreign trade under the leadership of Deng Xiaoping.

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<sup>15</sup> Deming Liu, *Now the Wolf Has Indeed Come! Perspective on the Patent Protection of Biotechnology Inventions in China*, 53 Am. J. Comp. L. 207, 212 (2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Allison, *supra* note 6, at 751.

<sup>20</sup> Deming, *supra* note 15 at 216.

<sup>21</sup> Allison, *supra* note 6, at 751.

<sup>22</sup> Deming, *supra* note 15 at 216.

<sup>23</sup> Allison, *supra* note 6, at 752.

## Part II: Intellectual Property Rights in Modern China

In 1978, China embarked on sweeping political and economic reforms, which included a new openness to direct foreign investment. Under the leadership of Deng Xiaoping, these changes led to a series of intellectual property reforms throughout the 1980s, in which China began to join a number of international organizations and treaties for the protection of intellectual property rights. During this time, the United States took an active role in developing, or coercing, adoption of IPR policies that the United States viewed as critical for protecting U.S. business interests in China. In the last thirty years, China has extensively revised their intellectual property legislation to comport to international norms, setting the stage for the next round of administrative and judiciary reforms necessary to ensure IPR holders receive the benefit of enacted legislative protections.

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### Economic Reforms and Internal Development

Following the fallout from the Cultural Revolution and the death of Chairman Mao in 1976, China embarked on a series of reforms known as the "Four Modernizations," with the goal of increasing China's stature in the world.<sup>24</sup> Part of the reform effort involved a decentralization program, designed to provide local villages and regions more autonomy over governing their own affairs, with still retaining control over national issues in Beijing.<sup>25</sup> Retaining national control has proven more difficult than perhaps Xiaoping anticipated. There is a traditional Chinese saying, "The mountains are high, and the Emperor is far away,"<sup>26</sup> which local government leaders have taken to heart with respect to intellectual property issues.

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<sup>24</sup> Deming, *supra* note 15 at 217.

<sup>25</sup> Yonehara, *supra* note 3, at 403.

<sup>26</sup> Joseph A. Massey, *Symposium: Legal Implications of a Rising China: The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection 1986-2006*, 7 Chi. J. Int'l L. 231 (2006).

Xiaoping recognized the need for stronger intellectual property protections, including patent rights, as being necessary to encourage foreign investment and advance technology development in China. He also recognized that participation in international organizations, such as the World Intellectual Property Organization (WIPO), would benefit China.<sup>27</sup> China joined WIPO in 1980 and acceded to the *Paris Convention for the Protection of Industrial Property* (Paris Convention) in 1984.<sup>28</sup>

Throughout the 1980s and 1990s, China continued to join international organizations and treaties to further IPR, including: the *Berne Convention for the Protection of Literary and Artistic Works* in 1992,<sup>29</sup> the *Madrid Agreement Concerning the International Registration of Marks* in 1989,<sup>30</sup> the *Protocol Relating to the Madrid Agreement* (Madrid Protocol) in 1995,<sup>31</sup> and the World Trade Organization (WTO) in 2001<sup>32</sup>.

In conjunction with participation in international agreements, China passed a number of new laws and regulations protecting IPR as well, including: the *Trademark Law of the PRC* in 1982, the *Patent Law of the PRC* in 1984, and the *Copyright Law of the PRC* in 1990.<sup>33</sup> These laws were not without issues. For example, the 1985 Patent Law favored foreign applicants over domestic Chinese inventors.<sup>34</sup> The Chinese Patent Law did not provide protection for chemicals

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<sup>27</sup> Allison, *supra* note 6, at 753-754.

<sup>28</sup> WIPO Contracting Parties, available at

[http://www.wipo.int/treaties/en/ShowResults.jsp?search\\_what=C&country\\_id=38C](http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=C&country_id=38C) (last visited Apr. 19, 2007).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> WTO, *Protocols of accession for new members since 1995, including commitments in goods and services*, available at [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm#chn](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn) (last modified Jan. 11, 2007).

<sup>33</sup> Graham J. Chynoweth, *Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws*, 2003 Duke L. & Tech. Rev. 3 (2003).

<sup>34</sup> Allison, *supra* note 6, at 755.

or pharmaceuticals, which was a significant difference from most foreign patent systems,<sup>35</sup> and a large disincentive to many foreign businesses.

### **Pressure from the United States and Foreign Investment**

The United States has long recognized the importance of international trade, but has not necessarily embraced free trade with open arms. The economic growth and potential of the PRC brings with it commensurate fears of trade inequities that the U.S. Congress attempted to address with the *Omnibus Trade and Competitiveness Act (OTCA)* in 1988.<sup>36</sup>

The OTCA amended the *Trade Act of 1974* to add two new provisions, Super 301 and Special 301. Special 301 directed the United States Trade Representative (USTR) to identify countries with policies that might have an adverse impact on U.S. businesses, and to engage those countries in efforts to address those issues.<sup>37</sup> Under this directive, China faced a great deal of scrutiny, being on the Watch List or Priority Watch List throughout the 1980s and 1990s, and being identified as a Priority Foreign Country on three occasions.<sup>38</sup>

In 1992, the USTR threatened China with trade sanctions, and negotiations led to the first of several bilateral agreements between the U.S. and China aimed at improving the IPR climate for U.S. interests. The 1992 Memorandum of Understanding (1992 MOU) led to the Chinese accession to the Berne Convention and the Geneva Convention.<sup>39</sup> Unfortunately, while this

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<sup>35</sup> Allison, *supra* note 6, at 755.

<sup>36</sup> Warren Newberry, *Copyright Reform in China: A "Trips" Much Shorter and Less Strange Than Imagined?* 35 Conn. L. Rev. 1425, 1428 (2003).

<sup>37</sup> Hong Xue, *Between the Hammer and the Block: China's Intellectual Property Rights in the Network Age*, 2 UOLTJ 291, 295 (2005).

<sup>38</sup> *Id.*

<sup>39</sup> Newberry, *supra* note 36, at 1439.

increased copyright protection offered to foreign entities in China, the changes enacted by the PRC did not extend to Chinese nationals, creating a dual system of IPR.<sup>40</sup>

Under the 1992 MOU, China also enacted changes to the 1984 Patent Law, broadening the scope of patent protection to include chemicals, pharmaceuticals, and food additives, as well as lengthening the period of protection from 15 to 20 years.<sup>41</sup> Another significant change was narrowing the scope of compulsory licensing of patents to be in compliance with the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS).<sup>42</sup> Although China was not yet a member of the WTO or a signatory of TRIPS, this move was indicative of China's aspirations, and was seen as an important move towards WTO membership.

Following the 1992 MOU, the U.S. again threatened to impose trade sanctions on China to strengthen IPR protection.<sup>43</sup> The threat of sanctions led to another bilateral agreement between the U.S. and China, the 1995 Agreement Regarding Intellectual Property Rights (1995 Agreement).<sup>44</sup>

The focus of the 1995 Agreement was enforcement, concentrating on administrative reform and education.<sup>45</sup> This led to the creation of the State Council Working Conference on Intellectual Property Rights, which would be responsible for national IPR enforcement, and working to eliminate issues of IPR enforcement, local protectionism, and judicial reform,<sup>46</sup> goals that to this day remain elusive.

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<sup>40</sup> Xue, *supra* note 37, at 303.

<sup>41</sup> Deming, *supra* note 15, at 218-219.

<sup>42</sup> *Id.*

<sup>43</sup> Newberry, *supra* note 36, at 1441.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1442.

The goals set forth in the 1995 Agreement were affirmed in an accord in 1996, which did not impose any new terms, but merely reaffirmed the commitments of the previous agreements.<sup>47</sup> With the goal of eventual WTO membership in mind, China continued to bolster IPR legislation and enforcement. In 1998, the Working Conference gave way to the State Intellectual Property Office (SIPO), which functions as a ministerial level organization to coordinate IPR enforcement among the various Chinese administrative agencies.<sup>48</sup>

While engaged in a cycle of sanctions and agreements with China, the United States was growing dissatisfied with the role of WIPO in intellectual property, and shifted focus to the WTO introducing TRIPS as a multilateral agreement designed to address what the U.S. perceived as global shortcomings with respect to IPR.<sup>49</sup> TRIPS was adopted in 1993 and became effective on January 1, 1995.<sup>50</sup> China became a member of the WTO, and a TRIPS signatory on December 11, 2001.<sup>51</sup>

#### **Post-WTO Chinese Intellectual Property Rights**

As a member of the WTO, China is bound by TRIPS to adopt minimum standards of intellectual property protections,<sup>52</sup> which are granted to parties from all WTO member states. China's legislative initiatives at the turn of the millennium have brought the majority of Chinese regulations into compliance with the TRIPS standards. China revised the Patent Law in July

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<sup>47</sup> *Id.* at 1443.

<sup>48</sup> *Id.* at 1444.

<sup>49</sup> *Id.* at 1432.

<sup>50</sup> *Id.*

<sup>51</sup> *Supra* note 32.

<sup>52</sup> Newberry, *supra* note 36, at 1425.

2001, the Copyright Law in November 2001, and the Trademark Law in December 2001, a mere ten days before accession to the WTO.<sup>53</sup>

The 2001 amendments to the Patent Law expanded patent owners rights to include prohibiting others from unauthorized “offers of sale,”<sup>54</sup> and shifted the burden of proof in infringement actions to the alleged infringer, eliminating ignorance of the patent as a defense for infringement.<sup>55</sup> Changes were also made in the compulsory licensing scheme, making it more difficult for domestic Chinese companies and particularly state entities to obtain compulsory licenses.<sup>56</sup>

The most significant changes in the 2001 Patent Law amendments addressed shortcomings in remedies available to patent owners. Previously, there were no standards for calculating infringement damages under the old Chinese Patent Law, which often resulted in calculations that were heavily biased against patent owners in favor of local infringers or inconsistent between the various administrative agencies and courts.<sup>57</sup> The amendments also allowed patent owners the ability to pursue injunctive relief,<sup>58</sup> which allows owners a more aggressive means of preventing patent infringement that was previously unavailable.

With respect to copyrights and trademarks, the amended Chinese laws also helped refine compliance with international standards. The 2001 amendments to the Copyright law expanded the economic rights vested in a work’s author, to include reproduction, distribution and even communication through an information network.<sup>59</sup> This last component is interesting, because it

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<sup>53</sup> Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 Am. U.L. Rev. 901, 908.

<sup>54</sup> Andrew Evans, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 Ga. J. Int'l & Comp. L. 587, 605 (2003).

<sup>55</sup> *Id.* at 606.

<sup>56</sup> *Id.* at 607.

<sup>57</sup> *Id.* at 605-606.

<sup>58</sup> *Id.* at 606.

<sup>59</sup> Eric Priest, *The Future of Music and Film Piracy in China*, 21 Berkeley Tech. L.J. 795, 811 (2006).

actually goes beyond the standards established by TRIPS, and incorporates elements of the WIPO Copyright Treaty,<sup>60</sup> which addresses copyright issues relevant to the network age. The amendments also narrowed the previously expansive fair use privileges enjoyed by the Chinese government,<sup>61</sup> and in 2004, China lowered the threshold for criminal penalties associated with copyright infringement in an effort to help combat piracy issues.<sup>62</sup>

The Chinese Trademark Law had already gone a long way to TRIPS compliance, after adopting the Madrid Agreement and Protocol, to develop standardized registration procedures.<sup>63</sup> However, the 2001 amendments to the Trademark Law also allowed registrants to claim priority in accordance with the Paris Convention, and allowed for judicial review of decisions of the Trademark Review and Adjudication Board.<sup>64</sup>

With these changes to the majority of the Chinese intellectual property laws and regulations, the issues regarding China's compliance with international standards, such as TRIPS, have largely been eliminated. However, the United States has continued to criticize China's efforts to enforce IPR legislation, placing them on the USTR Priority Watch List, under Special 301, as recently as 2005.<sup>65</sup>

The shift in focus from legislation to enforcement signals the beginning of the next phase of intellectual property development in China. With a solid legislative background and substantial compliance with international treaties regarding intellectual property, China must turn its attentions to ensuring that the legislation enacted is being enforced. As we are about to

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<sup>60</sup> *Id.* at 812.

<sup>61</sup> *Id.* at 811.

<sup>62</sup> *Id.* at 814.

<sup>63</sup> Jessica C. Wong, *The Challenges Multinational Corporations Face in Protecting their Well-Known Trademarks in China*, 31 *Brooklyn J. Int'l L.* 937, 943 (2006).

<sup>64</sup> *Id.* at 944.

<sup>65</sup> Jessica Haber, *Motion Picture Piracy in China: Rated Arrgh!* 32 *Brooklyn J. Int'l L.* 205, 222 (2006).

examine, this is not necessarily a simple or easy task, and will likely involve a great deal of other reforms which China may or may not be ready to address.

### **Part III: Intellectual Property Rights Enforcement in China**

With TRIPS compliant legislation in place, the issues facing IPR protection in China become centered on enforcement. Without administrative agencies and courts with the power and desire to enforce the international agreements and domestic laws designed to protect intellectual property, the laws become illusory. The U.S. has long recognized the importance of enforcement issues. Through the bilateral agreements of the late 1990s, the U.S. has attempted to strong-arm China into bolstering their enforcement regime, often with limited results.

With membership in the WTO, enforcement issues now are at the forefront of intellectual property issues in China. These issues are compounded by limitations of the multilateral treaties and shortcomings in China's judicial system. Until these issues are addressed, intellectual property protections in China will remain fragmented.

### **The Limitations of the Multinational Approach of the WTO and TRIPS**

There are a number of issues facing countries, such as the United States, who wish to increase the efficacy of China's IPR law enforcement. There are issues regarding trade sanctions and working within the framework of the WTO. Although mechanisms exist for WTO members to settle disputes, the process is slow moving and may not yield satisfactory results. Other issues facing enforcement are related to directly to the history of China, and the current state of the Chinese judicial system and administrative agencies charged with enforcement of IPR

regulations. Under the current structure of the TRIPS agreement, reforms to the internal enforcement mechanisms employed by China will largely need to come from within.

Although the United States was successful in negotiating a number of bilateral agreements with China regarding IPR in the 1990s, China's accession to the WTO changed the dynamic of bilateral negotiations, as member states of the WTO are precluded from bilateral trade agreements.<sup>66</sup> Instead, member states must employ the WTO mechanisms, such as the Dispute Settlement Understanding (DSU).<sup>67</sup>

Utilizing the DSU can be a cumbersome process, and is not guaranteed to produce expedient results. The procedures are mandatory for member states and require that if an action is initiated for a breach of treaty obligations, the member states must first engage in consultations; if those fail, disputes are addressed before a WTO Dispute Settlement Body (DSB).

However, TRIPS is not a self-executing agreement. Although TRIPS requires member states to enforce intellectual property rights, the specifics of how enforcement should be implemented are not defined.<sup>68</sup> China's laws are substantially compliant with TRIPS. A challenge from the United States for breach of treaty obligations is not likely to meet with success.<sup>69</sup> Virtually all of the existing disputes are over non-implementation of specific provisions of the TRIPS agreement, and the agreement itself may work against such an action: Article 41(5) of the TRIPS Agreement specifies that a member is not required to expend more on

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<sup>66</sup> Carl Erik Heiberg, *American Firms in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Expectations Amidst Rampant Piracy*, 15 Minn. J. Int'l L. 219, 244 (2006).

<sup>67</sup> Newberry, *supra* note 36, at 1455.

<sup>68</sup> Yu, *supra* note 53, at 927.

<sup>69</sup> Peter K. Yu, *U.S.-China Trade: Opportunities and Challenges: Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*. 34 Ga. J. Int'l & Comp. L. 143, 146 (2005).

IPR enforcement than other areas of law enforcement.<sup>70</sup> Various trade groups in the United States have tried to pressure the government into filing complaints against China with the WTO, to no avail.<sup>71</sup>

There are mechanisms in place which allow TRIPS provisions to be reviewed and amended. Article 71 calls for a periodic review of TRIPS provisions and allows for modification or amendment of the agreement if conditions warrant.<sup>72</sup> While this may be a valid course for developed nations such as the United States to pursue, the issues facing developing nations, such as effective law enforcement and judicial reform, may prove to be beyond the scope of trade and the TRIPS agreement. The differences of opinion are substantial, and modification of TRIPS to add increased enforcement provisions will be contentious.

### **Administrative Agency Enforcement Issues**

China's administrative landscape is rocky. In addition to 23 provinces, China also contains four autonomous regions and two special administrative regions.<sup>73</sup> As a result of the local autonomy granted under Deng Xiaoping, designed to encourage economic growth, bureaucratic localism is a nightmare.<sup>74</sup> Administrative agencies charged with developing regulations for the enforcement of intellectual property laws are often completely beholden to the local authorities. Local governments supply the agencies with funding, facilities, and personnel, but agencies are then expected to enforce regulations that may have a dire impact on the local economy.<sup>75</sup> This often places administrators in an untenable situation.

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<sup>70</sup> *Id.* at 145-146.

<sup>71</sup> Yu, *supra* note 53, at 923.

<sup>72</sup> Haber, *supra* note 65 at 225.

<sup>73</sup> Amanda S. Reid, *Enforcement of Intellectual Property Rights in Developing Countries: China as a Case Study*, 13 DePaul-LCA J. Art & Ent. L. 63, 86-87 (2003).

<sup>74</sup> Evans, *supra* note 54 at 590.

<sup>75</sup> *Id.* at 591.

Infighting among localities is also a problem. For example, if a dispute involves multiple localities or multiple intellectual property rights, there may be political infighting among the various agencies for jurisdiction over the claim adjudication.<sup>76</sup> These rivalries exist because bureaucratic agencies may see an increase in staffing and budget, or even potential income from fines for handling some administrative procedures.<sup>77</sup> IPR holders must simultaneously be concerned with issues of local protectionism, and jockeying for administrative jurisdiction.

It is also said that “Chinese law is relative, depending on . . . who you are and who you know.”<sup>78</sup> This stems from the Chinese notion of *guanxi*, which amounts to relationships or connections. Connections to local officials may have a tremendous bearing on the outcome of an administrative action. It has been said, “If you have a strong case but don't use *guanxi*, you may not win. If you have a weaker case and don't use *guanxi*, you will definitely lose.”<sup>79</sup>

It is not difficult to understand the pressures facing local government officials with respect to enforcing intellectual property rights. Their positions and *guanxi* depend upon the economic realities of the local community.<sup>80</sup> For example, closing a pirate DVD factory may cause unemployment issues.<sup>81</sup> The immediate, local impact of unemployed workers has far more weight in the decision making process than the rights of a foreign movie studio.

Even when local protectionism is not a factor, the lack of administrative transparency can be frustrating to foreign entities pursuing IPR enforcement. An example of the administrative frustrations facing foreign patent applicants in China is a case of the Pfizer drug, Viagra. The

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<sup>76</sup> *Id.*

<sup>77</sup> Priest, *supra* note 59 at 824.

<sup>78</sup> Reid, *supra* note 73 at 93.

<sup>79</sup> Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 Am. J. Comp. L. 77, 94 (2004).

<sup>80</sup> Yonehara, *supra* note 3, at 404.

<sup>81</sup> Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. Cin. L. Rev. 569, 646-647 (2002).

Viagra patent was initially approved in China in September, 2001.<sup>82</sup> The patent was challenged by a group of 13 Chinese pharmaceutical companies on the grounds that it did not meet novelty requirements under Chinese Patent Law. Upon review, SIPO invalidated the patent, though on the grounds that Pfizer had not provided a sufficient description.<sup>83</sup> Many saw the move by SIPO as a move to undermine the pharmaceutical protections in the law, considering pharmaceutical patents were added only under pressure from the United States in 1984. More troubling was that the decision was made by SIPO after the patent had already been approved under a seven year review process.<sup>84</sup>

Pfizer was ultimately able to prevail in the Chinese courts. TRIPS requires a mechanism for judicial review, and Pfizer was able to appeal the SIPO decision to the First Intermediate People's Court in Beijing.<sup>85</sup> The Viagra patent was reinstated,<sup>86</sup> but this lack of transparency by SIPO, the administrative agency charged with patent enforcement, is disturbing. Judicial review of administrative decisions is not a panacea for problems with administrative agencies, as pursuing a challenge in the courts involves significant additional time and expense. IPR holders may instead turn to the courts first for enforcement, but unfortunately, many of the same issues that plague Chinese agencies like SIPO are also endemic to the courts.

### **Enforcement Issues and the Chinese Courts**

Judicial review is available for parties who do not believe they have received a fair administrative resolution. Alternately, parties may by-pass administrative remedies altogether

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<sup>82</sup> Xue, *supra* note 37, at 309.

<sup>83</sup> *Id.*

<sup>84</sup> Yu, *supra* note 53, at 988.

<sup>85</sup> Yu, *supra* note 53, at 989.

<sup>86</sup> *Pfizer Wins Key China Court Ruling*, Forbes.com, available at [http://www.forbes.com/business/2006/06/03/pfizer-china-patent-cx\\_pm\\_0603drug.html](http://www.forbes.com/business/2006/06/03/pfizer-china-patent-cx_pm_0603drug.html) (last modified Jun. 3, 2006).

and turn to the courts first to enforce intellectual property rights. However, many of the issues facing administrative agencies are mirrored in the Chinese Court system. Local protectionism, lack of independence and transparency, and ill trained judges and lawyers also complicate the judicial process.

The Chinese courts are beholden to local officials in much the same ways as administrative officials: they receive their staffing and budgets from the localities and judges have strong personal ties to the local community.<sup>87</sup> To this end, if a judgment has political implications, the local interests may trump official state policy in order to preserve local harmony.<sup>88</sup>

Even at the highest level, the court system is beholden to the political apparatus of the Chinese Communist Party. The Supreme People's Court (SPC), the highest court in China, is responsible to the Standing Committee of the National People's Congress (Standing Committee), which has the authority to directly over-rule any decision of the court.<sup>89</sup> This is consistent with China's political development and history, the courts having long been subjugated to political ideals, most notably by Mao, who decimated the courts during the Cultural Revolution.<sup>90</sup>

After the reforms of the late 1970s, the court system has been rebuilt, but it is young. Judges are often ill trained and inexperienced. Many judges are political appointees who have very little legal training.<sup>91</sup> The atmosphere is changing; in 1996, China passed the Lawyer's Law of the PRC, which establishes minimal standards of training for lawyers in China.<sup>92</sup> However, training for the legal profession is still in a state of recovery from purges of the Cultural

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<sup>87</sup> Yonehara, *supra* note 3, at 408.

<sup>88</sup> Jordana Cornish, *Cracks in the Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within its Borders*, 9 Vand. J. Ent. & Tech. L. 405, 430 (2006).

<sup>89</sup> Yonehara, *supra* note 3, at 408.

<sup>90</sup> Cornish, *supra* note 88, at 425.

<sup>91</sup> *Id.* at 426.

<sup>92</sup> *Id.* at 426-427.

Revolution. Increased legal training also does not necessarily provide judges with a proper background in intellectual property, which may require additional specialized training to ensure adequate treatment of IPR in China's courts.

Independence is a critical problem facing the Chinese courts. The Chinese Constitution of 1982, amended in 2004, provides that courts are to exercise authority independently, without administrative influence;<sup>93</sup> however, many view this as mere lip service to an independent judiciary. For example, the Chinese constitution also provides that the Standing Committee may appoint or remove judges, but does not outline any criteria for doing so.<sup>94</sup> Chinese Judges do not enjoy life tenure similar to their American federal judge counterparts.<sup>95</sup>

Transparency is also an issue, as many Chinese court decisions remain unpublished. Traditionally, the only opinions published are those of the Supreme People's Court deemed relevant, but there is no codified criteria establishing relevancy.<sup>96</sup> The SPC also retains discretion over publication of lower court opinions. Often, if a lower court decision is published, it is done so with extensive modifications and revisions, in order to provide an "exemplary model" for lower courts to use in guiding decisions.<sup>97</sup>

Finally, there is the matter of judicial enforcement. Chinese courts have traditionally had very limited powers to enforce their decisions. Official decrees of the court must be enforced by local administrative officials, which lead to the same types of local protectionism and political influence that plague administrative actions. Until recently, Chinese courts did not have the authority to issue criminal contempt orders and it remains unclear whether the failure to obey or

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<sup>93</sup> China Const. art. 126, available at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) (last visited Apr. 21, 2007).

<sup>94</sup> China Const. art. 67, §11, available at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) (last visited Apr. 21, 2007).

<sup>95</sup> Yonehara, *supra* note 3, at 410.

<sup>96</sup> *Id.* at 409.

<sup>97</sup> *Id.*

enforce a court order is considered a crime.<sup>98</sup> Obtaining enforcement of a judgment in China often involves additional enforcement procedures and expenditures, with no guarantee of eventual enforcement. In 2004, the SPC listed nationwide enforcement rates for the Intermediate People's Courts and the Primary People's Courts as 50 and 60 percent, respectively.<sup>99</sup> It has been said that obtaining enforcement of a judicial decree in China is "harder than reaching the sky".<sup>100</sup>

China has been making efforts to reform the court system with respect to intellectual property rights. In 1996, the SPC formed an IPR Tribunal, whose role was to hear high-profile IPR cases and to supervise the administration of IPR cases in the lower courts.<sup>101</sup> In 2002, the SPC also issued *Rules Concerning Adjudication of International Trade-Related Cases*, which provide rules for dealing with administrative cases under WTO related rules.<sup>102</sup>

Lower Chinese Courts are also embarking on bold experiments that have the potential for radical reform within the Chinese judicial system. For example, the local District Court of Zhongyuan has introduced a system that allows judges to use approved, vetted judgments as precedent in some cases.<sup>103</sup> The Second Intermediary Court of Shanghai has also begun to include dissent in published opinions.<sup>104</sup>

Although these steps are occurring on a limited basis, they do represent encouraging signs of the Chinese recognition of deficiencies in the courts, and indicate at least a willingness of the court system itself to approach these problems with innovative solutions, which may indicate the groundwork for a profound shift in the role of the courts in China.

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<sup>98</sup> Evans, *supra* note 54, at 592.

<sup>99</sup> Robert Slate, *Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance*, 31 N.C.J. Int'l L. & Com. Reg. 665, 686 (2006).

<sup>100</sup> Cornish, *supra* note 88, at 429-430.

<sup>101</sup> Slate, *supra* note 99, at 679-681.

<sup>102</sup> Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform* 4 Asian-Pac. L. & Pol'y J. 256, 291-292, available at <http://www.hawaii.edu/aplpj/> (last visited Apr. 21, 2007) (2003).

<sup>103</sup> *Id.* at 300-301.

<sup>104</sup> *Id.* at 309.

#### **Part IV: Intellectual Property Rights in China: The Next Thirty Years**

In spite of a cultural legacy biased against protecting the rights of individuals in intellectual property, China has made great strides in the past thirty years enacting comprehensive legislation to protect various IPRs from copyrights to trademarks to patents. The principle motivator has been economic growth, with an emphasis on establishing IPR to encourage foreign investment in China.

Although pressure from the outside has been instrumental in the development of basic legislative protection for IPR, the issue of enforcing those laws has become the new focus for IPR reform in China. As the Chinese economy continues to develop, and as domestic Chinese enterprises begin to develop their own innovations, the focus must shift. Instead of looking externally for the motivation to protect intellectual property rights, China must now begin to look internally. With a new introspective approach to enforcing intellectual property rights, China's principle reform must begin within their own administrative agencies and judicial system.

Other nations and multinational corporations must abandon the coercive techniques previously employed to force IPR protections in China, and instead cooperate and adapt to work within the Chinese framework to promote change from within. The success of intellectual property rights enforcement in China will not hinge on the efforts of foreign entities, but the will of the Chinese people.

#### **Limitations of Coercive Techniques for Reform**

Throughout the later part of the twentieth century, the primary mechanism for achieving intellectual property protection in China was the combination of threatened trade sanctions and

bilateral agreements, such as the various MOUs initiated by the United States under the Section 301. Because of China's desire to increase foreign investment and participate in a growing global economy, these efforts met with some success. However, since China's membership in the WTO in 2001, bilateral and even multilateral agreements have essentially run their course. Coercive tactics by the United States with respect to IPR in China are likely to meet with decreasing success in the coming years.

First, China's WTO membership restricts the imposition of bilateral agreements and limits the U.S. to actions through the WTO dispute resolution mechanisms. These types of actions must be approached with caution. DSU, under the rules of the WTO, carries with it a substantial risk of failure, given the current constructs of the TRIPS agreement that China has implemented, which centers on legislative IPR protection. Without amending the TRIPS agreement itself, the U.S. has limited grounds for action against China for breach of its obligations under the WTO agreements.

Equally important, coercive actions on the part of the United States are likely to be increasingly met with skepticism from China itself. China's strength in global trade continues to grow, and access to the Chinese market is becoming more important to U.S. companies. China represents the world's fifth largest economy,<sup>105</sup> and is poised to overtake Germany and Japan within the next decade.<sup>106</sup> To remain competitive in the global economy, U.S. based multinational corporations will need access to the Chinese market. Provoking China into

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<sup>105</sup> Yahong Li, *The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?* 20 UCLA Pac. Basin L.J. 77, 103 (2002).

<sup>106</sup> Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 Am. Bus. L.J. 317, 318 (2006).

retaliatory trade actions will continue to become an increasing risk as the Chinese economy evolves.<sup>107</sup>

Finally, even when international coercion achieves what appear to be satisfactory results, these may be largely illusory because they fail to address the systemic problems within China's legal system. China's IPR laws substantially comply with the terms of the TRIPS agreement. The shortcomings of China's IPR protections are now largely related to enforcement issues, which begs the question of why. The answer is not China's lack of understanding of the global economy or a lack of desire to participate in international trade. The answer can be found in a historical and cultural legacy that did not place a premium on intellectual property rights for the individual, in a political system that did not promote the rule of law, and in the development of a socialist economy that achieved accelerated growth through foreign investment at the expense of domestic innovation. These are the reasons that further IPR development, including stronger enforcement, must come from within.

### **Internal Motivators for Change**

When addressing the development of intellectual property rights in China, it may be useful to examine the growth of IPR in some of China's Asian neighbors, specifically Japan and Korea. Both Japan and Korea faced external pressures to improve IPR protections, and both have made great strides in protecting intellectual property. However, in both cases, internal rather than external motivators pushed IPR to the next level as their respective economies matured beyond low-level manufacturing into areas of higher technology.

IPR came to Japan in much the same way as China: external pressure from the United States led to a Japanese harmonization with international IPR standards.<sup>108</sup> However, it was the

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<sup>107</sup> *Id.* at 339.

growth of the Japanese economy and the strength of domestic businesses which contributed the most to eventual IPR enforcement in Japan. A prime example is that of Yoshida Kogyo KK, which faced issues with counterfeit versions of YKK zippers imported from Korea. YKK and other industries placed pressure on the Ministry of Finance, which in turn organized the Customs Information Centre to combat IPR infringement, leading to intense efforts by the Japanese government to crack down on counterfeit goods. By the 1970s, Japan had virtually eliminated the counterfeit problem.<sup>109</sup>

Korea has also seen an economic explosion which has triggered increased IPR protections for domestic enterprises. Korean companies such as Samsung and LG have worked with the government to promote IPR enforcement to eliminate counterfeit goods and piracy. As a result Korea, once a leader in piracy practices, has shifted to strong IPR enforcement, suggesting that market forces can overcome cultural values with respect to intellectual property.<sup>110</sup>

China's economy is still in the early stages of development. Although growing at a phenomenal rate, China is still a "lower middle income economy" that has a great deal of disparity among the various regions and industries.<sup>111</sup> The British Commission on Intellectual Property Rights found that strong IPR protections can have a negative impact on developing countries, increasing costs of production and potentially retarding economic growth.<sup>112</sup> However, as economies continue to develop, stronger IPRs are necessary to protect access to higher technologies and encourage domestic innovation.<sup>113</sup>

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<sup>108</sup> Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?* 32 N.C.J. Int'l L. & Com. Reg. 1, 35 (2006).

<sup>109</sup> *Id.* at 38.

<sup>110</sup> *Id.* at 43.

<sup>111</sup> Li, *supra* note 105, at 80-81.

<sup>112</sup> Li, *supra* note 105, at 80.

<sup>113</sup> *Id.*

This is currently the case in China. Chinese domestic enterprises are beginning to focus on innovation, but Chinese businesses often lack a fundamental understanding and awareness of IPR protections, such as the patent system. Chinese science has placed an emphasis on publication and sharing of knowledge, consistent with a cultural legacy of Confucian ideals, but as a result it is estimated that only 20 percent of Chinese research is protected by patents.<sup>114</sup>

In recent years, some Chinese industries, such as Chinese traditional medicine manufacturers, have recognized the impact of protecting their intellectual property and begun to apply for patent protections.<sup>115</sup> Various local Chinese governments have also recognized this increased need, and are now offering financial assistance and aid to local enterprises pursuing foreign IPR protection.<sup>116</sup> China is beginning to emerge from the formative period, and as technology rapidly advances, Chinese companies are increasingly likely to recognize the need for stronger IPR in order to move past the low-end manufacturing based economy.<sup>117</sup> This growth and realization of the importance of IPR for themselves may serve as a primary motivator for increasing reform in government administration and enforcement of intellectual property rights.<sup>118</sup>

The disparity among the various regions will undoubtedly be a factor in the development of the Chinese economy, and subsequently, development of intellectual property rights. However, in the more developed economic areas, Chinese business is beginning to see how strong IPR enforcement may not only benefit foreign enterprises, but also benefit domestic enterprise. That selfish motivator may be the best impetus for China to strengthen intellectual property rights enforcement.

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<sup>114</sup> *Id.* at 101-102.

<sup>115</sup> *Id.* at 102.

<sup>116</sup> *Id.* at 103.

<sup>117</sup> Newberry, *supra* note 36, at 1450.

<sup>118</sup> Massey, *supra* note 26, at 237.

## **Judicial Reform and Mitigating Localization**

IPR enforcement in China cannot succeed without some level of judicial reform. The Chinese courts suffer from a lack of education about IPR issues, a lack of transparency, and a lack of independence. The subject of judicial reform in China spans far more than just intellectual property areas and any reformation towards an independent judiciary will have an impact on intellectual property issues. However, there are three main areas where reform will have the most impact on IPR cases before the courts: increased IPR training and knowledge, publishing decisions, and delocalization.

First, although there is some knowledge and sophistication regarding IPR issues at the Intermediate and Supreme Court levels, education at the lowest court levels, the Primary People's Courts, must be increased through legal education. Partnering with organizations such as WIPO, China needs to create judicial educational programs to increase awareness of IPR issues, and to assist Chinese judges in seeing the broader issues beyond merely the immediate local impact.

Second, the Chinese courts must increase transparency. Prof. Wang Liming, of the People's University, has suggested that courts be required to include factual and legal analysis in all decisions, and that decisions be made available to the public for scrutiny.<sup>119</sup> Broader adoption of the programs already initiated by the Zhongyuan and Shanghai lower courts would vastly improve transparency of the Chinese judicial process. Regular, predictable publications of Chinese judicial decisions, containing factual analysis, legal reasoning, and including publication of dissenting opinions, would likely have a profound effect on increasing predictability of adjudication outcomes and also greatly aid in eliminating corruption and local protectionism.

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<sup>119</sup> Lin, *supra* note 102, at 296-297.

Finally, local protectionism must be addressed in order to have hope of real judicial reform. Chinese scholars have promoted the idea of delocalization, which would serve to isolate lower Chinese courts from the pressures of local government. One step towards delocalization would be the establishment of regional lower courts with jurisdictions overlapping local government areas. This would serve to make the court less beholden to one specific locality, which is a significant contributor to the influence of *guanxi* in the courts. Another critical component would be to remove the control of local governments over court staffing and budgets. A system of clearly defined and mandatory budgeting and staffing models dictated by the central government would eliminate much of the control local authorities could exert over local judges through control of the purse strings.<sup>120</sup>

### **The Role of Foreign Powers and Multinationals in Chinese IPR Enforcement**

The most effective mechanism for foreign governments and multinational corporations to increase the enforcement of intellectual property rights in China is cooperation. Chinese culture places a premium on harmony, and investment in the local community is an effective means for businesses to gain acceptance and goodwill among local leaders.<sup>121</sup> Coercion has run its course and the new approach should be cooperation.

Multinationals doing business in China have a strong incentive to engage Chinese officials, rather than adopting an adversarial approach. The *guanxi* that benefits IPR infringers could instead be employed to benefit foreign business.<sup>122</sup> This is not to advocate that foreign entities should simply learn to play the Chinese game. Instead, by engaging Chinese partners, by investing and developing local communities and support networks, foreign enterprises can

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<sup>120</sup> *Id.* at 298.

<sup>121</sup> Yu, *supra* note 81, at 648.

<sup>122</sup> *Id.* at 645.

achieve the goodwill necessary to help educate the Chinese about the importance of intellectual property rights to their own economic future.

## **Conclusions**

Given the cultural and historical role of intellectual property rights in China, the progress China has made in effecting intellectual property rights protections in the past thirty years is nothing short of phenomenal. In the race to protect their own interests, developed nations are sometimes reluctant to admit the great strides China has made in opening doors to foreign trade and becoming a productive member of the international community.

However, China's progress in the IPR arena is not complete. China faces a number of issues regarding enforcement of the IPR laws it has enacted, and balancing those enforcement issues with economic growth and development presents many unique challenges. China must address issues of localization and enact significant judicial reform in order to bring the IPR reality in line with the text of the Chinese Laws. Until China does so, it will continue to face criticism from developed nations regarding its IPR climate.

The reforms China is facing, ultimately, will benefit both the Chinese people and foreign entities who want access to the Chinese market. As IPR enforcement is strengthened in China, China's domestic enterprises will begin to be able to develop technology and compete on a global scale, while foreign companies will be able to enter the Chinese markets with more certainty regarding the protection of their intellectual property. In the end, intellectual property protection, once seen as antithetical to China's Confucian legacy, may prove the very means through which China achieves harmony in the global community.