



# Chinese Attitudes toward Intellectual Property Rights-Change and Continuity

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## ABSTRACT

Intellectual property has been central to Sino-US disputes in the past decades. The US government has taken various measures to compel China to enforce IP rights (IPR) protection in conformity with what would be acceptable by US standards, only to find differences persisting and these IPR disputes far from resolved. To better understand the tension between China and the US over IPR protection, this note provides a historical analysis of China's IPR development from Late Qing to today, focusing on the changes and continuities in Chinese attitudes toward IPR across different periods. Without indigenous concepts of IPR, China was forced to accept western standards at a time of military and political weakness and has consequently remained vigilant against foreign domination in this field. However, China also gradually developed a genuine appreciation for modern IPR to the degree that would benefit China's economic development and status in the global community. A normative judgment on China's IPR protection would frustrate efforts at dispute resolution by assuming US standards of IPR protection as universally ideal. As China and the US continue to cooperate in trade and technology, mutual understanding and appreciation of a shared set of IP standards would be essential.

**Keywords:** Intellectual Property, China, Sino-US, IPR, Copyright, Trademark, Patent, Legal History, International Law

## INTRODUCTION

China's intellectual property rights (IPR) protection, or the lack thereof, has been the subject of heated debate in the past decades. Since China and the United States signed the Agreement on Trade Relations in 1979, the two countries have constantly disputed about China's IPR protection. Although China joined all the major international IP treaties and enacted IP laws consistent with treaty standards, critics complain that China has serious under enforcement issues that render the laws ineffective. The US blacklisted China on its special 301 watch list, threatened with sanctions and waged a trade war, in order to get China to better protect the IPR of US businesses in the Chinese market.

While to some extent, China's under enforcement of IPR protection may be a self-fulfilling prophecy resultant of western business's lack of faith in China's alternative enforcement mechanisms<sup>1</sup>, both Chinese and western scholars have provided data demonstrating that the under enforcement is a real institutional function of China's IP

regime. To issue qualitative judgment on China's IP regime based on a normative understanding of IPR, however, risks over simplifying the dispute and blinding oneself to a Chinese perspective. This note provides a historical analysis of China's IPR development from Late Qing to today to offer fuller insights into the constant tug-of-war between China and the US over IPR protection. Rather than an ill-intentioned vile infringer, China has a history of coming to terms with foreign standards of IPR and overcoming institutional inertia against IPR recognition.

## IPR DEVELOPMENT IN LATE QING

Foreign influence has been there since the first day of Chinese IPRs. While in the seventeenth and eighteenth centuries the notion developed in Europe that "authors and inventors had a property interest in their creations that could be defended against the state," no counterpart of such development happened in China.<sup>2</sup> There were no indigenous IP laws in Imperial China. Imperial Codes that addressed publishing and reproduction of written works

<sup>1</sup> See Brian J. Safran, *A Critical Look at Western Perceptions of China's Intellectual Property System*, 3 U. Puerto Rico Bus. L.J. 135 (2012).

<sup>2</sup> WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION*, p. 18 (Jan. 1997).



were primarily concerned with controlling the dissemination of ideas that could potentially sabotage the dynasty.<sup>3</sup> The cultural and political environment in Imperial China was not conducive to the development of IP laws. "To steal a book" was "an elegant offense," for the elite class of intelligentsia engage in a canonical way of writing and painting, where copying from one's seniors was equivalent to paying tribute to the authors. It was also politically incorrect for writers to seek remunerative benefits for their works, as Confucian scholars considered commercial efforts inelegant. "True scholars wrote for edification and moral renewal rather than profit," Alford observed.<sup>4</sup> These cultural and political sentiments dispossessed the elite ruling class of any incentives to develop IP laws.

To clarify, it was not the case China had no need for IP laws-after all, the scholar-officials were not the only social class living in Imperial China. Merchants attempted to establish distinctive brand images and resorted to the help of industry guilds and local clans to maintain them.<sup>5</sup> In Song Dynasty, a needle-making family workshop in Shandong Province installed a stone-carved rabbit statue in front of its shop and circulated pictures of the rabbit to use as its brand, named the *White Rabbit*.<sup>6</sup> Such examples are private attempts to fill a void where IP law was needed, rather than state effort to recognize IP rights. In feudal China, merchants belong to the lowest social class, and their interests were generally of low priority.<sup>7</sup> The official social and political culture operated against an institutionalized IP regime.

It was not until the late 19<sup>th</sup> century, when western powers opened the gate to Chinese market by gun barrels, that China encountered IP laws. To gain market advantage and extraterritoriality in China, foreign powers, including the British Empire, the US, Russia and Japan, imposed a series of unequal treaties on China through military threats.<sup>8</sup> One

goal of the treaties was to make China adopt what the treaty powers deemed a modern legal system more conducive to the operation of international business. Or at least, the treaty powers made it appear that China would be able to gain an equal sovereign standing by modernizing its laws.<sup>9</sup> The US provided in its treaty with China, for example, that it would be "prepared to relinquish extra-territoriality when satisfied that the state of the Chinese law, the arrangements for their administration and other considerations [so] warrant."<sup>10</sup> As part of the treaty negotiations, foreign powers wanted intellectual property protection, and China wanted to show an effort towards it. Treaty powers pushed for an IP protection regime, and the Qing Court had no practical choice but to respond to this demand.

At the same time, there was a growing consensus among Chinese scholars and officials that China needed "self-strengthening."<sup>11</sup> On one hand, a string of defeats in battles with foreign powers, especially Japan, who the Qing Court had considered inferior in military power, served as a wakeup call for the ruling elite that China was weak; on the other hand, a number of Chinese officials and scholars had studied western ideas on law and society and come to appreciate them. In a memorial, several primary cabinet ministers, including the renowned Zhidong Zhang, advised the Emperor that clear and detailed western laws regulating commerce, accompanied with effective state enforcement, led to the prosperity of western commerce.<sup>12</sup> The merchants and industry guilds, who had long since substituted non-existing IP laws with a make-do private regime, voiced their opinions on the need to have China's own IP laws, citing severe disadvantages compared with foreign merchants due to lack of legal protection.<sup>13</sup> Responding to these sentiments, then reigning Emperor Guangxu started a legislative reform to draft China's modern laws in various fields, including IP.<sup>14</sup> Although Guangxu himself was soon imprisoned by

<sup>3</sup> With the advent of printing during the Tang Dynasty, the Tang Code added restrictions on reproduction of prognostication materials and later, "devilish books and talks," mainly to allow the court to monopolize interpretation of astronomical signs and control speech. *Id.* at p. 13.

<sup>4</sup> *Id.* at p. 29.

<sup>5</sup> *Id.* at p. 16, citing Hamilton and Lai, "Jinshi zhongguo shangbiao."

<sup>6</sup> Giana M. Eckhardt & Anders Bengtsson, *Articles A Brief History of Branding in China*, 30(3) JOURNAL OF MACROMARKETING 210, 216 (2010).

<sup>7</sup> Zhu Ying (朱英), Lun Qingmo de Jingji Fagui (论清末的经济法规)[A Discussion on Economic Regulations in Late Qing], Guoji Shehui Kexue Zazhi (国际社会科学杂志)[INT'L SOCIAL SCI. J.], p.3 (1993).

<sup>8</sup> FEDERAL RESEARCH DIVISION LIBRARY OF CONGRESS, CHINA: A COUNTRY STUDY, Introduction, xxxii (Robert L. Worden et al. eds., Mar. 1989) ("Through force of arms the Westerners imposed unequal treaties compelling China to accept humiliating compromises to its traditional system of society and government").

<sup>9</sup> 1 JEROME COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW, p. 11 (Mar. 2017).

<sup>10</sup> Alford, p. 37, quoting Commercial Treaty of 1903 art. 12, art. 15, Sino-U.S., Oct. 8, 1903, reprinted in MacMurray, ed., *Treaties and Agreements*.

<sup>11</sup> "自强."

<sup>12</sup> Zhu Ying, Lun Qingmo de Jingji Fagui (论清末的经济法规), supra note 7., p. 2, quoting Guangxuchao Donghua Lu (Fourth)(光绪朝东华录(四))[Records of Eastern China under Guangxu Reign], p. 4763.

<sup>13</sup> Zhu Ying (朱英), Lun Qingmo de Jingji Fagui (论清末的经济法规), p. 5, quoting Shanghai Shangwuzonghui zhi Gebushanghui Nikaidahui Taolun Shangfa Cao'an Shu (上海商务总会致各埠商会拟开大会讨论商法草案书)[Letter from Shanghai General Chamber of Commerce to the Chamber of Commerce of Each Port on a Meeting to Discuss a Trademark Law Draft] Shen Bao (申报)[Shanghai News] (Sept. 10, 1907) and Tianjin Shanghui Dang'an Bianhui (天津商会档案汇编)[Tianjin Collection of Chamber of Commerce Cases] (1903—1911) Volume 1, p. 284 (1989). In contrast, foreign merchants enjoyed legal protection for their intellectual property rights through foreign laws. For example, without Chinese patent laws and operating with extraterritoriality, American merchants brought their claims to the US consular under US laws. Mark Cohen, *An American Patent Dispute in the Qing Dynasty*, CHINA IPR - INTELLECTUAL PROPERTY DEVELOPMENTS IN CHINA (Jul. 3, 2012), <https://chinaipr.com/2012/07/02/an-american-patent-dispute-in-the-qing-dynasty/>.

<sup>14</sup> FEDERAL RESEARCH DIVISION LIBRARY OF CONGRESS, CHINA: A COUNTRY STUDY (Robert L. Worden et al. eds., Mar. 1989), p. 28-29.

the anti-reformist Empress Dowager Cixi<sup>15</sup>, reformers carried on the legislative effort to install modern IP laws through Late Qing.

## THE BYLAWS OF AWARDING INDUSTRIAL INVENTIONS OF 1898

In 1898, reformers promulgated the Bylaws of Awarding Industrial Inventions, the first patent legislation in the history of China.<sup>16</sup> The bylaws granted inventors fifty years of patent right for inventions that surpassed western technological standards in various fields, including shipbuilding and firearm production, as well as industrialists who undertook mass-scale industrial projects that would benefit the livelihood of people. Inventors of innovative sundries could be granted positions in the government<sup>17</sup> and thirty years of patent right. Those who successfully imitated western technologies that were unavailable to China could also be granted officialdom and ten years of patent.<sup>18</sup> The bylaws also mentioned enforcement mechanisms against fake inventions.<sup>19</sup>

Due to sabotage by conservatives who opposed the legal reform, this piece of legislation barely took effect<sup>20</sup>, but its historical significance lingered. It was the first step that China took towards changing its attitude towards IPR protection. China had come a long way when it enacted these Bylaws, for previously, the Chinese word for "patent", *zhuanli*, literally meant monopolization of profits, was against Chinese norms for prioritizing morality over profits and carried only negative connotations.<sup>21</sup> Witnessing how patent law protected the interests of western merchants, however, Chinese merchants pushed the state to adopt similar regimes for Chinese merchants.<sup>22</sup> The Bylaws were the product of a drive for strengthening domestic industries, as well as a recognition that patent law promoted industrial success in the west.<sup>23</sup> Chinese law

acknowledged for the first time that inventions and innovations served advancement of progress.

## THE TRADEMARK LAW DRAFT OF 1904

As part of the "self-strengthening" effort, reformers established a new Ministry of Commerce to oversee legislation and regulation of business activities within China.<sup>24</sup> In 1904, the Ministry of Commerce drafted China's first trademark law after studying western trademark law and consulting advisors from Japan. Meanwhile, foreign influence also pressured China to adopt trademark laws. Under the Mackay Treaty between China and Britain signed after the Boxer Rebellion, China undertook to "afford protection to British trade-marks against infringement, imitation, or colourable imitation by Chinese subjects."<sup>25</sup> The Ministry of Foreign Affairs invited the Imperial Maritime Customs Service, a treaty-power controlled agency<sup>26</sup>, to help provide a draft of trademark law, in order to meet Britain's treaty demands on trademark protection.

The two resultant drafts had discrepancies. The Ministry of Commerce version subscribed to a "attributive" approach, while the Maritime Customs version a "declaratory" approach. The former, which requires all trademarks, foreign and Chinese, to be registered prior to receiving protection, favors newcomers to the international trade scene, including China and its advisor, Japan. The declaratory approach, which allows older marks to enjoy protection without registration, favors more established parties with older brands—the European merchants in China. In the Maritime Customs draft, therefore, foreign persons did not need to register their trademarks to be protected in China and abroad; persons who chose to register foreign marks in China need not prove prior foreign registration.<sup>27</sup> The drafting committee also selected the Imperial Maritime

<sup>15</sup> *Id.*

<sup>16</sup> Qu Chunhai (屈春海), Qingmo Zhongwai Guanyu "Shangbiao Zhuce Shibanzhangcheng" Jiaoshe Shishi Kaoping (清末中外关于《商标注册试办章程》交涉史实考评)[A Commentary on the historical facts of the negotiation on "Provisional Regulations on Trademark Registrations" between China and Foreign Powers in Late Qing], April 2012 Lishi Dang'an (历史档案)[HISTORICAL ARCHIVES], p. 2.

<sup>17</sup> Officialdom, which carried with it prospects and prestige, was highly desirable in feudal China. See, e.g., CHINA: A COUNTRY STUDY, *supra* note 14., p. 106, 108.

<sup>18</sup> This provision would be unusual by today's standards of patent law—the state rewarded what could be infringers of western technologies. The provision reflects an understanding of patent law as an instrument for bettering domestic technologies, rather than recognizing rights.

<sup>19</sup> Zhang Shangce (张尚策), Qingwangchao "Zhenxing Gongyi Gejiangzhangcheng" Chansheng Qianhou 清王朝《振兴工艺给奖章程》产生前后 [Before and After "The Bylaws of Awarding Industrial Inventions" in Qing Dynasty], FA XUE (法学)(LEGAL SCIENCE)(SHANGHAI, CHINA: 1982) 40.

<sup>20</sup> One known example is a Hokian merchant being granted fifteen years of patent for inventing a spinning machine. Sun Liwei (孙丽伟), "Zhenxing Gongyi Gejiangzhangcheng:" Jindai Zhongguo Diyibu Zhuanli Fagui 《振兴工艺给奖章程》: 近代中国第一部专利法规

][The Bylaws of Awarding Industrial Inventions:" The First Patent Law of Modern China], CHINA SCIENCE DAILY 中国科学报 (Sep. 18, 2015),

<https://news.sciencenet.cn/sbhtmlnews/2015/9/304560.shtml>.

<sup>21</sup> Zhu Hongyan (朱红燕), Wanqing "Zhuanli" Sixiang de Yanbian yu Fazhan (晚清"专利"思想的演变与发展) [The Evolution and Development of the Concept of "Patent" in Late Qing], 26 Puyang Zhiye Jishu Xueyuan Xuebao (濮阳职业技术学院学报)[JOURNAL OF PUYANG VOCATIONAL AND TECHNICAL COLLEGE] 47, 47 (Oct. 2013). For Chinese norms prioritizing morality against profits, see Alford and China: a Country Guide.

<sup>22</sup> *Id.* at 48. In Late Qing, Merchant Guanying Zheng persuaded the throne to extend a 10-year monopoly for his fabrics factory before official patent laws were even enacted.

<sup>23</sup> See, e.g., Zhu, *supra* note 17., at 48 (discussing how prior to the enactment of the bylaws, Chinese elites recognized the importance of patent laws for incentivizing innovation from examples of the west).

<sup>24</sup> The Ministry of Commerce (商部) was established in April, 1903 by the order of the Qing Court. Ying Zhu (朱英), Lun Qingmo de Jingji Fagui (论清末的经济法规), p. 2.

<sup>25</sup> The Mackay Treaty, art. 7, reprinted in Allman, *Protection of Trademarks*.

<sup>26</sup> Alford, *supra* note 2., p. 35.

<sup>27</sup> *Id.*, at p. 38, citing "Gaiding Shangbiao tiaoli" (1909), art. 2.

Customs itself, “through which British influence ran deeply, rather than an entity more directly under Chinese control,” to enforce the law.<sup>28</sup> From Chinese perspective, the Maritime Customs draft obviously biased towards foreign merchants.<sup>29</sup> While it was perfectly reasonable that China, writing laws for itself, would want a trademark law that works to the advantage of its businesses<sup>30</sup>, its multiple treaty obligations under the unequal treaties subjected it to drafting opinions of foreign powers who disagreed among themselves and had different interests in mind than China, a situation that would have been ridiculous by today’s standards of private international law. Nevertheless, a compromise of the two contrasting approaches was reached and a version that accommodated both sides’ wishes came to being.<sup>31</sup> The new draft made concessions such as granting a six-month priority period for established foreign marks<sup>32</sup> and allowing extraterritorial adjudication for foreign merchants.<sup>33</sup> A western source retrospectively commented that it was “a well balanced combination of the different legal approaches, and of the different political and economic interests-Chinese, western, Japanese - involved.”<sup>34</sup>

The compromised version, however, was still not met with uniform enthusiasm by treaty powers, who each sought to push China to amend the law more to their respective advantage. The ministers of US and especially Japan welcomed the law, and their merchants actively sought registration under the new regime.<sup>35</sup> Representatives of European powers, especially the minister of Germany strongly opposed and requested delaying its enforcement. The British minister opposed the draft mainly on the grounds that it served Japanese interests more than theirs, even though the *North China Herald*, an influential western publication founded by a British auctioneer<sup>36</sup>, called on treaty powers to accept the new law and deemed criticisms “undignified and unjust.”<sup>37</sup> The drafting process hit a stalemate.<sup>38</sup> Citing its multiple, competing treaty obligations, China withdrew from the situation and no formal trademark law was adopted before the collapse of Qing Dynasty in 1912.

While foreign demand pushed China to initiate trademark legislation, and foreign legal advice informed China’s drafting, ultimately, competing foreign interests, largely at odds with China’s own, also prevented China from officially adopting its first trademark law. The convoluted drafting process, which eventually led to nowhere, dispels the myth that trademark laws were some normative ideals that modern nations looked up to. For treaty powers, getting Qing China to adopt trademark laws was motivated more by commercial interests, which set a competitive course among treaty powers to alter the changing China more to their taste, and less by normative respect of rights, which would have compelled a more or less uniform regard for the law.

## THE GREAT QING COPYRIGHT LAW OF 1910

The Great Qing Copyright Law was enacted in 1910, at the Eve of Imperial China. The Law granted life plus thirty years of copyright for registered works of writings, paintings, images, sculptures, and models and carved out fair use exceptions.<sup>39</sup> The term is far longer and the scope more expansive than the copyright provision that China had agreed to in the Sino-U.S. Commercial Treaty of 1903. To eventually create this copyright law, China started by reluctantly ceding to foreign demands expressed in treaties.<sup>40</sup> As part of the Boxer Rebellion aftermath, the US negotiated with Qing ministers for further extension and protection of its commercial interests in China, including affording copyright protection for creative works. Initially outright opposing copyright protection, China gradually ceded grounds as it became “inevitable.”<sup>41</sup> China pushed against the length of copyright term and scope of protected works raised by the US and finally agreed to a term of ten years for books “especially prepared for the use and education of Chinese people.”<sup>42</sup> Similar situations emerged in China’s negotiation with Japan and Britain. Thus, China took in the notion of copyright protection by making a compromise to foreign powers.

The copyright negotiations, however, pushed the ruling elites to learn about western copyright laws and appreciate

<sup>28</sup> *Id.*

<sup>29</sup> Qu Chunhai (屈春海), Qingmo Zhongwai Guanyu “Shangbiao Zhuce Shibanzhangcheng” Jiaoshe Shishi Kaoping (清末中外关于《商标注册试办章程》交涉史实考评) *supra* note 16., at p.4.

<sup>30</sup> See, e.g., Robert Heuser, *The Chinese Trademark Law of 1904: A Preliminary Study in Extraterritoriality, Competition, and Late Ch’ing Law Reform*, 22 *ORIENTAL EXTREMUS* 183 (Harrassowitz Verlag 1975).

<sup>31</sup> Alford, *supra* note 2., at p. 39.

<sup>32</sup> The Trademark Law Draft of 1904 (商标注册试办章程), Art. 26; *see also* Alford p. 39

<sup>33</sup> The Trademark Law Draft of 1904 (商标注册试办章程), Art. 20; Heuser, *The Chinese Trademark Law of 1904: A Preliminary Study in Extraterritoriality, Competition, and Late Ch’ing Law Reform*, 22 *ORIENTAL EXTREMUS* at 198.

<sup>34</sup> Heuser, *The Chinese Trademark Law of 1904*, at 198.

<sup>35</sup> Qu Chunhai, *supra* note 16., at p. 4.

<sup>36</sup> FRANK H. H. KING & PRESCOTT CLARKE, A RESEARCH GUIDE TO CHINA-COAST NEWSPAPERS, 1822-1911 (Harvard University Asia Center 1965), p. 28-29 (describing the history and influence of *North China Herald*).

<sup>37</sup> *North China Herald*, Sept. 30, 1904, p. 737.

<sup>38</sup> “With the foreign powers refusing to approve the proposed Chinese regulations and the Chinese refusing to substitute a draft more in keeping with their wishes, a stalemate ensued.” Alford, *supra* note 2., at p. 41.

<sup>39</sup> Daqing Zhuzuoquan Lü (大清著作权律) [The Great Qing Copyright Law] (1910).

<sup>40</sup> Li Yufeng & Catherine W. Ng, *Understanding the Great Qing Copyright Law of 1910*, 56 *J. COPYRIGHT SOC’Y U.S.A.* 767, 777-81 (2008-2009).

<sup>41</sup> *Id.* at 779

<sup>42</sup> Treaty for the Extension of Commercial Relations, Oct. 8, 1903, U.S.-China, 1 TREATIES AND AGREEMENTS CONCERNING CHINA: 1894-1919, at 429 (John Van Antwerp MacMurray ed., 1921).

their benefits. Even though the Minister of Education, Zhang Baixi held the view that a copyright regime is detrimental to the dissemination of knowledge, as fewer people would be able to afford books<sup>43</sup>, Yan Fu, a renowned reformist educator, identified copyright as “necessary reward for the arduous tasks of writing and translating for the public good” and without which, publishing would become unsustainable.<sup>44</sup> Domestic publishers like the Commercial Press<sup>45</sup> and Wenming Book Company<sup>46</sup> joined forces to advance the latter view.<sup>47</sup>

The law, though short-lived, carried historical significance.<sup>48</sup> Chinese society recognized for the first time that people could write for monetary rewards without being frowned upon. In the private sector, foreign and domestic publishers alike, eager to reap the fruits of the booming information consumption, urged for copyright protection.<sup>49</sup> In the public sector, the Qing court was responding to demands by treaty powers to set in place copyright laws to protect foreign commercial interests; as part of the “self-strengthening” movement, the ruling elite identified the benefits of having copyright protection domestically, despite arguments to the contrary. As domestic norms changed to welcome copyright law, Chinese society developed a sincere acceptance of copyright law as an instrument for developing the creative industries and ultimately, promoting the dissemination of knowledge.

In Late Qing, China learned for the first time about the concepts of IPR, once entirely foreign to its society, under the coercion of unequal treaties imposed by military threats. Through treaty negotiations, the dissemination of western ideas among its literate elites, and identifying needs in its domestic industries, China started to appreciate and internalize IP laws, overcoming thousands of years of cultural and political norms against IPR recognition. Neither foreign pressure nor the self-strengthening rationales for developing IPR, however, were based on a commitment to some rights inherent to creators and inventors. Rather, IPR was seen as an instrument to stimulate and sustain domestic

industries, as well as appease foreign demands that served foreign interests.

## IP LAW REFORMS WITHOUT EXECUTION DURING THE ROC PERIOD

During the ROC period (1912-1949), the government sought to engage with foreign powers on more principled grounds by respecting international law. Rather than abrogating the unequal treaties altogether, the government respected them to gain membership of the international community.<sup>50</sup> If the Qing court explored an IP regime under foreign coercion, the ROC government proactively published IP laws for gaining recognition as a modern state.<sup>51</sup>

In 1923, the ROC congress passed the first Trademark Law<sup>52</sup>, the Copyright Law in 1928, and a patent law, the Measure to Encourage Industrial Arts in 1932<sup>53</sup>. The Trademark Law set a middle course for an Anglo-Japanese dispute over the appropriate protection standard of trademark in China, but was rejected by both parties, on treaty grounds, for not steering towards their sides.<sup>54</sup> The Copyright Law borrowed heavily from German examples, consulted Japanese advice, and echoed the Great Qing Copyright Law of 1910 in its protection of Chinese works, but reminisced of the Copyright Provision in the Sino-U.S. Commercial Treaty of 1903 in its protection of foreign works.<sup>55</sup> The patent law only protected domestic inventions, which would have served the “renaissance of Chinese science” during the 1920s and 1930s.<sup>56</sup> The law was extended in 1949 to protect foreign-origin inventions on the principle of reciprocity.<sup>57</sup>

The IP laws were more modernized compared with those of Qing dynasty, but it was an importation of foreign standards too sweeping to be suitable for the state of Chinese society, with its fledgling modern judiciary and untrained personnel.<sup>58,59</sup> Sometimes, the legislation seemed

<sup>43</sup> Li & Ng, *Understanding the Great Qing Copyright Law of 1910*, at 782.

<sup>44</sup> *Id.* at 783-84.

<sup>45</sup> “商务印书馆.”

<sup>46</sup> “文明书局”

<sup>47</sup> *Id.* at 784-85.

<sup>48</sup> It was replaced by the Copyright Law proclaimed by the provisional government that overthrew Qing dynasty in 1911. *Id.* at 772.

<sup>49</sup> *Id.* at 775-77, discussing how a thirst for knowledge about the west drove up the demand for foreign works and correspondingly, publishers’ awareness of their opportunities. The authors provided the example of how an American missionary, Young John Allen, used his journal *Review of the Times* (万国公报) to promote copyright protection in China.

<sup>50</sup> See generally Pasha Hsieh, *The Discipline of International Law in Republican China and Contemporary Taiwan*, 14 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 87 (Jan. 2015).

<sup>51</sup> See, e.g., Alford, *supra* note 2., at p. 50 (“The development of laws regulating creative and inventive endeavor was a key element of the effort to foster a new legal system.”).

<sup>52</sup> Eiichi Motono, *Anglo-Japanese Trademark Conflict In China And The Birth Of The Chinese Trademark Law* (1923), 1906-26, EAST ASIAN HISTORY 9, 23 (Dec. 2011).

<sup>53</sup> Alford, *supra* note 2., at p. 52.

<sup>54</sup> Motono, *Anglo-Japanese Trademark Conflict In China And The Birth Of The Chinese Trademark Law*, EAST ASIAN HISTORY, at 23-24.

<sup>55</sup> The law granted life plus thirty years of copyright protection for a variety of Chinese works, but only ten years of copyright protection for a limited scope of foreign works. Alford, *supra* note 2., at p. 50.

<sup>56</sup> John R Allison & Lianlian Lin, *Evolution of Chinese Attitudes toward Property Rights in Invention and Discovery*, 20 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW 735, 748 (1999).

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., Alford, *supra* note 2., p. 52-53.

<sup>59</sup> Treaty powers were partly to blame for the discrepancy between legislation and enforcement.

The very manner in which the treaty powers sought in this context to introduce intellectual property law into China appears, ironically, to have been a major factor impairing its reception. Apart from the essentially self-serving advice provided by a small core of British, Japanese, American, and other foreign advisors largely involved in legislative drafting and general legal counselling, it appears that the treaty powers made no

more to show foreign powers that China had been reformed, than to really put in place a set of functioning laws. The amended patent law of 1949, for example, "adopted almost every type of patent provision in other nations' patent systems, with little attention to whether they fit into a cohesive whole," and ignored the fact that the ROC government did not have the capacity to enforce those laws.<sup>60</sup> Due to lack of a structured legal system and legal consciousness on the grounds<sup>61</sup>, the IP laws, good on paper, failed to effectively regulate infringements.

Foreign influence and domestic incentives took different forms, but they continued to shape IP legislation in China in the ROC period. ROC built its IP laws on the Qing laws and published them at least partly to stimulate domestic industries. Meanwhile the IP laws were heavily influenced by foreign laws and served as an instrument for showcasing the nation's modernized conception of laws, so that China would gain international recognition as a newly born nation-state.

## SETBACKS IN EARLY PRC

The takeover by the Communist Party ended ROC rule of mainland China and along with it, any IP laws then in place. Despite being a Communist regime, the PRC government initially made an effort to legislate about IPR in the 1950s. The Resolution to Improve and Develop Publishing Work<sup>62</sup> in 1950 had a general requirement of respecting the author's copyright and stipulates guidelines on how to determine royalties. The Provisional Regulation for Protection of Invention Rights and Patent Rights<sup>63</sup> gave inventors a choice of applying for an invention right versus a patent right, borrowing the dual bases of protection for inventions from the Soviet Union. The Provisional Regulation for Trademarks<sup>64</sup> protected exclusive right to use trademarks by businesses, not excluding privately owned ones. However, these attempts were aborted by a growing political ideology that denied all forms of private rights. In 1957, a draft for Provision Regulations for Copyright Protection of Published Works was aborted due

to criticisms that the copyright protection equaled to "privatizing knowledge" and showed "remnants of capitalist legal rights."<sup>65</sup> In 1963, the provisional patent regulations were replaced by Regulations for Rewarding Inventions<sup>66</sup>, which only granted rewards to the inventor, but not any protection for exclusive private use. The provisional trademark regulations were replaced with Regulations for Merchandise Management<sup>67</sup>, which only kept the trademark system for identifying purposes in order to control the quality of merchandises, not to grant protection for any private business use. PRC descended into an absence of formal IPR laws. "The 50,000 registered trademarks in China at the time were criticized as 'representing capitalist values,' and fell into disuse. Tens of thousands of leading scientists and technical professionals were lumped into a generalized 'bourgeoisie,' sentenced to labor camps to pay for the social and financial capital that they had earned from their work. Rewards for intellectual creation diametrically opposed socialist values, and for the following decade, intellectual property rights largely ceased to exist."<sup>68</sup> Much like Confucianism, Communism gave China a reason to frown upon asserting private interests in intellectual property. The following quote illustrates the general sentiment towards IPR during the Cultural Revolution: "Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"<sup>69</sup> Even though Marxist ideology bore no resemblance with Confucianism which dominated the social and political culture of Imperial China, "because each school of thought in its own way say intellectual creation as fundamentally a product of the larger society from which it emerged, neither elaborated a strong rationale for treating it as establishing private ownership interests."<sup>70</sup>

## NEW IP LAWS IN THE 1980S

Under a set of domestic and foreign dynamics to be discussed below, PRC enacted its first modern intellectual property laws in the 1980s. With the historic introduction

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substantial efforts to show the Chinese government why intellectual property law might be of benefit to China, to assist in the training of Chinese officials with responsibility in this field, or to educate the Chinese populace as to its rationale . . . Instead, what was good for each treaty power was deemed by nationals of that particular treaty power, perforce, to be good for China. Alford, p. 49 (emphasis added).

<sup>60</sup> Allison & Lin, *Evolution of Chinese Attitudes toward Property Rights in Invention and Discovery*, 20 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL ECONOMIC LAW, at 748.

<sup>61</sup> The ROC government was preoccupied with dealing with warlords and suppressing the Communist Party, which was quickly gaining influence. See, e.g., Alford at p. 50.

<sup>62</sup> Guanyu Gaijin he Fazhan Chuban Gongzuo de Jueyi (关于改进和发展出版工作的决议), which required balancing the interest of the author, readers and the publisher in determining royalties. Cao Wenzhe (曹文泽) & Wang Qian (王迁), *Zhongguo Zhishi Chanquan Fazhi Sishinian: Licheng, Tezheng yu Zhanwang* (中国知识产权法制

四十年: 历程、特征与展望)[Forty Years of Intellectual Property Law Development in China: History, Characteristics and Outlook], *Fa Xue* (法学)[OPEN JOURNAL OF LEGAL SCIENCE] 3, 4 (2018).

<sup>63</sup> Baozhang Famingquan he Zhuanliquan Zanxing Tiaoli (保障发明权和专利权暂行条例). *Id.* at 5.

<sup>64</sup> Shangbiao Zhuce Zanxing Tiaoli (商标注册暂行条例) *Id.* at 6.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> Faming Jiangli Tiaoli (发明奖励条例) *Id.* at 5.

<sup>67</sup> Shangpin Guanli Tiaoli (商品管理条例) *Id.* at 6.

<sup>68</sup> Joseph Longo, *A Brief Analysis of the Chinese Intellectual Property Regime*, MICHIGAN STATE UNIVERSITY CENTER FOR ANTI-COUNTERFEITING AND PRODUCT PROTECTION, <https://a-cpp.msu.edu/article/a-brief-analysis-of-the-chinese-intellectual-property-regime/>.

<sup>69</sup> Alford, *supra* note 2., p. 65 (quoting Zheng Chengsi, "Future Chinese Copyright Systems," 152).

<sup>70</sup> *Id.* at p. 57.

of Trademark Law in 1982, which restarted protection of private right to exclusively use trademarks, PRC's legal system started to recognize private interests in IP again. In 1984, PRC quickly enacted Patent Law, which recognizes property interests in technology and inventions and is aimed at incentivizing technological innovation. The first Copyright Law was enacted in 1990.<sup>71</sup> While the law remained concerned with the government's control over the dissemination of ideas, reminiscent of past copyright laws during the Imperial and ROC periods<sup>72</sup>, it provided a comprehensive framework for some protection of creative works, a significant improvement from the non-existent copyright law in the from the 50s to 70s.<sup>73</sup> In 1993, the National People's Congress passed the Anti-Unfair Competition Law, granting protection to trade secrets and thereby recognizing a whole new category of IPR.<sup>74</sup>

These laws were in no small part due to an awakening in legal consciousness in Chinese society. Coming out of the Cultural Revolution, China harbored growing domestic interests in developing a market economy, which revitalized interests in IPR. The new leadership put forward a series of policies to restore the position of intellectuals in society and advance intellectual property protection, "believing the promotion of scientific and other intellectual work to be crucial" for China to recover from the destruction to its culture and science by the decade of turmoils.<sup>75</sup> To enact copyright law, the legislature had to overcome the idea that regarding copyright protection as an obstacle to speech control<sup>76</sup>, a purpose of Chinese laws and regulations on publications since the Imperial period. Similar hurdles existed in the patent field-even though contentions lingered in the patent field due to remnants of socialist ideas that a patent system is "inherently corrupt", a majority view prevailed that a patent system will benefit China.<sup>77</sup> The proponents argued that a patent system will not only incentivize domestic inventions, but also attract sorely needed foreign technologies as well as reassure foreign investors of China's seriousness in constructing a legal system conducive to international business.<sup>78</sup>

Recognition of benefits of patent law prevailed over socialist ideas against it. Following WIPO's General Secretary's visit to China, PRC joined WIPO in 1980 and "committed to a stronger intellectual property rights system by sending delegations across the world to learn about patent systems in other countries, including Germany, Brazil, and the United States." In the following decade, China continued to have WIPO assist with building its patent system.<sup>79</sup> Such examples as China's convoluted path to establishing a patent system illustrates how the adoption of IPR in post-Cultural Revolution PRC is largely incentivized by domestic recognition of the need of a legal structure, both to sustain domestic industries and to gain international recognition that China was committed to creating an environment suitable for foreign technologies and investments.

The first IP laws were also incentivized by foreign pressure, most evidently by the US. As China opened up to the world, the world embraced China. Preceded by the U.S.-China Agreement on Cooperation in Science and Technology, in 1979, China and the US signed the Agreement on Cooperation in High-Energy Physics and the Agreement on Trade Relation, both of which contained copyright provisions at the direction of President Carter.<sup>80</sup> At the backdrop of these agreements are PRC's outreach into the world after ending years of turmoil that was the Cultural Revolution, and US recognition of PRC's legitimacy through the Shanghai Communiqué<sup>81</sup>. Following normalization of their relation, the two governments signed a number of important agreements to solve substantive problems such as international trade, foreign investment, licensing of technology and to accommodate the world's biggest corporate giants that were expected to come to China.<sup>82</sup> China had to establish a legal system. Seeing how IP protection was one vital issue for the US government, China actively worked towards establishing an IP regime from scratch.<sup>83</sup>

<sup>71</sup> Cao & Wang, *Zhongguo Zhishi Chanquan Fazhi Sishinian*: Licheng, Tezheng yu Zhanwang (中国知识产权法制四十年: 历程、特征与展望), *Fa Xue (法学)*[ OPEN JOURNAL OF LEGAL SCIENCE] at 8.

<sup>72</sup> The Copyright Law of 1929 refused to register the work if it "obviously goes against the doctrines of the Guomindang." *Id.* at p. 51.

<sup>73</sup> Cao & Wang, *Zhongguo Zhishi Chanquan Fazhi Sishinian*: Licheng, Tezheng yu Zhanwang (中国知识产权法制四十年: 历程、特征与展望), *Fa Xue (法学)*[ OPEN JOURNAL OF LEGAL SCIENCE] at 8.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> Alford, *supra* note 2., p. 65.

<sup>76</sup> Cao & Wang, *Zhongguo Zhishi Chanquan Fazhi Sishinian*: Licheng, Tezheng yu Zhanwang at 8.

<sup>77</sup> Alford, p. 67-69 (describing the debate on the benefit of patent system in China).

<sup>78</sup> *Id.* at 67-68.

<sup>79</sup> Joseph Longo, *A Brief Analysis of the Chinese Intellectual Property Regime*, MICHIGAN STATE UNIVERSITY CENTER FOR ANTI-

COUNTERFEITING AND PRODUCT PROTECTION, <https://a-capp.msu.edu/article/a-brief-analysis-of-the-chinese-intellectual-property-regime/>.

"In order to ensure China's commitments and assist with the new system, General Secretary Bogsch visited Beijing nearly every year for the following twelve years, and was even awarded the title of "Honorary Professor" by Peking University."

<sup>80</sup> Cao & Wang, *Zhongguo Zhishi Chanquan Fazhi Sishinian*: Licheng, Tezheng yu Zhanwang at 7.

<sup>81</sup> *U.S.-PRC Joint Communiqué (1979)* (Jan. 1979). Article one states, "The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979." Article two states, "The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China," despite continued relation with Taiwan.

<sup>82</sup> This assessment is from Cohen's lecture on week five of our class.

<sup>83</sup> Cao & Wang, *Zhongguo Zhishi Chanquan Fazhi Sishinian*: Licheng, Tezheng yu Zhanwang, at 7.

## IP LAW AMENDMENTS

In the following decades, PRC enacted a series of amendments to its IP laws. These amendments served to respond to scrutiny by the US Trade Representative, incorporate international treaties and accommodate changing domestic needs. China needed continued international recognition leading up to its joining the World Trade Organization (WTO) in 2001. China's rapidly developing economy rendered new challenges that called for changes to its IP regime.

Even though China's first set of IP laws helped it attract billions in foreign investments, the US identified China's IP regime as insufficient.<sup>84</sup> Under the Omnibus Trade and Competitiveness Act of 1988, the US Trade Representative (USTR) is charged with investigating countries with "unfair trade practices."<sup>85</sup> USTR identifies countries with heavy IPR infringements in the "Special 301" Report, an annual review of the global state of IP protection and enforcement.<sup>86</sup> China made the priority watchlist in 1989<sup>87</sup>, 1990<sup>88</sup> (and most recently, 2022<sup>89</sup>), and was listed among "priority foreign countries" in 1991<sup>90</sup>, citing underenforcement<sup>91</sup> Under the threat of unilateral economic sanctions, which would undoubtedly harm the growing market, China proposed a series of trademark regulations to better enforce against infringements of famous brands like IBM computers components and Levi's jeans<sup>92</sup>. In 1992, Patent Law was amended to include protection of recipes of food, medicine and extend the protection term after China and US under a foundational Memorandum of Understanding.<sup>93</sup>

<sup>84</sup> Joseph Longo, *A Brief Analysis of the Chinese Intellectual Property Regime*.

<sup>85</sup> H.R.4848 – 100th Congress (1987-1988): Omnibus Trade and Competitiveness Act of 1988. <https://www.congress.gov/bill/100th-congress/house-bill/4848>

<sup>86</sup> USTR Releases 2022 Special 301 Report on Intellectual Property Protection and Enforcement, UNITED STATES TRADE REPRESENTATIVE, <http://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/april/ustr-releases-2022-special-301-report-intellectual-property-protection-and-enforcement> (last visited May 13, 2022).

<sup>87</sup> 1989 Special 301 Report (Office of the United States Trade Representative Washington, D.C. May 1989).

<sup>88</sup> 1990 Special 301 Report (Office of the United States Trade Representative Washington, D.C. Apr. 1990).

<sup>89</sup> 2022 Special 301 Report (Office of the United States Trade Representative Washington, D.C. Apr. 2022).

<sup>90</sup> 1991 Special 301 Report (Office of the United States Trade Representative Washington, D.C. Apr. 1991).

<sup>91</sup> Joseph Longo, *A Brief Analysis of the Chinese Intellectual Property Regime*.

<sup>92</sup> Alford, supra note 2, p. 85.

<sup>93</sup> Cao & Wang, Zhongguo Zhishi Chanquan Fazhi Sishinian: Licheng, Tezheng yu Zhanwang, at 9-10.

<sup>94</sup> *Id.* at 9.

<sup>95</sup>

China became a member of the World Intellectual Property Organization in 1980, joined the Paris Convention for the Protection of Industrial Property in 1985, the Madrid Agreement

Internal incentives also pushed for these IP law amendments. In the 90s, China's top priority of its economic policy was to join the WTO, which required China to have an internationally recognized IP regime.<sup>94</sup> To meet the requirements of the global IP community, China further amended its IP laws. The substance of China's IP laws is largely informed by international IP treaties. China joined a series of international treaties on IP law, including the Paris Convention for the Protection of Industrial Property in 1985, the Madrid Agreement Concerning the International Registration of Marks in 1989, and the Berne Convention for the Protection of Literary and Artistic Works in 1992.<sup>95</sup> Most importantly, China needed to amend its IP laws to meet the requirements set in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)<sup>96</sup>, the minimum standards of IP protection set by WTO for its members. In 2001, Trademark Law was amended to implement TRIPS.<sup>97</sup> Changes include protection of geographical signs, improve protection of famous brands, and strengthen the procedure and scrutiny over Trademark Review Committee decisions. In the same year, Copyright Law was updated according to requirements of the Berne Convention.<sup>98</sup> The legislature expanded the scope of protected subject matters to include acrobatics and architecture, as well as clarified authors' rights in relation with broadcast and TV stations, abrogating old laws. China continued to change its IP laws to conform with international standards post-joining WTO. For example, in 2010, the legislature deleted a provision that previously denied copyright protection to works that were prohibited from publication and distribution in China, complying with a WTO ruling.<sup>99</sup>

Concerning the International Registration of Marks in 1989, the Berne Convention for the Protection of Literary and Artistic Works in 1992, the Convention for the Protection of Procedures of Phonograms Against Unauthorized Duplication of Their Phonograms in 1993, the Patent Cooperation Treaty in 1994, and the WIPO Copyright Treaty in 2007.

Can Huang, *Recent Development of the Intellectual Property Rights System in China and Challenges Ahead*, 13 MANAGEMENT AND ORGANIZATION REVIEW 39, 41 (Cambridge University Press Mar. 2017).

<sup>96</sup> "A minimum standards agreement, which allows [WTO] Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice." *Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited May 13, 2022).

<sup>97</sup> Ruixue Ran, *Well-Known Trademark Protection in China: Before and After the Trips Amendments to China's Trademark Law*, UCLA PACIFIC BASIN LAW JOURNAL 231, 248-51 (2002).

<sup>98</sup> See Cissy Zhou, *China Scraps Highly Controversial Clause in New Copyright Law Amendment*, SOUTH CHINA MORNING POST (Nov. 13, 2020), <https://www.scmp.com/economy/china-economy/article/3109785/chinas-copyright-law-sees-biggest-amendment-two-decades-and>.

<sup>99</sup> Copyright Law of the People's Republic of China (2010 Amendment). For background, see *Copyright Law of the People's Republic of China (2010 Revision)*, PUBLICATIONS | INSIGHTS | FAEGRE



In recent years, changing domestic needs drove China to further optimize its IP regime. The third patent amendment in 2008 “was triggered by the call from the stakeholders in the Chinese patent system, including domestic and foreign companies, universities and research institutes to strengthen patent protection,” while the first two amendments had been to conform with bilateral and international agreements.<sup>100</sup> Xi’s leadership makes it a goal to shift Chinese economy from manufacture-heavy to innovation based<sup>101</sup>, and IPR protection has naturally become a policy focus. Xi was quoted saying it is “necessary . . . to strengthen IPR protection comprehensively” to build a well-rounded socialist economy.<sup>102</sup> With the establishment of three specialized IP courts in Beijing, Shanghai, and Guangzhou in 2014, China aims to have designated personnel develop expertise to carry out what is promised by the law.<sup>103</sup> The legislature enacted a series of IP law amendments from 2019 to 2021<sup>104</sup> to strengthen protection and judicial efficiency. For example, the amended Copyright Law confers to authorities’ additional powers when investigating suspected infringements.<sup>105</sup> US criticisms on China’s IP regime has mainly taken issue with enforcement, rather than the letter of the laws.<sup>106</sup> Recent changes in China’s IP regime shows that, as scholars predicted<sup>107</sup>, China would voluntarily enhance its enforcement regime as it identifies needs domestically to have effective enforcement.

Chinese attitudes towards IPR shows a series of changes and continuities. On one hand, China’s IPR development has been subject to heavy foreign influence. In Late Qing, China reluctantly accepted IPR standards imposed by foreign powers and learned about IP laws out of necessity. During ROC period, foreign standards became a welcome source of

knowledge for creating China’s own modern IP laws, and IP provisions from foreign laws were enacted even though foreign standards might not have suited the state of legal development in China. For PRC since 1980s, foreign IP laws are to be actively learned from, and international treaties to be actively joined. While the presence of foreign influence remains constant, the motives behind embracing such influence has shifted. In Late Qing, China perceived a necessity of IP laws in accordance with foreign standards, in order to get rid of the yoke of extraterritoriality under unequal treaties. During the ROC period, China as a fledging nation-state needed to show its commitment to building a modern legal structure to the world. Today in PRC, China amends its IP laws to gain international recognition as a worthy partner in international trade.

At the same time, China is aware of the influx of foreign influence and watches out for an utter imposition of foreign standards that might not work best for self. Even during the negotiation of Sino-US Commercial Treaty in Qing Dynasty, when China had barely any bargaining power to be talked of, China pushed against the term and scope of the copyright provision proposed by the US. When PRC made concessions to the US in intellectual property disputes, the legislature would have to withstand scrutiny by its people of whether it is bowing to imperialism.<sup>108</sup> In the 2000s, the Central Government concluded that previous versions of IP laws mainly benefited foreign companies who had access to Chinese market, and any benefits to domestic businesses were “a byproduct of bowing to foreign powers,”<sup>109</sup> a sentiment reminiscent of Chinese attitudes towards treaty powers in Late Qing. Unsurprisingly, there was a similar public sentiment towards the IP law enactment in Taiwan, which shares the history of imperialist invasion with PRC.<sup>110</sup> Critics

DRINKER BIDDLE & REATH LLP,  
<https://www.faegredrinker.com/en/insights/publications/2010/4/copyright-law-of-the-peoples-republic-of-china-2010-revision> (last visited May 13, 2022).

<sup>100</sup> Can Huang, *Recent Development of the Intellectual Property Rights System in China and Challenges Ahead*, 13 MANAGEMENT AND ORGANIZATION REVIEW at 41.

<sup>101</sup> “The Chinese government announced the ‘innovation-driven’ development strategy to promote the economic and social development of the country in the 18th

National Congress of the Communist Party of China in 2012.” *Id.* at 47. See also *Xi Jinping’s Bold Plan for China’s next Phase of Innovation*, THE ECONOMIST, <https://www.economist.com/finance-and-economics/2022/04/16/xi-jinpings-bold-plan-for-chinas-next-phase-of-innovation>.

<sup>102</sup> *Xi Focus: Xi Stresses Strengthening Intellectual Property Rights Protection* - Xinhua, XINHUA (Dec. 2, 2020), [http://www.xinhuanet.com/english/2020-12/02/c\\_139556530.htm](http://www.xinhuanet.com/english/2020-12/02/c_139556530.htm).

<sup>103</sup> Can Huang, *Recent Development of the Intellectual Property Rights System in China and Challenges Ahead*, 13 MANAGEMENT AND ORGANIZATION REVIEW at 45.

<sup>104</sup> See The Patent Law of People’s Republic of China (中华人民共和国专利法) (2020) and *Decision of the Standing Committee of the National People’s Congress on Amending the Patent Law of the People’s Republic of China*; The Copyright Law of People’s Republic of China (中华人民共和国著作权法) (2021) and *China’s National People’s Congress Releases*

*Translation of the Amended Copyright Law*, XII THE NATIONAL LAW REVIEW (May 14, 2022),

<https://www.natlawreview.com/article/china-s-national-people-s-congress-releases-translation-amended-copyright-law>; Xiaoping Wei, *New Trademark Law Enhances Trademark Protection in China*, MANAGING INTELLECTUAL PROPERTY, <https://www.managingip.com/article/b1x3h004mmr5wj/new-trademark-law-enhances-trademark-protection-in-china>.

<sup>105</sup> See, e.g., *China’s Copyright Law Amended: What Are the Key Changes?*, CHINA BRIEFING NEWS, <https://www.china-briefing.com/news/china-copyright-law-amended-key-changes/> (last visited May 13, 2022).

<sup>106</sup> See, e.g., Carl Erik Heiberg, *American Films in China: An Analysis of China’s Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT’L L. 219, 231-32.

<sup>107</sup> See, e.g., Can Huang, *Recent Development of the Intellectual Property Rights System in China and Challenges Ahead*, 13 MANAGEMENT AND ORGANIZATION REVIEW at 39; Mike W. Peng et al., *History and the Debate Over Intellectual Property*, 13 MANAGEMENT AND ORGANIZATION REVIEW 15, 26-27 (Mar. 2017).

<sup>108</sup> Longo, *A Brief Analysis of the Chinese Intellectual Property Regime*, MICHIGAN STATE UNIVERSITY CENTER FOR ANTI-COUNTERFEITING AND PRODUCT PROTECTION.

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

<sup>110</sup> Alford, *supra* note 2., p. 103 (discussing how commentators denounced American pressure in Taiwan’s amendment of IP laws in 1989 as rushing out “to legislate laws that benefit others and harm [their] own.”).

called the June 5 understanding<sup>111</sup> between Taiwan and the US a “national humiliation” and denounced supporters of the understanding as traitors<sup>112</sup>, demonstrating nationalist sentiments against a perceived domineering foreign power. The Chinese public and members of the legislature remain vigilant against being strong-armed into accepting unfavorable standards by foreign powers.

While Chinese society has undergone dramatic changes socio-politically, one constant is institutional inertia against IPR recognition that lurks in the background. In Late Qing, such inertia manifested in the form of traditional Confucian ideas that authors did not work for monetary gains. In PRC from late 1950s to 1970s, it came in the form of Marxist ideas that knowledge is not to be privatized. Each time, China had to overcome the social and political norms against IPR recognition to develop an IP regime. Last but not least, to different degrees at different points in history, China sincerely recognizes that IP laws could benefit its domestic commerce and society. In Late Qing, business owners were able to persuade the ruling class to publish a rough patent law, the Bylaws of Awarding Industrial Inventions of 1898. Educators like Yan Fu pointed out how copyright law would help sustain the publishing industry and ultimately benefit education. In PRC and especially in the past decade, the leadership has internalized IP laws as necessary instruments to realize its economic goals.

China has gone through undeniable changes in how it receives foreign influence and looks at IP laws. But on a general level, Chinese attitudes towards IPR has been the continuities of acceptance of foreign influence, vigilance against foreign impositions, overcoming institutional inertia and growing sincere appreciation of IP laws.

### INCENTIVES RATHER THAN NORMATIVE URGE

China continues to view IPR as an instrument for attracting technologies and investments internationally and sustaining industries domestically. In fact, this view is largely shared by the US, which deploys IP laws to incentivize domestic innovation rather than protect the sweat of brow effort of

creators. The US differ from European countries in its conception of IPR. To promote “the progress of arts and sciences,” as the US Constitution requires of IP laws<sup>113</sup>, IPR protection needs to strike a balance between protection and openness; more protection is not necessarily good. This rationale of promoting the progress of arts and sciences can be expanded to the global scope to refute the idea that more IPR protection is normatively good.

The instrumental nature of China’s IP regime sheds light on how it is incentive-based rather than norm-based. China’s IPR had never been developed out of a sense of “right” in the sense that creators and inventors had property rights in their works, which served as the engine for IRPs to be first developed on the European continent. The development is incentivized by rational institutional choices, rather than a normative urge to recognize IPR. China’s development pattern is not unlike that of the US in the 19<sup>th</sup> Century. The parallel IPR development between China and the US reveals the benefits of shifting from a normative narrative, where the protection of IPR is taken for granted as an end in itself, to a pragmatic perspective, where IPR protection is driven by rational choices depending on the actor’s stage of development.<sup>114</sup>

It has not changed that China continues to amend its IP regime to respond to foreign demands. The source of these demands became the product of bilateral wishes to engage in business activities, rather than unequal treaties-it remains relevant, however, that the dynamic between the parties is influenced by their bargaining powers. The standards may be pushed on to one party under the coercion of not military wars but trade wars. As indicated in the Uruguay Round negotiation of TRIPS Agreement, developing countries, led by Brazil, had different interests and thus different provisions in mind than developed countries, led by the US.<sup>115</sup><sup>116</sup> The US managed to push forward its standards for IP protection through the threat of economic sanctions.<sup>117</sup> Even though the negotiation rationales were interest-based, the stance of increasing protection has come to occupy the moral high ground. As a result, scholars caution against casting a maximalist IP

<sup>111</sup> Understanding Between the AIT and the CCNAA, June 5, 1992. The understanding was designed to solve a series of IP issues that USTR identified in Taiwan and signed under the looming threat of economic sanctions. Alford, p. 104-05.

<sup>112</sup> Alford, p. 106.

<sup>113</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>114</sup> Mike W. Peng et al., *History and the Debate Over Intellectual Property*, 13 MANAGEMENT AND ORGANIZATION REVIEW at 21-22, 32.

<sup>115</sup> Brazil, along with thirteen other developing countries, voiced concerns about keeping IPR protection standards in line with their “socioeconomic, technological, development and public interest concerns,” and had initially wanted to avoid bringing IPR issues into GATT (WTO today) in lieu of WIPO. The US and other developed countries pushed for an agreement that mandated higher IPR protection standards. A relevant background information is that during the Uruguay Round, which was the final round of negotiation of TRIPS, Brazil, among some of the other developing countries, was under unilateral trade sanctions by the US for “lack of patent protection for pharmaceutical and agrochemical products” and for

“not applying ‘adequate’ IP protection to software.” THE MAKING OF THE TRIPS AGREEMENT: PERSONAL INSIGHTS FROM THE URUGUAY ROUND NEGOTIATIONS, pp. 240-42, 244 (Jayashree Watal et al. eds., World Trade Organization 2015). See also Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2871 (2006) (discussing how developing countries including Brazil and South Africa wanted to be able to keep laws that allowed for domestic flexibilities in enforcing TRIPS standards).

<sup>116</sup> “Even though the rules of globalization, shaped by international organizations such as the WTO, seek to establish equality in global society, those rules are created and influenced by a powerful group of countries.” Kitsuron Sangsuvan, *Separation of Powers in Intellectual Property Rights: Balancing Global Intellectual Property Rights or Monopoly Power in the Twenty-First Century by Competition Law*, 26 N.Y. Int’l L. Rev. 1, 14 (2013).

<sup>117</sup> Cao & Wang, Zhongguo Zhishi Chanquan Fazhi Sishinian: Licheng, Tezheng yu Zhanwang, at 9.

protection policy, where a developed country pushes for greater IP protection to maintain monopoly, into a harmonization principle, where the goal is to unify protection standards to facilitate international trade for the greater good.<sup>118</sup> Sometimes having the same standards does not serve the best interests of all parties involved.

As PRC is a developing economy, some hold the view that it should be allowed to copy foreign innovation to some extent, citing that the US had been a major copyright infringer when it was a developing economy.<sup>119</sup> Indeed, “piracy ‘promoted domestic publishing output’ in nineteenth century America.”<sup>120</sup> This historical parallel between China and the US should serve as a point of understanding. Although the US is a world leader of IPR protection today, this was not always the case. The transformation of the US from IPRs violator to protector suggests the importance of domestic incentives for an effective IP regime, especially when foreign powers do not have the capacity to coerce. The US only started to value IP protection when its own economy became more innovation driven. China’s increased protection of IPR is also largely interest-based. Initially in the 90s, China adopted its first set of IP laws to gain recognition of good international citizenship on the eve of its entry to WTO. Recent development in IPR protection in China suggests that similar to the US in the 20<sup>th</sup> Century, China is responding to domestic needs of stronger protection, which would in turn, drive China to push for an international IPR order where more protection is granted. Different IP standards work best for different kinds of economies.

This is not to say that there can never be an international set of standards for IP protection. The note cautions against, however, assuming western or US standards today to be legitimate by default, or normatively better, simply because the parties had more bargaining power during negotiations. Judging from history, while foreign pressures can impose a set of rules on China from a position of strength, domestic needs were always necessary to drive China to make meaningful legal changes. The US pushed China to agree to ten years of copyright protection for a narrow scope of works in 1903, but when Chinese society developed a sincere demand for copyright law, the government voluntarily stipulated a much longer term of copyright protection for a more expansive scope of protected works.<sup>121</sup> True progress in China’s IP regime has been achieved when public opinion sincerely appreciated how IP laws would promote their own progress. Framing China as an enemy against US businesses’ IPR interests would only deepen this sense of

“foreign standards vs. selfhood.” An interest-based approach that facilitates mutual recognition of the advantages of an effective IP regime would be more beneficial in the long run. Through engendering sincere recognition of the benefits of IPR enforcement for domestic industries, China has and will continue to internalize IPR, which were once foreign to China’s value system. Compared with threats and carping criticisms, a gradual process that allows China to internalize the benefits of a stricter IP regime is more sustainable in the long run, so that IPR protection becomes less the product of power struggle and more the result of genuine appreciation of a shared set of principles across the Pacific Ocean.

## CONCLUSION

Chinese attitudes towards IPR are a series of change and continuity. One constant theme is the presence of foreign influence, although it has taken different forms during different periods. Another is domestic perception of IPR, which has undergone major changes since the Imperial period. Although in early PRC, IPR were again dismissed out of ideological reasons, overall, China has made great strides towards removing stigmas of privatizing intellectual property and recognizing the benefits of IPR.

Western criticism of China’s IP regime is mainly based on under enforcement.<sup>122</sup> China’s under enforcement of IP laws is tied to its current state of development where a maximalist IPR protection scheme would not best serve its economic interests. China’s initial adoption of formal IP laws was driven by the interests of international recognition of good citizenship and thus eligibility for WTO. Extending IPR protection to foreign companies also helped attract the foreign investments that China needed for its economic reform. As indicated by recent legislative and enforcement attempts, however, China will voluntarily expend more resources to protect IPR as China’s economy develops to rely more heavily on domestic innovation instead of cheap labor. Conversely, an implication is that if the development of domestic economy turns stale, China will lack incentives to further improve IPR protection.

In the 1980s, China needed to reenter the world stage and attract foreign investments and technology. Contrary to the passive acceptance of foreign influence in Late Qing, PRC in the 80s actively sought to form its IP laws by looking outward onto international agreements. The drive for international recognition prompted PRC to join the international treaties and enter into bilateral agreements with the US, and the treaties and agreements, in turn,

<sup>118</sup> Sarah R. Wasserman Rajec, *The Harmonization Myth in International Intellectual Property Law*, 62 Ariz. L. Rev. 735, 779 (2020) (“The rhetorical power of inaccurately naming the changes that increase protection, ‘harmonization,’ imbues maximizing measures with an unmerited, default legitimacy.”).

<sup>119</sup> Longo, *A Brief Analysis of the Chinese Intellectual Property Regime*.

<sup>120</sup> Mike W. Peng et al., *History and the Debate Over Intellectual Property*, 13 MANAGEMENT AND ORGANIZATION REVIEW at 22.

<sup>121</sup> See supra p.6; Daqing Zhuzuoquan Lü (大清著作权律) [The Great Qing Copyright Law] (1910).

<sup>122</sup> See, e.g., Carl Erik Heiberg, *American Films in China: An Analysis of China’s Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT’L L. 219.

informed and shaped the substance of Chinese IP laws. Another source of motivation is again, domestic needs. In the 80s, China needed to attract foreign capital and technologies to build its fledging industries; now China needs to establish a comprehensive IP regime to stimulate and sustain its growing domestic industries, as well as to shift its economy from manufacture-heavy to innovation-based. Under repeated demands by the US government, China reluctantly amended its IP regime, but the appeasement of foreign pressure, like in 1900s, only had limited effects on motivating IP enforcement. Only through genuine appreciation of the benefits of IP laws for its domestic industries will China be able to put forth a maximal enforcement regime.

In 2022, China joined two key WIPO treaties, WIPO's Hague System for the International Registration of Industrial Designs and the Marrakesh Treaty, drawing international attention.<sup>123</sup> It is reasonable to join Huang and Peng's prediction that as China's economy grows to become sufficiently innovation-driven, it will voluntarily strengthen its IP enforcement regime to serve domestic needs. While threats of economic sanctions and trade wars could have short-term effects of prompting negotiations, as China and the US continue to cooperate in trade and technology, mutual understanding and appreciation of a shared set of IP standards would be key.

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<sup>123</sup> China Joins Two Key WIPO Treaties, [https://www.wipo.int/pressroom/en/articles/2022/article\\_0001.html](https://www.wipo.int/pressroom/en/articles/2022/article_0001.html) (last visited May 10, 2022).