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The Protection and Enforcement of Intellectual Property in China since Accession to the WTO: Progress and Retreat

BRYAN MERCURIO*

ABSTRACT: China is without a doubt the world's leading infringer of intellectual property rights (IPRs). China's factories produce counterfeit and pirated products for local and foreign consumption while China's domestic industry infringes patent rights with relative impunity – this despite nearly 30 years of improving laws for the protection and enforcement of IPRs as well as accession to the World Trade Organization in 2001. This brief article seeks to understand the reasons behind China's apparent failure to adequately enforce its IPRs. Finding local protectionism a major impediment to enforcement efforts, the article further analyses whether the central government has the power to enforce IPRs or whether it is powerless to confront and challenge local interests.

KEYWORDS: intellectual property, counterfeiting, piracy, enforcement, local protectionism, WTO.

The People's Republic of China ("China") has over the past three decades experienced unprecedented rapid economic growth. In large part, China's success results from an export-oriented economy relying on foreign direct investment (FDI), government subsidies, and low input and labour costs. The downside to this strategy, however, is a reputation as a sweatshop producing low-quality goods without recognising or managing externalities such as product standards and environmental protection.⁽¹⁾

Primarily following a government-interventionist model utilised by the early-industrialising countries of East Asia, the Chinese government has managed and controlled almost every aspect of its economy and social development. Such management and control can be seen in China's policies concerning, *inter alia*, its currency and exchange rate, FDI, export subsidies, and indigenous innovation policies, and even in its policies concerning the protection and enforcement of intellectual property rights (IPRs). In these and in other sectors and issues China has vigilantly pursued policies that arguably conflict with the rules and norms of international law, including those of the World Trade Organization (WTO).⁽²⁾

Again, similarly to the early-industrialising countries, China now realises it must innovate in order to maintain its economic growth and developmental path. It is clear that in order to do so, China must advance beyond a low-level producer.⁽³⁾ In this regard, China has become adept at absorbing foreign technology by learning from multi-national enterprises (MNEs) that have invested in China, building internal capacity, and then utilising the acquired capacity to directly compete with MNEs. At the same time, China has seemingly accepted that it must increase the protection and enforce-

ment of IPRs in order to assist its progress beyond that of a "world factory" and toward a true innovator nation.⁽⁴⁾ Accession to the WTO has accelerated the pace of change, with most now considering China's IP laws to generally comply with its commitments under the WTO's Agreement on Trade-Related Measures on intellectual property rights (TRIPS). Enforcement of these laws, however, remains problematic.

China is the world's leading IP infringer. China is by some measure a producer of counterfeit and pirated goods (it is estimated that China accounts for over 80 percent of the world's counterfeits),⁽⁵⁾ producing large quantities of goods such as knock-off designer-brand clothing and accessories, shoes,

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1. For instance, it is widely reported that China produces 35 percent of the world's coal but accounts for 80 percent of coal mining deaths. The likely source of these statistics is the following: Zhao Xiaohui and Jiang Xueli, "Coal mining: Most deadly job in China," *Xinhua News Service*, 13 November 2004, www.chinadaily.com.cn/english/doc/2004-11/13/content_391242.htm (consulted on 24 February 2012).
2. Interestingly, and unlike many Western countries, Chinese law provides that "where the provisions of an international treaty which the PRC has concluded or acceded to differ from the civil laws of the PRC, the provisions of the international treaty shall prevail, with the exception of those articles to which the PRC has made a reservation" (*General Principles of Civil Law*, Article 142). Thus, under Chinese law a plaintiff can cite international treaties to which China is a signatory in a lawsuit if domestic law conflicts with the international commitment or provides no recourse. Catherine Sun, *China Intellectual Property for Foreign Business*, Hong Kong, LexisNexis, 2004, pp. 8-9.
3. At the same time, and unlike the early-industrialising countries, China has given no indication that it seeks to abandon low-cost, low-technology manufacturing.
4. For analysis of the effect of IPRs on investment, see Keith E. Maskus, "Lessons from Studying the International Economics of Intellectual Property Rights," *Vanderbilt Law Review*, vol. 53, no. 6, 2000, p. 2219.
5. Daniel C. K. Chow, "Why China Does Not Take Commercial Piracy Seriously," *Ohio Northern University Law Review*, vol. 32, no. 2, 2006, p. 2003.

and apparel, pirated films and books, and fake consumer electronics, aircraft, and car parts for both the local and export market.⁽⁶⁾ China also is a large-scale infringer of patents, with both industrial giants and technology-related industry appearing to blatantly ignore the patent rights of foreign companies.

Legitimate businesses are estimated to suffer annual losses of US\$250-750 billion in lost sales as a result of counterfeit and pirated goods, while unsuspecting consumers have suffered great losses – including loss of life – from poorly-made imitation products.⁽⁷⁾ It is almost impossible to predict the losses suffered from patent infringement. Membership in the WTO has done nothing to curtail the infringements; ironically, liberalised trade policies (including fewer export restrictions and the cessation of the state-trading monopoly on exporting) coupled with the rise of the Internet and e-commerce has led to a dramatic rise in counterfeiting and piracy over the last decade. Indeed, estimates from the Chinese government, United States (US) Congressional Research Service, and others conclude that counterfeits constitute between 15 percent and 20 percent of all Chinese-made products, and that upwards of 90 percent of software in China is pirated.⁽⁸⁾ Rather amazingly, 85 percent of all infringing goods seized at EU borders are sent from China (with an additional 2 percent coming from the Hong Kong SAR), with around 90 percent seized for trademark infringement.⁽⁹⁾

This article will briefly survey the rapid change in China's approach to IPRs over the past two decades, particularly as it relates to China's accession to the WTO in 2001. While acknowledging the breadth of China's transformative legislative and administrative response to IPRs, the main theme of the article challenges China's commitment to the enforcement of IPRs. In so doing, the article seeks to understand the reasons behind China's apparent failure to adequately enforce IPRs and finds a lack of incentive among provincial leaders as one of the main causes of the failure. An interesting offshoot of this, however, is whether the central government in Beijing has the power to increase enforcement efforts. This article discusses this issue at length before taking a more nuanced view that separates patent infringement from trademark and copyright infringement. Finally, the article concludes that while the problems of IP enforcement in China are significant, they are not insurmountable. That being said, prior to solving the problem, better identification and understanding of the root cause of the problem is necessary.

Intellectual property rights and enforcement in China

With the rise of Chairman Mao and Communism in 1949, notions of private property rights essentially became meaningless.⁽¹⁰⁾ This included IPRs, with the abandonment of existing methods and schemes for rewarding and stimulating creation.⁽¹¹⁾ A system of limited rewards followed, but even that was called into question as hard-core ideology rejected any material inducement to innovation.⁽¹²⁾ The Cultural Revolution dealt a final blow to IPRs and banned all incentives to creation by deeming all such creations national assets. With this, innovative creation virtually ceased in China for several decades.

In 1979, China began to seriously consider IPRs as part of its greater strategy to engage the rest of the world. At the same time, negotiations over the protection of IPRs formed part of – and actually held up finalisation of – the Sino-US Trade Agreement (1979). More specifically, the US viewed IPRs as critical to any agreement with China encompassing science and

technology and trade arrangements, and made it clear it would not sign any agreement that did not specifically include IPRs. Having no experience in issues involving IPRs, China was reluctant to include them, and thus began intensively studying IP shortly thereafter.

Fearing China would present the same IP-related problems of a rising Japan, in the mid-1980s the US began pressuring China to adopt a general domestic framework for strengthening IPRs and to sign on to some of the more important international IP treaties, such as the Paris Convention (1985), Madrid Agreement (1989), and the Integrated Circuits Treaty (1989). At the same time, China also established the State Intellectual Property Office (SIPO) and the Trademark Office and restructured its judicial process for dealing with matters involving IPRs. Under the threat of being designated a "priority foreign country" – that is, a country whose trade policies and/or inadequate IP protection are deemed injurious to US commerce – under Section 301 of the US Omnibus Trade and Competitiveness Act (1988) and thus facing retaliatory US trade sanctions, China committed to the US in a 1989 Memorandum of Understanding to submit a copyright bill to the National People's Congress.⁽¹³⁾ The bill became law in 1990.

Shortly after being designated a "priority foreign country" in 1992, China reached a comprehensive agreement on IPRs with the US.⁽¹⁴⁾ As part of the agreement, China strengthened and expanded copyright protection, joined the Berne Convention (1992) and Geneva Convention (1993),⁽¹⁵⁾ provided pharmaceutical protection for chemical and pharmaceutical products, restricted the use of compulsory licences, and committed to protecting trade secrets through forthcoming legislation. China also agreed to adopt effective measures to enforce IPRs in China and at its border. In return, the US re-

6. On why China counterfeits, see *ibid.*, Section II.
7. For analysis relating to film and music, see Eric Priest, "The Future of Music and Film Piracy in China," *Berkeley Technology Law Review*, vol. 21, 2006, p. 795.
8. Chetan Kulkarni, "Calls for Chinese crackdown on piracy," *United Press International*, 17 May 2005, www.upi.com/Business_News/Security-Industry/2005/05/17/Calls-for-Chinese-crackdown-on-piracy/UPI-44181116369129/#ixzz1fuPgSkR2 (consulted on 24 February 2012). In 2001, the PRC State Council estimated counterfeit trade at \$19 billion-\$24 billion per year, accounting for 8 percent of China's gross national product. See PRC State Council Research and Development Committee, "Survey of the Effects of Counterfeiting on the National Economy," 2003, p. 5. The problem for the movie industry is compounded by the fact that China creates a barrier to market access by censoring or prohibiting the importation and distribution of many foreign films. Of course, pirated copies of these films are readily available throughout China. Trade relations between China and the US prominently featured during the visit of Chinese Vice President Xi Jinping to Washington in February 2012. More specifically, China agreed to expand its import quota of foreign films from 20 to 34 and to increase the percentage of revenue that foreign film companies receive from the showing of their films in China from 13-17 percent to 25 percent. This agreement partially but not totally resolves a long-running dispute between the two countries regarding the importation and distribution of reading materials, audiovisual home entertainment products, sound recordings, and films for theatrical release. See Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 19 January 2010.
9. European Commission, Taxation and Customs Union, "Report of EU Customs Enforcement of Intellectual Property Rights: Results at the European Border – 2010," 2011, p. 2.
10. Peter K. Yu, "The Second Coming of Intellectual Property Rights in China," *Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law, Yeshiva University*, no. 11, 2002, p. 7. See also Andrea Wechsler, "Intellectual Property Law in the P.R. China: A Powerful Economic Tool for Innovation and Development," *China-EU Law Journal*, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=13545465 (consulted on 24 February 2012).
11. On IPRs protection prior to 1949, see generally William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Stanford, Stanford University Press, 1996.
12. William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, *op. cit.*, p. 61.
13. US-China Memorandum of Understanding on Enactment and Scope of PRC Copyright Law (1989).
14. Memorandum of Understanding between the United States of America and the People's Republic of China, 1992, http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005362.asp (consulted on 24 February 2012).
15. At the same time, China also ratified the following treaties: the Universal Copyrights Convention (1992), Geneva Convention (1993), Patent Cooperation Treaty (1994), and Budapest Treaty (1994).

moved the designation and likely also committed to renewing China's MFN status.

It quickly became apparent that China was not wholeheartedly fulfilling its obligations, and the US and China negotiated two additional agreements, one in February 1995 and the second in June 1996. In these agreements, China committed to further strengthening IP enforcement measures (including improving enforcement at the border and additional criminal penalties for violating IPRs under certain conditions), and undertook to reduce counterfeiting/piracy and to open its internal markets to US copyright material (i.e., computer software, sound recordings, and movies). For its part, the US agreed to provide Chinese lawyers and judges with training in IPR.⁽¹⁶⁾

As part of its accession package to the WTO, China undertook further commitments and obligations regarding its protection and enforcement of IPRs. Through a combination of revised laws,⁽¹⁷⁾ implementing and administrative measures,⁽¹⁸⁾ and judicial interpretations,⁽¹⁹⁾ these commitments essentially completely overhauled China's system of protecting and enforcing IPRs in a number of areas, including copyright, trademark, and patent.⁽²⁰⁾

Many of the revisions were clearly made in direct response to – that is, in order to comply with – the obligations contained in the TRIPS Agreement.⁽²¹⁾ In relation to patents, such revisions include the prohibition of "offering for sale," judicial review of patent invalidations, and stricter standards for the issuing of a compulsory licence.⁽²²⁾ For copyright, protection was extended to architectural works, compilations, and databases,⁽²³⁾ the right of communication was added for information networks, public performance rights, and rental rights, and protection for computer software was also added.⁽²⁴⁾ The revisions also modified China's fair dealing provision in order to comply with obligations sets out in the TRIPS Agreement.⁽²⁵⁾ The trademark law was also significantly revised in order to meet China's obligations under the TRIPS Agreement. For instance, registerable subject matter was extended so as to include three-dimensional and colour marks, protection for "well-known" marks protection was brought in line with the international standard, protection for certification marks, collective marks, and geographical indications was granted, the time limit for challenging fraudulently or unfairly acquired marks was removed, and judicial review of all trademark and administrative decisions was added.⁽²⁶⁾ Revisions relating to the enforcement of IPRs – including allowing for injunctions and criminal liability – were also added in order to comply with the TRIPS Agreement.

Other revisions, however, are not directly related to accession to the WTO. It is suggested that these revisions grew organically in response to the domestic market. For instance, revisions to the patent law also included a simplification of the invalidation and revocation process, clarification of the ownership of patent rights between employees and employers, and damages based on appropriate royalties.⁽²⁷⁾ Similar revisions in relation to copyright include the elimination of preferential treatment to foreigners, certain requirements relating to the assignment of copyright, and even enhanced protection of acrobatic art.

Since 2001, China has continued to update and revise its laws and regulations relating to the protection of IPRs. For instance, the Chinese Patent Law was revised in October 2009 in an attempt to more effectively protect patent rights while at the same time promoting indigenous innovation. Correspondingly, the Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Adjudicating Patent Infringement Disputes came into effect on 1 January 2010, and Implementing Regulations followed in February 2010. Likewise, the Chinese Copyright Law was revised in April 2010 in two limited ways: first, the express prohibition on copyright pro-

tection for prohibited works was removed so as to implement the WTO decision in *China-IPRs*; and second, formal requirements when taking a security interest over copyright were amended so that the pledgor and the pledgee must register the pledge with the copyright administrative authorities of the State Council. Finally, the Chinese Trademark Law is also in the process of being revised after years of consultation. The latest draft revisions, released in October 2011, intend to strengthen the trademark system in a number of ways, including *inter alia* extending protection to single colour and sound, amending the registration system (i.e., allowing multiple class applications, online applications, etc.), amending the opposition procedures, and allowing heavier penalties for "repeat offenders."

After four major IP agreements with the US (1989, 1992, 1995, and 1996), membership in WIPO, the signing and ratification of numerous international IP agreements, and accession to the WTO, the problem is no longer that China does not provide adequate laws for the protection and enforcement of IPRs but rather that China simply does not enforce its laws.

The source of the problem

As mentioned above, China's laws and regulations concerning IPRs are for the most part consistent with its TRIPS obligations.⁽²⁸⁾ The enforcement of those laws and regulations, however, is lacking. The problem is widespread and encompasses all forms of IPRs. Moreover, the problem is not limited to underground counterfeiting networks, as legitimate businesses regularly engage in IP violations with impunity and often target competitors' senior or

16. In February 1995, the USTR executed an agreement stating that the US approved of China's "Chinese Action Plan for Effective Protection and Enforcement of Intellectual Property Rights." China-United States: Agreement Regarding Intellectual Property Rights (1995).
17. See, e.g., Copyright Law of the People's Republic of China (effective 1 November 2001), www.sipo.gov.cn/sipo_English/laws/relatedlaws/200804/t20080416_380362.html (consulted on 24 February 2012); Patent Law of the People's Republic of China (effective 1 July 2001), www.sipo.gov.cn/sipo_English/laws/lawsregulations/200804/t20080416_380327.html (consulted on 24 February 2012); Trademark Law of the People's Republic of China (effective 1 December 2001), www.sipo.gov.cn/sipo_English/laws/relatedlaws/200804/t20080416_380361.html (consulted on 24 February 2012).
18. See, e.g., Regulations on the Protection of Layout-Designs of Integrated Circuits (promulgated by State Council, April 2001), www.sipo.gov.cn/sipo_English/laws/lawsregulations/200804/t20080416_380325.html (consulted on 24 February 2012).
19. Such judicial interpretations are recognised as binding within the judicial system. See Provisions of the Supreme People's Court on Judicial Interpretation 6 Work, Fa Fa, (2007) no. 12 (effective 1 April 2007), at Article 5, www.eastlaw.net/chineselaws/judicial/JudicialInterpretation2007.htm (consulted on 24 February 2012). See also Hong Xue and Chengsi Zheng, *Chinese Intellectual Property Law in the 21st Century*, Hong Kong, Sweet & Maxwell Asia, 2002, p. xxxvii.
20. See generally Catherine Sun, *China Intellectual Property for Foreign Business*, *op. cit.*; Yahong Li, "The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?," *UCLA Pacific Basin Law Journal*, vol. 20, no. 1, 2002, p. 77; Ruixue Ran, "Well-Known Trademark Protection in China: Before and After the TRIPS Amendments to China's Trademark Law," *UCLA Pacific Basin Law Journal*, vol. 20, no. 1, 2002, p. 231.
21. Shi Miaomiao, "China's Participation in the Doha Negotiations and Implementation of Its Accession Commitments," in *China's Participation in the WTO*, London, Cameron May et al. (eds.), 2005, pp. 23, 32 (citing a Chinese Ministry of Commerce official as stating "the amendment of IPR laws and regulations... was initiated with a view to bringing the IPR protection system in line with the requirements laid out by the TRIPS Agreement").
22. See Chinese Patent Law, Articles 11, 46, and 48-50. See Peter K. Yu, "From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China," *American University Law Review*, vol. 55, 2006, p. 901.
23. See Chinese Patent Law, Articles 3(4) and 14.
24. See Chinese Patent Law, Article 10.
25. See Chinese Patent Law, Article 22. See Article 13 of TRIPS.
26. See Peter K. Yu, "From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China," *op. cit.*, pp. 910-911.
27. *Ibid.*
28. See also Yahong Li, "The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?," *op. cit.*, pp. 88-89.

knowledgeable employees for the purpose of acquiring trade secrets and proprietary information.⁽²⁹⁾ Foreign rivals also regularly accuse Chinese companies of blatant patent infringement. It is also well known that most government computers have pirated software installed; even the controversial and ill-fated "Green Dam Youth Escort Internet" filtering software, which the government required installed in all computers sold in China for a short time, included approximately 3,000 lines of code from US-based CYBERSitter and is now subject to a copyright infringement lawsuit in the US.⁽³⁰⁾

This is not a controversial statement, but the more difficult issue is why enforcement of IPRs in China is largely absent. Here there is substantial disagreement among scholars and onlookers. Even so, there is a certain degree of common ground between the varying positions. For instance, no one doubts the substantial progress the central government has made over the past two decades in the protection and enforcement of IPRs. Importantly, most commentators also point to provincial governments and local protectionism as the main impediment to adequate enforcement.⁽³¹⁾ This sentiment is echoed by former Assistant US Trade Representative Joseph A. Massey, who in the context of China's failure to enforce its commitments in the 1992 Agreement with the US stated:

That China would fail to enforce its IPR laws and commitments was foreshadowed almost immediately after the agreement when a senior USTR official visiting Guangdong was told by a senior provincial government leader that "Beijing's agreement" with the US was "mei you guanxi" (irrelevant) in that southern province. So far as Guangdong was concerned, the mountains were high and the emperor in Beijing was far away. It was not surprising, then, that despite the 1992 agreement, US firms' losses to piracy continued to escalate alarmingly...⁽³²⁾

Almost all commentators agree that combating the problem of local protectionism will be difficult. The differences of opinion are on whether the central government has the power to control the provinces and whether it sees it in its interest to do so. Put simply, while some believe the central government is powerless to act (and often repeat the well-known Chinese proverb that "the mountains are high and the emperor is far away" (*shan gao huangdi yuan* 山高皇帝远), others believe the central government could rein in the provinces and improve enforcement of IPRs throughout the country, and they question the government's commitment to IP enforcement.

Local protectionism seems to be at the heart of large-scale counterfeiting and piracy in China,⁽³³⁾ with both local leaders and the entire community (including the criminal element) benefiting from the infringing activities.⁽³⁴⁾ In this regard, it has been reported that "leaders of local government bureaucracies are often intimately involved with companies that profit from [counterfeit and] pirated goods," while the community benefits from employment and income distribution both directly in the manufacturing and indirectly through increased access to goods and support for the wider economy. Noted China-law expert Professor Daniel Chow succinctly states:

Many of these wholesale markets are established by local governments, specifically the administration's ministry of commerce... You shut down the trade in counterfeit goods, you shut down the local economy... It is no exaggeration to say that [counterfeiting] supports the entire local economy and legitimate businesses such as restaurants, nightclubs, warehouses, transportation companies, hotels.⁽³⁵⁾

Massey concurs with Chow's assessment of local leaders in China, stating: "Provincial authorities [...] benefit financially or politically from the proceeds of piracy or [simply] turn a blind eye to powerful local interests that do [benefit from piracy]." ⁽³⁶⁾ Given communities' heavy dependence on counterfeiting and piracy as part of their economic development,⁽³⁷⁾ it is unsurprising that local governments provide only limited resources to IP enforcement activities.

Professor Chow is one of the main proponents of the view that China could and should do more to control counterfeiting and piracy. In this opinion, the central government has both the power and ability to rein in the provinces and implement stronger IP enforcement initiatives. In this regard, Chow shares an opinion with Eric Smith, president of International Intellectual Property Alliance, who argues that political will rather than other administrative or legal impediments most severely hampers IP enforcement efforts.⁽³⁸⁾ Both Chow and Smith thus argue that IP enforcement could be improved through the concerted effort of the central government. To substantiate this claim, Smith points to the government's successful effort to curtail pornography,⁽³⁹⁾ while Chow's example of the crackdown on counterfeit Beijing Olympic 2008 merchandise is less persuasive.⁽⁴⁰⁾

Proponents of this position also point to the labyrinth of administrative processes and proceedings needed to enforce IPRs, the difficulty of persuading authorities to begin a criminal investigation, and the unequal level of

29. While the disclosure of such information violates IP, contract, and anti-unfair-competition laws, enforcement is rare.

30. For details on this case and subsequent lawsuit in US courts, see Danny Friedmann, "Update on CYBERSitter, LLC v. The People's Republic of China et al.," 2011, Blog Posting available at <http://ip-dragon.blogspot.com/2011/08/update-on-cybersitter-llc-v-peoples.html> (consulted on 24 February 2012); Michael Kan, "US Court Rejects Dismissal in China Internet Filter Case," *PCWorld*, 4 August 2011, available at www.pcworld.com/businesscenter/article/237154/us_court_rejects_dismissal_in_china_internet_filter_case.html (consulted on 24 February 2012).

31. Yu traces this phenomenon to historical reasons: "Local protectionism has been a dominant problem in China throughout its millennial dynastic history." Peter K. Yu, "From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China," *op. cit.*, p. 421.

32. Joseph A. Massey "The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006," *Chicago Journal of International Law*, vol. 7, no. 1, 2006, p. 231. See also Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, Ithaca, Cornell University Press, 2005, p. 230.

33. See, e.g., Tao Jingzhou, "Problems and New Developments in the Enforcement of Intellectual Property Rights in China," in *Intellectual Property and TRIPS Compliance in China: Chinese and European Perspectives*, Paul Torremans et al. (eds.), Cheltenham, Edward Elgar, 2007, pp. 107-109; Yiqiang Li, "Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem," *Columbia Journal of Asian Law*, vol. 10, no. 2, 1997, pp. 395-401; Wei Shi, "The Paradox of Confucian Determinism: Tracking The Root Causes of Intellectual Property Rights Problem In China," *John Marshall Review of Intellectual Property Law*, vol. 7, no. 3, p. 454.

34. Jeffrey Sheban, "In the Land of Counterfeit," *The Columbus Dispatch*, 25 October 2010, www.dispatch.com/content/stories/local/2007/11/25/Fake_1.ART_ART_11-25-07_A1_8E815ID.html (consulted on 24 February 2012; quoting Daniel C.K. Chow as stating: "Most consumers think it's harmless fun to buy knockoffs... But if you buy counterfeit products, you are supporting organized crime and all the abuses that come with it, including narcotics, smuggling and prostitution"). See also Daniel C.K. Chow, "Organized Crime, Local Protectionism and the Trade in Counterfeit Goods in China," *China Economic Review*, vol. 14, no. 4, pp. 474-75 (lack of enforcement, high profits equals organised crime).

35. Chetan Kulkarni, "Calls for Chinese crackdown on piracy," *op. cit.*

36. Joseph A. Massey "The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006," *op. cit.*, pp. 231-232.

37. Daniel C.K. Chow, "Why China Does Not Take Commercial Piracy Seriously," *op. cit.*, p. 203 (stating that "[counterfeiting is] vital to the economy of many local municipalities and there are now millions of people in China involved in the counterfeiting industry").

38. Chetan Kulkarni, "Calls for Chinese crackdown on piracy," *op. cit.* See also Rogier Creemers, *Explaining Audiovisual Media Piracy in China: Media Control, Enforcement and Globalization*, Dissertation to receive the Degree of Doctor at Maastricht University, 2012, p. 191 (stating: "piracy networks have been able to develop a relatively stable relationship with enforcement officials").

39. Chetan Kulkarni, "Calls for Chinese crackdown on piracy," *op. cit.*

40. See Peter K. Yu, "Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate," *John Marshall Review of Intellectual Property Law*, vol. 7, no. 3, 2008, p. 412.

judicial enforcement of IPRs (with Chinese companies seemingly receiving adequate remedies for violations of their IPRs⁽⁴¹⁾ while foreign firms struggle to find favour with the courts).⁽⁴²⁾ Correspondingly, it is widely believed that even when infringers are successfully identified and authorities are convinced to act, the Chinese system does not impose penalties strong enough to serve as a deterrent.⁽⁴³⁾ According to statistics compiled by the Chinese State Administration of Industry and Commerce, only 45 of the 22,001 cases registered in 2000 were referred to the Public Security Bureau for criminal prosecution. Those convicted faced average fines of \$794, and the average compensation awarded by administrative authorities to a brand owner was about \$19.⁽⁴⁴⁾ With such low rates of prosecution and negligible punishments it is no exaggeration to say that large-scale counterfeiters view occasional IP enforcement as merely a "cost of doing business."⁽⁴⁵⁾

The position that the Chinese government is a capable but unwilling power is shared by several others, including Ralph Oman, the former Register of Copyrights, and James Shinn, political commentator and Lecturer at Princeton's School of Engineering and Applied Science. In this regard, Oman states that China "could end piracy with a telephone call. All that is needed is the political willpower,"⁽⁴⁶⁾ while Shinn adds: "It is laughable to hear excuses from Beijing that they can't control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest – rather than bootleg copies of 'The Lion King' – the factory managers would be sharing a cell with other dissidents in a heartbeat."⁽⁴⁷⁾

Other commentators, most notably Peter K. Yu (Drake University, Law) and Andrew Mertha (Cornell University, Government),⁽⁴⁸⁾ counter by pointing out the substantial progress the central government has made over the past two decades and the difficulties the central government faces in convincing its 31 provinces to steadfastly enforce IP protection.⁽⁴⁹⁾

Proponents of this view argue that the enforcement problem in China is not limited to foreign IPRs. Trademarks of Chinese companies are regularly counterfeited, and locally produced music and movies are veraciously pirated in both digital and physical form. Countering Chow's premature example of China's successful efforts to protect Beijing Olympics merchandise, these commentators often point to the seemingly ubiquitous presence of counterfeit merchandise both prior to and after the Olympic Games in 2008 as evidence of the central government's inability to control the problem. In this regard, Yu states: "If one could draw any lesson from the protection of Olympic symbols in China, it is how serious and entrenched the piracy and counterfeiting problems are in the country... Due to the country's rapid decentralization, the central government does not have the ability to fully protect the Olympic symbols throughout the country."⁽⁵⁰⁾

Yu and Mertha share similar beliefs that China's size, heterogeneity, and historical complexities all play a role in the local attitudes and difficulties in addressing the problem. More specifically, both scholars point to the multifaceted and layered levels of bureaucracy related to the protection and enforcement of IPRs at the central, provincial, and local level as a reason for the inefficient and maze-like system, the considerable differences in economic development among and between the different cities and provinces as a structural administrative problem perpetuating low levels of enforcement, and a lack of deterrents, local protectionism, and significant conflicts of interests.⁽⁵¹⁾

Yu also takes a radical approach to the issue in arguing that the failure to resolve piracy and counterfeiting problems in China can be "partly attributed to the lack of political will on the part of U.S. policymakers and the American

public to put intellectual property protection at the very top of the US-China agenda."⁽⁵²⁾ Thus, Yu believes, "It is not only the Chinese who lack political will, as many critics have claimed, but the Americans as well."⁽⁵³⁾ In support of his position, Yu points to the fact that the US does not prioritise IPRs in its negotiations with China (instead focusing on currency manipulation and nuclear proliferation), its lack of will to strengthen the Chinese central government, and American interest in promoting censored material.⁽⁵⁴⁾ Yu further (and correctly) points out that counterfeiting and piracy are also major problems in major US cities, where counterfeit CDs, DVDs, clothes, and apparel are readily available through street vendors, and that online piracy is rampant throughout the US.

Thus, scholars and commentators share a number of similar sentiments in regards to China and the protection and enforcement of IPRs. Almost all scholars and commentators believe protection and enforcement efforts are hampered by a number of factors, including vaguely worded laws and regulations allowing for multiple interpretations, lack of effective deterrents against infringers, lack of political will from the central, provincial, and local governments, and industry reluctance to confront the central government or provincial authorities for fear of losing their positioning. It is also a shared belief that both a lack of resources and poor coordination among various enforcement agencies impedes the protection and enforcement of IPRs. The main point of contention is whether the central government can control

41. This is increasingly becoming problematic as Chinese government subsidies for patent applications have led to thousands of low-quality applications and patents.
42. The most notable example is the unsuccessful lawsuits brought by the International Federation of the Phonographic Industry regarding music tracks available for download on Baidu. For statistics on the use of courts in IPR cases, see Xuan-Thao Nguyen, "The China We Hardly Knew: Revealing the New China's Intellectual Property Regime," *Saint Louis University Law Journal*, vol. 55, no. 2, 2001, p. 773 (reporting that Chinese companies are embracing IPRs and using the courts to enforce their rights, with almost as much IP-related litigation in China as in the US – in 2006, 11,486 cases in the US and 11,436 in China. Only 449 of those cases filed were by foreigners, with 108 of those from Hong Kong).
43. Joseph A. Massey "The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006," *op. cit.*; Veronica Weinstein and Dennis Fernandez, "Recent Developments in China's Intellectual Property Laws," *Chinese Journal of International Law*, vol. 3, no. 1, 2004, pp. 230-235; Eric Priest, "The Future of Music and Film Piracy in China," *op. cit.*, pp. 821-825.
44. Daniel C.K. Chow, "Why China Does Not Take Commercial Piracy Seriously," *op. cit.*, p. 206.
45. *Ibid.*
46. Ralph Oman, "Copyright Piracy in China," *John Marshall Review of Intellectual Property Law*, vol. 5, no. 4, 2006, p. 583.
47. Peter K. Yu, "Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate," *op. cit.*, pp. 419-420 (citing James Shinn, *The China Crunch*, *Washington Post*, 18 February 1996, at C1). But see Creemers, who argues that at least in the case of audiovisual media piracy it is "a consequence of the limitations on the media market. In other words, the narrow scope of legally available works is not able to meet the public's demand, making piracy the only way to obtain a significant amount of media works." Rogier Creemers, *Explaining Audiovisual Media Piracy in China: Media Control, Enforcement and Globalization*, *op. cit.*, p. 190.
48. Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, *op. cit.*
49. See Peter K. Yu, "Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility," *Georgia Journal of International and Comparative Law*, vol. 34, no. 1, 2005, p. 155.
50. Peter K. Yu, "Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate," *op. cit.*, p. 420.
51. Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, *op. cit.*, especially pp. 90-100; Peter K. Yu, "From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China," *op. cit.*
52. Peter K. Yu, "Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate," *op. cit.*, p. 413.
53. *Ibid.*, emphasis in original.
54. See generally Peter K. Yu, "Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate," *op. cit.* See also Peter K. Yu, "Intellectual Property, Economic Development, and the China Puzzle," in *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, Daniel J. Gervais (ed.), Oxford, Oxford University Press, 2007, p. 173.

the local protectionism that shelters, shields, and fosters counterfeiting and piracy.

Quite surprisingly, few commentators have attempted to differentiate between forms of IPRs when analysing the issues. This lack of differentiation is a major omission, as the issues relating to some IPRs do not apply to others. For instance, while the debate regarding the power of the central government to curtail local protectionism is entirely relevant to copyright piracy and trademark counterfeiting, it is questionable whether it can be transplanted to large-scale patent infringement. In some ways, China has moved beyond relying on piracy and counterfeiting, and it is clear that many people in the government do not condone China's role as the world's factory for fakes. On the other hand, in terms of patent infringement of foreign technology it seems clear that Chinese companies are engaging in such behaviour with relative impunity, if not encouragement. Such behaviour can be seen in almost every large infrastructure project (where foreign companies initially supply the technology before losing all future tenders to local rivals) to the manufacturing of alternative energy devices (such as wind turbines), to automobile performance and design. Attempts to enforce IPRs in this regard are often met with resistance, and judicial proceedings and monetary awards are often frustrating and disappointing. One can only speculate why this is so, but some suggest that widespread industrial patent infringement is part of China's economic development strategy in that it allows domestic industry to "catch up" with foreign competition quicker and in a more cost-effective manner. Thus, when discussing IPRs in China a more nuanced view taking into account the various forms of IPRs is preferred to simply discussing IPRs as a whole.

Concluding analysis

Despite over 30 years of continually strengthening the protection of IPRs, China remains the hub of counterfeiting and piracy. This article outlined several reasons for the lax enforcement of IPRs and raised the question of whether the central government has the power to enforce IPRs in the provinces. Whatever the answer, it is clear that persistent pressure from the international community is not the way to convince China to increase its enforcement efforts.⁽⁵⁵⁾ China must on its own draw the conclusion that the economic and social benefit of allowing large-scale counterfeiting in the provinces is outweighed by, *inter alia*, its international obligations or the infusion of central tax revenues if consumers increased purchases of legitimate goods.

Regardless, China cannot escape the fact that the enforcement of IPRs depends on "the extent to which Beijing can compel Guangdong and the other provinces to accept that Beijing's laws are not 'irrelevant' but are the law of the land that must be enforced. The provincial and local committees cannot become 'Potemkin villages' mouthing lip service for IPR as piracy continues unabated."⁽⁵⁶⁾ Thus, if the central government is serious about enforcing IPRs, it must gain the cooperation of the provincial authorities and administrative agencies through central power, coercion, or inducement.

This does not mean that industry should sit idly by waiting for the central government to act; instead, industry must take a measured but serious approach to increasing enforcement of its IPRs. In this regard, industry would be wise to study Mertha's assessment of the three most important yet least understood aspects of the enforcement of IPRs in China, namely the nature and politics behind criminal enforcement; the complex relationship among and between the various administrative enforcement bureaucracies; and the

economics behind the industry.⁽⁵⁷⁾ In terms of the nature and politics behind criminal enforcement, Mertha concludes that in the short-to-medium term, China's legal infrastructure does not have the capacity or the power to effectively handle the volume of infringements of IPRs. In large part, this is due to local protectionism – courts are under the influence of local governments, which in turn either indirectly or directly have an interest in the infringing activities. Intellectual property infringing is a big business employing large numbers of people and supporting additional businesses (such as suppliers, restaurants, transportation, etc.). Thus, it is safe to assume that the counterfeit culture will not shift on its own and that the legal infrastructure will suddenly begin taking infringement of IPRs more seriously.

This leads to the second identified aspect, the web of complex and administrative enforcement bureaucracies. In Mertha's view, understanding these agencies is critical to enforcing IPRs in China. In this regard, it is also necessary for IP owners and industry to identify the deficiencies and inefficiencies in these institutions and to attempt to find ways to compensate for them or to lobby to change them. Finally, Mertha believes that simply appreciating the economics of IP infringement, as opposed to understanding the legal or cultural aspects of, say, counterfeiting, is one of the most important aspects to counterfeiting. Simply put, most consumers purchase counterfeit or pirated goods because they are cheaper than their legitimate counterparts. For the most part, these consumers do not care if the product infringes an IPR. Given this reality, alternative sales and marketing strategies will not end counterfeiting and piracy, but unlike enforcement and court action, this recognises that business as usual is no longer and will never again be the appropriate strategy for operating in China.

There is also a role to play for innovative Chinese companies, some of which have or soon will recognise that the enforcement of IPRs serves their interests as well as those of their foreign rivals. As Chinese companies further develop their own technologies and seek to protect and enforce their IPRs by looking to "Beijing," provincial authorities, and the courts, the pressure will increase on all levels of governmental, bureaucratic, and judicial authorities to adequately enforce IPRs.

China's problems with IP enforcement are not insurmountable. But it is only through better identification and understanding of the root cause of the problem that a solution can be tailored. As this article indicates, this solution will require political will and action on the part of the central, provincial, and local governments as well as determination, fortitude, patience, and persistence on the part of foreign and local industries. Until that time, counterfeiters and pirates will remain an industrial and lobbying force.

55. Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, *op. cit.*, especially chapters 1 and 7.

56. Joseph A. Massey, "The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006," *op. cit.*, p. 234.

57. See Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, *op. cit.*, chapter 7.