Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense

Wei Shi

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Cultural Perplexity in Intellectual Property:  
Is Stealing a Book an Elegant Offense?  

*Wei Shi*†  

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I. Introduction

Due to a strong perception of legislative shortfalls, China is conventionally seen as one of the main offenders in the international intellectual property arena. However, over the last two decades, China has established a full panoply of intellectual property rights (IPR) legislation and institutions. In China today, it is the enforcement of IPR that is contrastingly fragile. The enforcement of IPR has emerged as the essential issue to be resolved when reviewing China's IPR. It is no longer persuasive for the Chinese government merely to point to the existence of legislation as proof of China's compliance with its World Trade Organization (WTO) commitments.

There is extensive theoretical literature examining the IPR enforcement problem in China. Confucianism is the concept most frequently cited by commentators, and the literature criticizing Confucian philosophy as the root of China's IPR enforcement problems is plenteous. The prevailing point of view is that
traditional Chinese philosophy—Confucianism in particular—provides a pervasive and unconscious influence on the comprehension of, and commitment to, intellectual property laws. One cynical commentator has even asserted that "until it abandons its twisted Confucianism, the [Asian] region will trail the West," and, as a result, alleged that "it is time to deconstruct Confucius." This argument levels criticism at the phrase "to steal a book is an elegant offense" (qie shu bu suan tou), which indicates that traditional Chinese culture does not consider copying to be "wrong." Under the dominating theory of this point of view, Confucianism is a cultural predisposition leading to a lack of consciousness of intellectual property, and the creed of the

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4 Id.

“elegant offense” is likely to have a continuing influence on attitudes to IPR protection. In this article, the author aims to raise a challenge to this mainstream perception and demonstrate the genuine causes of China’s IPR enforcement problems.

The reasons for the enforcement problems are so complex and varied that a comprehensive discussion is beyond the scope of this article. This article considers the enforcement insufficiency via a discussion of the evolving cultural phenomena associated with the fundamental systemic weakness of China’s institutional problems. Section II argues that current mainstream legal epistemology incorrectly links China’s enforcement problem to Confucian values, which is confusing and misleading. This section challenges the mainstream viewpoint by providing clues to the genuine Chinese cultural underpinnings and further creates a new cultural perspective. Section III examines the copying phenomenon through insights into the economic sphere and seeks to assess the link between economic development and intellectual property protection. Apart from exploring the origin, evolution, and impact of Confucian values on current Chinese society, Section IV extends beyond China to focus on the global intellectual property regime. This section also compares China to other economies that have emerged in Asia, such as Japan and Korea, which share similar Confucian values. By tracing and comparing development trajectories of different economies, this article demonstrates that counterfeiting and piracy are not problems caused by the Confucian ethics, as the mainstream view states, but rather common, inevitable consequences of inadequate economic development and a by-product of a unique set of socioeconomic crises deriving from the development of a dysfunctional institutional regime.

II. Confucius Confusion: To Steal a Book is an Elegant Offense?

A. Exploring Confucian Values

1. Principles of Confucianism

Confucianism is an ancient Chinese way of thought that spread through much of the neighboring Asian region, including Japan, Korea, Taiwan, and Vietnam. As a systematic code of interpersonal behavior, Confucianism is a practical, political, and social doctrine, rather than a religion or a quasi-religion. As a philosophical system, Confucianism has been developed from the writings attributed to the Chinese philosopher Confucius (551-479 BC). Born into a middle class family, Confucius lived in ancient China during a time of great chaos and feudal rivalry known as the Warring States Period (Zhanguo Shidai). He is credited with numerous books, the best-known of which is The Analects, a collection of his sayings which was compiled into its modern form during the Han Dynasty (206 BC-24 AD). His

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7 It is debatable whether Confucianism should be described as a religion, or a quasi-religion. While it involves much ritual, little of it could be construed as worship or meditation in a formal sense. Whether Confucianism should be considered a religious tradition or not is part of the question of how to define Confucianism. The interpretations of Confucianism are divergent. See XINZHOG YAO, AN INTRODUCTION TO CONFUCIANISM 38-39 (2000).

8 See CHINA: A HISTORICAL AND CULTURAL DICTIONARY 62 (Michael Dillon ed., 1998); see also Yongming Chen, Ruxue Yu Zhonggue Zongjiao Chuantong Confucianism and China's Religious Tradition], in RELIGIOUS CULTURE PRESS 109-31 (2003) (stating that, as an orthodox philosophy, Confucianism contains few characteristics found in religions).

9 His Chinese name Master Kong (Kung Futze / Kong Fuzi) was later latinized to Confucius by Italian Jesuit Matteo Ricci (1552-1610) in order to portray Chinese society to Europeans. See YAO, supra note 7 at 1-2, 21-22.


11 See CHINA: A HISTORICAL AND CULTURAL DICTIONARY, supra note 8, at 62-63 (explaining that Confucianism had no priesthood or liturgy and Confucius himself was not treated as god).

12 Written by his pupils, The Analects is regarded as the chief text of Confucianism. It contains sayings and conversations between the Teacher and his disciples. For a full text and comprehensive interpretation of The Analects, see CONFUCIUS, THE ANALECTS
writings and beliefs did not become popular until well after his death and international recognition and study of Confucianism did not occur until the sixteenth century.

Confucian thought is based on varying levels of honesty. The rituals of Confucianism evolved over time and matured into the four forms: li-ritual (which originally meant "to sacrifice"); xiao-filial piety; zhong-loyalty; ren-humaneness. The li is roughly analogous to the Western concept of natural law. It governs people's conduct and proper etiquette with regard to interactions with family, political establishments, and society at large, and emphasizes virtue and model behavior. In Confucianism, the ultimate political goal is to create great harmony in the world, as "everyone all over the world ought to be brothers." Confucianism has shaped the Chinese people's views, which have been developed over the course of tens of centuries.

One of Confucius's most important doctrines is that there is a proper order to all things in the universe, including human society, which is described as "harmony." Confucius illustrated this doctrine as "let a ruler be a ruler, a subject a subject, a father a father, and a son a son (jun jun chen chen fu fu zi zi)."

(Raymond Dawson trans., 1993).

13 See CHINA: A HISTORICAL AND CULTURAL DICTIONARY, supra note 8, at 204.
14 YAO, supra note 7, at 2 (mentioning that, by introducing Confucianism to Europe, Jesuit Matteo Ricci became a pioneer of Confucian studies in the West).
16 Id. at 57.
17 Id.
20 See YAO, supra note 7, at 172. In Confucianism, "harmony" is deemed as "the highest virtue," and is closely related to nature, politics, ethics and daily life, and is regarded as a moral standard to cultivate order and peace internally and externally. See id.
21 CONFUCIUS, supra note 12, at 46, bk. 12, chp.11. When Duke Jing of Qi consulted Confucius about government, Confucius replied that the only way such a doctrine could be made to work properly was for each person to act according to prescribed relationships. That is, let everyone play his proper role in the natural order, and all will be well.
the definition of "five cardinal relationships," Confucius provided a simple guide for ordering the family and society. The five moral disciplines that govern the five cardinal relationships are: (1) Justice and righteousness should mark the relations between sovereign and subject; (2) A proper rapport should be maintained between father and son; (3) Division of duties between husband and wife; (4) The younger should give precedence to the elder; and (5) Faith and trust should reign over relationships between friends. Confucius's "five cardinal relationships" reflect a hierarchical order based on a set of virtues. As Confucius emphasized, within and through this traditional order, peace and harmony can be achieved if every person plays his or her proper role in society and strives to uphold the responsibilities of that role. In this context, Confucianism advocates the virtues of honesty and loyalty in an effort to create a harmonious social order.

2. Confucian Values and Intellectual Property

As the oldest continuous civilization in the East, China has long been regarded as an "exceptionally creative and inventive" nation and has enjoyed a remarkable history of technological and creative enterprise. It is common knowledge that the Chinese invented a number of items prior to their "invention" or use in the West. The famous four great inventions — papermaking, typography, the compass, and gunpowder—have profoundly


23 See id.; see also Ronald J. Troyer, Chinese Thinking about Crime and Social Control, in SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA, 45, 51-52 (Ronald J. Troyer et al. eds., 1989) (claiming that Confucian philosophy has designated the importance of particular actors in society by placing the state first, the collective second, and the right of the individual last).

24 See ROUTLEDGE CURZON ENCYCLOPEDIA OF CONFUCIANISM, supra note 22, at 501.


26 Id.

impacted the world’s economy and human culture. Trademarks in China can be traced back to the *Tang* Dynasty (618-907 A.D.), when traders “started using marks and logos to distinguish goods.” With the advent of printing technology in the *Tang* Period, China also saw the first “substantial, sustained efforts to regulate publication and republication.” During the *Ming* and *Qing* Dynasties, an “informal system of guild registration and protection of [trade]marks was instituted, where a manufacturer could register his trademark with other guilds.” As early as the Imperial Period, beginning in 221 B.C., Chinese rulers issued decrees criminalizing the copying of certain works, although these decrees could hardly be characterized as copyright in the modern sense. Not surprisingly, the historical record dealing with intellectual property in China appeared very early.

At least to some extent, Confucius can be viewed as a popular international synonym of China, and Confucianism has been acknowledged as the foundational philosophy of oriental civilization and culture. In contrast to most Western societies, Confucian ethics is composed not of “individuals” per se but of their interconnections and interdependencies. Accordingly, Confucian ethics places a relatively low value on terms based on individuals and profit, but it does place value on the concept of

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31 The year 221 B.C., which marks the shift from state to empire, represents the beginning of the imperial era, a period that lasted until the fall of the *Qing* Dynasty in 1912. See CHINA: A HISTORICAL AND CULTURAL DICTIONARY, supra note 8, at 154.

32 Baum, supra note 30, at 50 (“Han dynasty regulations (circa 200 B.C.), for example, barred the unauthorized reproduction of the Confucian Classics.”).

33 Allison & Lin, supra note 25, at 743.


35 Id.
communal property. This is at significant variance with the dominating personal rights and property bases that are important to Western ideas. The Western concept of property is closely associated with the philosophy of natural law originating with the Greek Stoics and later interpreted and codified by Roman philosophers and jurists, while Confucianism reflects the natural order and emphasizes the obligations necessary to maintain it.

Nevertheless, this unique philosophy has played a positive role in fostering innovation and entrepreneurship over the centuries in China and other Eastern nations. Confucianism does not reject personal rights, but affords protection in a different way. Its emphasis on "personal development, in contrast to personal gain, helped create a culture in which the individual was viewed as quite important, but primarily so because of his or her contribution to society." It would therefore be inaccurate to state that Confucianism and technology cannot coexist, or that Confucianism has served to hold back technological development. Under the set of Confucian ethics there appears no credible evidence of a link between honesty and loyalty on the one hand and counterfeiting and piracy on the other.

3. The Diminution of Confucian Values

The influence of Confucian values has been diminishing and, although widely thought to be the most important basis of Chinese culture, the sage's ideas were severely criticized during the "Cultural Revolution" (1966-76) as the "superstructure of

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36 Id.


38 Id.

39 Allison & Lin, supra note 25, at 744.


41 The Cultural Revolution, more precisely known as the "Great Proletarian Cultural Revolution," was a massive attempt by Mao Zedong to inculcate the younger Chinese generation with his ardor for totalistic iconoclasm. The so-called "Four Olds," especially the traditional religions and philosophies, which were relegated to the sphere of feudal superstitions, were attacked and destroyed. For a comprehensive account of the Cultural Revolution, see 15 The Cambridge History of China 305-06, 660-65
feudalism."  During this period, statues at the Confucians’ Temple were regarded as feudal relics and were seriously damaged by the “Red Guards.” Although the broken statues were later carefully mended, this was more to preserve historical heritage than to demonstrate a widespread reconciliation between Confucianism and current beliefs.

From that time on, the influence of Confucian values has been diminishing. Now, in modern day China, attitudes towards traditional Confucian values tend to fall into two attitudinal categories based on age, education, and experience. Older generations tend to adhere to practices steeped in Confucianism and think of ethical behavior as a long-term commitment. In contrast, younger generations—born in the 1960s and 1970s—influenced by modern culture are apathetic and give little thought to traditional values. Thus, the Confucian tradition is fading and dwindling gradually, despite the attempts of many scholars to interpret Confucian ethics as a spiritual resource for the emerging global community.

(Continued from previous page)

See Willem Van Kemenade, **China, Hong Kong, Taiwan, Inc.** 373 (Diane Webb trans., 1998).

The Red Guards in China were composed of high school and university students and young workers, and were formed during the conflict within factions of the Chinese Communist Party during the Cultural Revolution in the 1960s. The name was borrowed from the krasnaya gvardia, who protected Lenin after the October Revolution. See THE CAMBRIDGE HISTORY OF CHINA, supra note 41, at 84-85; see also CHINA: A HISTORICAL AND CULTURAL DICTIONARY, supra note 8, at 260-61.

THE CAMBRIDGE HISTORY OF CHINA, supra note 41, at 84-85.


Id.

In the last two decades, a number of “leading [Neo-]Confucian thinkers in Taiwan, mainland China, and Hong Kong independently concluded that the most significant contribution the Confucian tradition can offer the global community is the [conception] of the ‘Unity of Heaven and Humanity’ [tian ren he yi] . . .” Tu Weiming, **The Ecological Turn in New Confucian Humanism: Implications for China and the World**, 130 DAEDALUS J. AM. ACAD. ARTS SCI. 243 (2001). In mainland China, more recently, a Neo-Confucian revival movement (Guoxue fuxing yundong) has taken shape among Chinese scholars and social critics who aim to explicitly promote Confucian values in society and strengthen the legitimacy of the Chinese Communist Party. See id. at 243-64.
4. Kong Yi Ji as a Harlequin

One important element of the misunderstanding of Confucian values is the intentionally or unintentionally misattributed proposition “To Steal a Book is an Elegant Offense” (*Qie Shu Bu Suan Tou*). This is a concept unknown to Confucianism and was only popularized with the 1919 publication of the popular fictional book *Kong Yi Ji*, written by the famous novelist Lu Xun.\(^4\) In his book, Lu exemplifies his belief that literature should be socially relevant, and attempts to avoid the “clichés” of traditional Chinese linguistics that, in his view, had hampered and restrained people’s creative thinking for centuries. In Lu Xun’s portrayal, Kong Yi Ji was depicted as a poor harlequin, who was “a big, pallid man whose wrinkled face often bore scars,” and was made fun of by everybody.\(^5\) He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine. His behavior drew on his being soundly beaten. “To Steal a Book Is an Elegant Offense” was his argument when he was taunted.\(^6\) His personal character and way of thinking are thus far removed from the Confucian values. However, he shares the same Chinese surname with Confucius (*Kong*), and this did much to cause and perpetuate confusion in the popular mind. Indeed, the phrase “To Steal a Book Is an Elegant Offense” was unknown to Chinese until Kong Yi Ji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular with foreigners until Professor Alford’s book, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, made its debut in the mid 1990s.\(^7\)

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\(^4\) Lu Xun (1881-1936), pseudonym of Zhou Shuren, was a short-story writer, essayist, critic, and literary theorist. He is arguably one of the greatest writers of modern China, and is considered a revolutionary pioneer by Chinese Communists. In some of his works, Lu Xun contrasted the hypocrisy of upper-class intellectuals with the suffering of the lower-class people and condemned the traditional Confucian culture. For a comprehensive introduction to his work, see James Reeve Pusey, *Lu Xun and Evolution* (1998); Jon Eugene von Kowallis, *The Lyrical Lu Xun: A Study of His Classical-Style Verse* (1996).

\(^5\) Id.

\(^6\) Id.

\(^7\) See Alford, *supra* note 2.
5. The Paradox of Confucian Determinism

When it comes to intellectual property enforcement problems in China and other Asian countries, Confucianism is commonly identified as the root of the problem. This suggests a question: in the current legal and political environment, where intellectual property is to be respected under the law, should Confucian values restrain people from breaking the law, or remain a passive influence allowing it to be broken?

As previously noted, Confucian ethics promote social order and ethical behavior. Confucius emphasized that each person has responsibilities to live up to within the social order and position they are in. Traditionally, in China, ethical and moral obligations formed the basis for personal and commercial communications and, as a result of Confucian philosophy, moral obligations may well have a greater influence on Chinese attitudes than Western thought may perceive.

It is apparent that the predominant commentary on Confucian philosophy serves to obscure rather than illuminate the situation. This is true because it is difficult to comprehend the prevalent theft of intellectual property in China as an inevitable outcome of an ethic that advocates "honesty," unless of course the ethical concepts derived from Confucius have somehow been subverted. As a non-Western philosophy, Confucianism did not prevent intellectual property protection from functioning in Chinese society. "To steal a book" is not an "elegant offense." Rather, from a Confucian viewpoint it is an act that is against the "natural order." Confucius has been the convenient scapegoat of a misleading theory. Now it is the time to rehabilitate Confucianism and identify more compelling causes.

B. Utilitarianism Rather Than Confucianism

As previously discussed, Confucianism has faded in mainland China in recent decades. As a result, older Chinese ethics have

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eroded and more pragmatic and self-serving utilitarian ideas have replaced them.\footnote{Philosophically, utilitarianism is a theory of ethics that prescribes the quantitative maximization of good consequences for a population. \textit{See generally} JOHN PLAMENATZ, \textsc{The English Utilitarians} (1958) (providing a comprehensive discussion of utilitarianism). The ethical theory proposed by Jeremy Bentham and James Mill states that all action should be directed towards achieving the greatest happiness for the greatest number of people. \textit{See id.} To examine the utilitarianism in a philosophical perspective is beyond the scope of this article. Here this term is only used to describe the dominating self-serving phenomena of losing ethical constrains in China.} The utilitarian concepts found fertilization in a set of socioeconomic crises that originated from a haphazard and dysfunctional institutional regime.

1. \textit{By-product of Economic Reform}

Many critics have linked economic change to greater political freedom in China.\footnote{Allison & Lin, \textit{supra} note 25, at 774.} But the reality is that China is currently standing at an ideological, social, and political crossroads: the intersection of a splendid economic landscape marred by lagging political reform.\footnote{See Wei-Wei Zhang, \textit{China's Political Transition: Trends and Prospects}, 7 \textsc{Eurasia Bulletin: Publication of European Institute for Asian Studies} 11 (2003) (asserting that Chinese economic reform may better be described as “great economic reform with lesser political reform”).} Like two lines askew, China’s economic and political structures are contrastingly divergent.

On one hand, Chinese leaders genuinely believe that the Western style of democracy is not suitable for the fundamental realities (\textit{guoqing}) of China.\footnote{\textit{Information Office of the State Council of the People's Republic of China}, \textit{Building of Political Democracy in China} \S 1 (Oct. 19, 2005), http://english.people.com.cn/whitepaper/democracy/democracy.html.} They have learned from China’s modern history\footnote{Id.} and the recent history of the former Soviet Union that Western-style democracy will lead the country to social chaos and state fragmentation,\footnote{See Mu Bai, \textit{Sulian Jubian Gaosu Women Shenme [What the Collapse of the Soviet Union Tells Us]}, \textsc{People's Daily Online}, Nov. 3, 2004, available at http://www.people.com.cn/GB/shizheng/1026/2962514.html.} or they may be afraid that the Communist Party will lose its dominant position if radical democratization takes place.\footnote{Id.} Political reform has thus been
characterized by incrementalism and progress made only by the trial and error method, working through existing political institutions within the one-party framework. The stated objective of the Communist Party to implement political reform is often just a way to strengthen its own legitimacy. Despite limited efforts at political reform, China still remains both fundamentally undemocratic and incapable of articulating a long-term plan for democratization.

On the other hand, there are growing concerns that the ongoing economic reform may have opened a Pandora’s Box of unintended consequences. Harry Harding, a leading expert on China, has suggested that while “dismantling many of the totalitarian institutions of the past, the Chinese Communist party was not prepared to move equally rapidly towards the creation of new institutions that could permit the articulation or aggregation of political demands.” As a consequence, economic reform has not only brought about greater prosperity, but also created “unprecedented opportunities for people to pursue their own interest and shape their own destiny.” Individual aspirations of the citizens are widespread, but they are released without a corresponding regulatory system.

2. Special Political Ecology and Socio-economic Crises

Having failed to bring its political evolution into comprehensive correspondence with its economic development, the Chinese government runs the risk of precipitating the social

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62 INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, supra note 58, at § VI.
63 Zhang, supra note 57, at 3.
64 Anthony Saich, Editorial, Beijing's Balancing Act on Reform, THE FINANCIAL TIMES, Nov. 4, 2002, http://www.ksg.harvard.edu/news/opeds/2002/saich_reform_ft_110402.htm (mentioning that substantive political reform would strengthen the legitimacy of party rule, and a “more democratic system would provide a residual legitimacy that might help the regime to negotiate the difficult transition ahead”).
67 Zhang, supra note 57, at 2.
instability and civil strife that Chinese leaders have sought to avoid by means of rigid political control. Against the backdrop of economic transition, the Chinese government has found itself in a precarious position. They must confront the grievous crises that rapid economic development is bringing; i.e., parasitic state enterprises, a dangerously overextended banking sector, regional disparities, rampant income gaps, rising unemployment, widespread official corruption and, arguably the most serious, a collapse of traditional values.

Since the economic reform began, crime and violence have risen, provoking widespread concerns about social stability and personal security. China's socioeconomic disorder has been accentuated by the erosion of traditional values. The profound changes taking place have unsettled the beliefs and values of Chinese people. The "rules of the game" by which Chinese citizens planned their lives for so many years have been undermined, producing an altered set of winners and losers. The negative elements of society that socialism was designed to eliminate over the past decades—including landlordism, unemployment, criminal mafias, and prostitution—are abundant

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69 In March 2005, 11 million urban residents, including those entering the workplace for the first time, ex-servicemen and college graduates, need to find employment. There are now 13 million unemployed and laid-off urban workers, and large numbers of surplus rural laborers need to find jobs in urban areas. See China expects higher urban unemployment rate in 2005, CHINA NEWS NET, Mar. 6, 2005, http://www.chinanews.cn/news/2004/2005-03-06/2238.shtml.


72 See id.

and are appearing on the scene once again.  

Disparities in income and wealth are growing intensely, and are not justified by national needs or meritocratic efficiency. Many of the benefits of the reforms are seen as "monopolized by the rich and powerful, whose gains are due to corruption and connections, rather than to entrepreneurship, intelligence, hard work, or contributions to social welfare." Gratitude for past improvements in general living standards has faded since the endeavor to meet family needs has been fraught with difficulties. Profound demoralization is widespread among officials and the broader citizenry. The specter of loss of employment, health insurance coverage, and other basics of life that have resulted from the state-led assault on the "iron rice bowl" security of the socialist era fosters nostalgia for the old days when Mao Zedong was in charge of the nation's fate. A great variety of satiric doggerel verses criticizing social evils and political scandals are spread privately through dinner conversation, Internet forums, and mobile messages as limited means of airing grievances.

3. The Sprouting and Growing of the Utilitarian Impulse

The cascading societal and political problems have, in many circumstances, frustrated the efforts of ordinary Chinese citizens to earn their living through normal channels. In order to survive the upheaval, people have to contemplate every possible approach they deem workable. Hedonism, money worship, and utilitarianism now dominate many people's minds throughout the country and "money for power" exchanges have been an increasing game throughout the country. As Chinese scholar

74 See id. at 5-6.
75 Id.
76 Id.
77 Yongqi Zhao, Yong Daode Guifan Quan Shehui [Strengthen the Morality of Our Society], PEOPLE'S DAILY (Overseas Edition), Jan. 29, 2002, at 2 (describing different forms of demoralization in Chinese society).
78 Id.
79 Those satiric doggerel verses, usually by anonymous authors, can be easily found inside the chatrooms of the major Chinese web portals such as Sina and Sohu.
Stanley Lubman stated; “Relations among Chinese are changing, as new networks of personal relationships appear as [a] means of getting things done.”\textsuperscript{81} The shift is exacerbated by the weakness of ethical constraints and the shared personal standards that might otherwise have provided a normative framework for interpersonal communications and market transactions. Ironically, the money fetishism\textsuperscript{82} that Karl Marx criticized over a century ago may now have been adopted as the credo of many people who are, or used to be, his faithful disciples.

All of these issues call for a more sophisticated and accountable government and a more liberalized political system, which would be a better way of tackling some of the new inequalities than such current outbursts as rioting and demonstrations.\textsuperscript{83} However, many commentators are pessimistic about China’s commitment to adhering to the rule of law.\textsuperscript{84} Nevertheless, China has demonstrated “a desire to join the global stage,” which will force China to “undergo a tortuous path . . . as it navigates from an isolated socialist country to a market-oriented, centrally-planned regime”\textsuperscript{85} where individual liberty and property rights are protected under the rule of law.

The 1990s have brought the beginning of what could eventually prove to be a significant wave of political reform with

\textsuperscript{81} Lubman, supra note 71, at 404.

\textsuperscript{82} Money fetishism attributes powers to an alien force that dominates social affairs. It is the illusion that money has its own productive powers, particularly in politics, and is fetishized as having the power to solve problems, believing that without money nothing can be done. \textit{See Karl Marx, Capital} 31-37 (Friedrich Engels ed., Samuel Moore, trans., 1952).

\textsuperscript{83} \textit{See} Saich, supra note 64.

\textsuperscript{84} Indeed, over the past years, flurries of expectant hopes have been repeatedly frustrated by central leadership inaction, or even worse, by political tightening. Such dashed hopes were discouraging for reformers, raising a perennial question: how will China be able to continue transforming itself into a more liberalized and democratic country? \textit{See} Karen Halverson, China’s WTO Accession: Economic, Legal and Political Implications, 27 B.C. INT’L & COMP. L. REV. 319, 363-65 (2004) (demonstrating the intractability and inflexibility of China’s political reform).

\textsuperscript{85} Yonehara, supra note 5, at 107-08.
Chinese leadership addressing the need to strengthen legal institutions\(^{86}\) "that might curb bureaucratic arbitrariness by defining the scope of administrative authority and providing remedies for the exercise of arbitrary power."\(^{87}\)

During a recent visit to the United States in April 2006, President Hu Jintao sent an unusual signal at a press conference with his pledge to adopt democracy in the future.\(^{88}\) Hu pointed out that, "in the light of China's own national conditions and the will of the Chinese people, [China will] continue to move ahead [with] political restructuring and to develop a socialist democracy."\(^{89}\) Unlike all the previous statements of Chinese leaders, which addressed "China's own national conditions," Hu's statement emphasized both "China's own national conditions" and "the will of the Chinese people."\(^{90}\) While for the time being it is difficult to decide whether it is a slip of the tongue, a political show, or a consensus of Chinese leaders, the statement at least shows a symbolic purpose.

Moreover, market liberalization and the widespread availability of information over the Internet\(^{91}\) have already

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86 As a symbolic move, China's National People's Congress amended the Chinese Constitution in 1999 to insert the "rule of law" into that document as a leading principle for the first time. See XIAN FA art. 5, § 1 (1999) (P.R.C.); see also XIAN FA, amend. III (1999) (P.R.C.).

87 Lubman, supra note 71, at 392.

88 At a joint press conference following the Hu-Bush Summit in Washington on April 20, 2006, President Hu noted that China would "continue to move ahead with the political restructuring and to develop a socialist democracy," and it will "further expand the orderly participation of the Chinese citizens in political affairs so that the Chinese citizens will be in a better position to exercise their democratic rights in terms of democratic supervision, democratic management, and the democratic decision-making." Press Release, Office of the White House Press Secretary, President Bush Meets with President Hu of the People's Republic of China (Apr. 20, 2006), available at http://www.state.gov/p/eap/rls/ot/64895.htm.

89 Id.


91 According to the latest figures released by China Internet Network Information Centre (CNNIC) in its Semi-annual Survey Report on the Development of the Internet in China, the number of Chinese Internet users connecting to the Internet over broadband connections rose by 173% during 2003. See Sumner Lemon, Broadband Internet Usage....
loosened the government's strength in controlling all spheres of society, and the phrase "rule of law" is becoming popular in Chinese society, particularly among officials and intellectuals. China's integration into the global trading system and participation in international rulemaking will profoundly influence Chinese attitudes and ways of thinking. China has become an institutional laboratory—the largest of its kind in human history—freighted with enormous implications for the future of the rule of law. This experiment will inevitably continue, driven by China's economic prosperity, social challenges, and external integration.

C. From Marx's Atheism to "Belief Vacuum"

The father of international law, Hugo Grotius, alleged that, in the same sense that religious toleration depends upon respect for international law, a stable international order depends upon religious toleration. Freedom of religion is considered by many to be a fundamental human right. The Chinese Constitution expressly guarantees citizens' right to "freely choose and express...


92 See Halverson, supra note 84, at 364-65 (addressing the widespread availability of information over the Internet as an important factor to limit the government's ability in controlling the public).

93 See id. at 332 (stating that China's WTO membership will further deepen its integration into the world economy and strengthen its active role in the international economic arena).

94 Zhang, supra note 57, at 5.


96 The Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948 at the Palais de Chaillot in Paris, France, defines freedom of religion and belief as follows: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance." Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc A/810 (Dec.12, 1948), art. 18.
their religious beliefs" and make clear their religious affiliations.\textsuperscript{97} Accordingly, both party and government are obligated to create the legal mechanisms necessary to enforce this constitutional guarantee. However, the gap between rhetoric and reality is enormous.

\textbf{1. Religions Currently Accepted}

The Chinese government officially recognizes five religions: Buddhism, Taoism, Islam, Catholicism, and Protestantism.\textsuperscript{98} According to the official statistics, there are 13,000 Buddhist temples and about 200,000 Buddhist monks and nuns.\textsuperscript{99} Among them are 120,000 lamas and nuns, more than 1,700 Living Buddhas, 3,000 temples of Tibetan Buddhism, nearly 10,000 Bhiksu and senior monks, and more than 1,600 temples of Pali Buddhism. Taoism, which is native to China with a history of more than 1,700 years,\textsuperscript{100} has over 1,500 Taoist temples and more than 25,000 Taoist priests and nuns.\textsuperscript{101} Islam, which was introduced to China in the seventh century, presently has ten national minorities, including the Hui and Uygur, with a total population of eighteen million.\textsuperscript{102} Catholicism, which was introduced into China intermittently in the seventh century and spread widely until after the opium War in 1840, has more than four million adherents, 4,000 clergy and more than 5,400 churches and meeting venues.\textsuperscript{103}

\textsuperscript{97} The Chinese Constitution stipulates that "citizens of the People’s Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination." XIAN FA art. 36 (1999) (P.R.C.).


\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} Id.
2. The Gap with Reality

The Chinese government has demonstrated a continued unwillingness to allow its citizens to develop freedom of beliefs. Dominated by socialist atheism, the government views religion as a perpetuation of feudal superstitions, treats religious groups as a threat, and places strict limitations on religious organizations. Currently, national regulations require that both religious organizations and individual places of worship must register with the Religious Affairs Bureau, a ministry-level branch of the Chinese government. Often, local regulations are “more detailed and restrictive than their national-level counterparts.” While some local officials encourage foreign religious organizations to work in their communities to supply basic social services, foreign domination over religion in China is strictly prohibited. On July 29, 2006, Christian residents in Hangzhou’s Xiaoshan District at China’s eastern Zhejiang province clashed with police after authorities sought to demolish a church that was deemed unlawful. This incident illustrates the government’s ambivalence towards religion. Consequently, many religious practitioners in China “reject the validity of worshipping in religious institutions that fall under the auspices of a government controlled by the officially atheist Communist Party.” Under such circumstances, some practitioners have no choice but to abjure their beliefs. The tight control over religious practice has isolated Chinese religious believers from the rest of the religious

105 Id. at 16 (citing Regulations on Managing Places for Religious Activities [Zongjiao Huodong Changsuo Guanli Tiaoli], issued on Jan. 31, 1994).
106 Id. at 17.
108 STAFF OF CONG.-EXEC. COMMISSION ON CHINA, supra note 104, at 17 (citing XIAN FA art. 36 (1999) (P.R.C.)).
110 Id.
111 Id.
world.

As a result, a large percentage of the population, particularly the youth, lacks religious beliefs and the ethical support that those beliefs provide. At the same time, with the disintegration of communism as a means of meeting social aspirations, there are few followers of the principles of Marxism, resulting in a situation where China has entered upon a period of belief vacuum. This is a precarious moment indeed, a time of doubt when the law can do nothing but wait powerlessly for the advent of real leadership, with no other ethical system to alleviate the strain.

3. A Syllogistic Implication

As stated in the Bible from Galatians:

A person is justified not by the works of the law but through faith in Jesus Christ. And we have come to believe in Christ Jesus, so that we might be justified by faith in Christ, and not by doing the works of the law, because no one will be justified by the works of the law. \(^{112}\)

The freedom to believe and to practice one's religious faith is recognized as a universal and essential right. Although religion and law are usually considered as two distinct sources of morality operating in different domains, in reality, religious faith and legal order inevitably interact. \(^{113}\) Without religious belief and faith, there are no developed ethical systems to provide a firm foundation to enable an enduring belief in law and, as such, no self-disciplining consciousness to constrain counterfeiting and piracy.

D. Press Control Policy: "Coin It In Silence"

Freedom of speech is often seen as one of society's most valued personal rights. \(^{114}\) However, while China has undergone dramatic economic and social changes, the central government has endeavored to maintain rigid control over media coverage as a

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\(^{112}\) Galatians 2:16.


means of stifling social discontent.\textsuperscript{115} China employs an extensive licensing system to restrict publication of news and opinions on matters of public concern, and the authorities place severe restrictions on imported movies, books, and audiovisual products.\textsuperscript{116}

Apart from traditional media, the government has a longstanding set of policies restricting information and has particularly attempted to implement controls to prevent the public’s access to politically sensitive information, namely through the methods of Internet filtering and blocking.\textsuperscript{117} A typical example of this is the government’s blocking of Chinese Internet users’ access to the Google and AltaVista search engines.\textsuperscript{118} Recently, Microsoft acknowledged that it was working, at the Chinese government’s request, with Chinese information officers to censor its new Chinese-language Web portal and new free Web log tool, MSN Spaces.\textsuperscript{119}

In China, “freedom of speech” is theoretically protected under the Constitution.\textsuperscript{120} However, it is not an individual liberty in practice, but rather a tool for citizens to sing a collective song of praise. As the Congressional-Executive Commission on China’s

\begin{footnotesize}
\textsuperscript{115} See He Qinglian, \textit{Media Control in China}, 4 CHINA RTS. F. 11, 11-16 (2004).


\textsuperscript{120} According to Article 35 of Chinese Constitution, Chinese citizens “enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.” XIAN FA art. 35 (1999) (P.R.C.).
\end{footnotesize}
report stated, the "PRC government has transformed the constitutional right of freedom of speech into a political privilege of 'freer' speech for the ideological elite." Further, the Chinese legal system "discourages the free flow of information, not only by erecting barriers to non-government-controlled institutions, but also by encouraging individual self-censorship by not clearly defining what constitutes protected speech." Those who are allowed to publish confront a legal system that obscures the boundaries of freedom of speech, so that many Chinese are vulnerable to publish information that authorities might deem sensitive. As a result, "coin it in silence" (men sheng fa da cai), which means making fortunes quietly without being associated with politics, has been a motto for many Chinese in their attempts to survive and adapt in an uncertain world. As such, the media business and the publishing industry remain the most heavily regulated industries in China.

Due to the stringent information control and self-censorship policy, cultural products are in great demand in the Chinese market. Often, consumers have to settle for black market products, which can saturate the cultural market. Even though the market is finally open, it will need much time to overcome the entrenched inertia of old custom.

E. Ignorance of the Notion of Private Rights

Private property rights are among the fundamental concepts upon which many Western states are built and intellectual property rights were born of a predominantly Western concept of private property rights and benefits. At the international level, the objective of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs) is to support liberalization of the

122 Id at 6.
123 Id.
124 See Lee, supra note 116, at 127.
125 Yu, supra note 2, at 24.
126 Id. at 31.
127 Griffin, supra note 2, at 182.
international trading system while protecting the private monopoly rights of intellectual property owners by reducing piracy and eliminating of "free-riding." The preamble of the TRIPs Agreement highlights these objectives by explicitly emphasizing the need to protect private interests by committing members to a shared objective of "desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights."[129]

In contrast to Western notions of property rights, Communism, the extraordinary social experiment promising equality and freedom in the twentieth century, substantially impacted cultural perceptions in modern China. As noted by Robert Weatherly, Karl Marx deemed the individual to be a "species being" who exists as an intrinsic part of the society to which he or she was born.[130] Influenced by communist ideology, Chinese society has traditionally viewed private rights as a form of individualization, which is considered wicked and vicious.[131] Unlike the constitutions in most developed countries, which hold sacred the individual's rights, emphasizing their abstract and universal nature, the Constitution of China does not address IPR.[132] In addition, Chinese justice is "geared towards the settlement of specific disputes rather than defining the claims for individual rights."[133] Although Marxist fundamentalism has been loosened by the new "pragmatic" Chinese leadership, the legacy of

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129 Id. at pmbl.


131 Indeed, in Chinese society, values to the individual are secondary to the values that would accrue to the community. While China is gradually re-introducing notions of private ownership, the process is likely to be time-consuming. See id. at 93.

132 LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 18-21 (Derk Bodde & Clarence Morris eds., 1967).

133 Fung, supra note 2, at 615.
communitarian thought has a certain amount of inertia. The prevailing point of view in China is that rights are bestowed by the State rather than being natural, inalienable rights enjoyed by individuals.\textsuperscript{134}

A notable characteristic of China's legal landscape is the government's establishment of the interrelated doctrines of legal equality and political inequality in the context of civil obligations.\textsuperscript{135} It is apparent that Chinese people do not, or dare not, believe that individuals are endowed with rights that they are entitled to assert, particularly with respect to those in positions of authority.\textsuperscript{136} The comprehension of general private rights is nascent and, as such, the legislation for protecting them is in some senses rudimentary. Despite the introduction of a 2004 amendment to China's Constitution that would provide protection to private property,\textsuperscript{137} China still has a long way to go in order to fully protect private rights, such as integrating the amended provisions into existent laws and regulations. The lack of rights consciousness illustrates, at least in part, how Western legal notions are incommensurable with Chinese sensibilities.\textsuperscript{138}

In contrast, China has been engaged in intellectual property protection for over two decades, which has resulted in comprehensive and substantive legislation.\textsuperscript{139} The protection of IPR preceded recognition of the general private rights. China has

\textsuperscript{134} WEATHERLEY, supra note 127, at 118.


\textsuperscript{136} See ALFORD, supra note 2, at 117 (stating that there has been a lack of "rights consciousness" in China).

\textsuperscript{137} On March 14, 2004, China's National Peoples Congress adopted a series of long-awaited amendments to the state constitution, including landmark provisions that refer to protection of human rights and private property rights. For example, Article 33 of the Chinese Constitution has a third paragraph inserted, which reads "The State respects and preserves human rights." XIAN FA art. 33 (1999) (P.R.C.); see also XIAN FA, amend. IV.

\textsuperscript{138} Palmer, supra note 132, at 475-76.

\textsuperscript{139} For example, the 1990s witnessed a wave of significant legal reform. Chinese Copyright Law was legislated in 1990, and Patent and Trademark Laws, which were promulgated one decade ago, were significantly amended in 1992 and 1993 respectively. During this period China also actively participated in IPR conventions and activities sponsored by related international organizations. For a recent and comprehensive account of Chinese intellectual property law, see PETER GANEA ET AL., INTELLECTUAL PROPERTY LAW IN CHINA (2005).
thus spawned a modern amalgam—China’s remarkable intellectual property regime has been inoculated whereas the notion of private rights is still in its infancy.

Within this context, the commitment to protection of IPR cannot be regarded as unalterable. Establishing a substantive private rights system in China and giving its citizenry private property rights are by no means a quick or easy solution to China’s IPR enforcement problem. They should be regarded as long-term policies that need to be underpinned in order to create a sound basis for further economic development.

III. Insight into the Economic Spectrum

As China scholar Frederick Abbott asserts, the piracy of intellectual property fuels economic development until the country reaches the point where IPR protection becomes economically advantageous to a sufficiently strong set of domestic vested interests. Within the global trading system, if a country is not economically ready to change its economic behavior, the risky strategy for stronger demands will only turn into a tragic legal failure. Obviously, China remains a consumer of intellectual property and is therefore unlikely to see gains from the vigorous protection of IPR, instead profits will result from the imitation of existing products.

A. Market Impetus: A Nationwide Shadow Economy

The most striking economic feature of counterfeiting and piracy is that the original products which are being counterfeited and pirated are expensive to create but inexpensive to copy. At the same time, a considerable gap exists between the retail prices of the pirate and legitimate products, which enable the pirates to

140 See Frederick M. Abbott, The WTO TRIPs Agreement and Global Economic Development, in PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION 3, 4-12 (1997).


capture market share from the legitimate producers.\textsuperscript{144} Under this scenario, it is no exaggeration that counterfeiting and piracy have developed into a nationwide shadow economy that contributes to the national economy.\textsuperscript{145} Eliminating this shadow economy would mean depriving communities of literally hundreds of jobs.\textsuperscript{146} The temptation of large profits, little capital, and vast opportunities for employment is a difficult combination to resist.\textsuperscript{147} By some estimates, piracy directly or indirectly employs three million to five million people, and provides national income of between nineteen and twenty-four billion dollars.\textsuperscript{148} This is becoming more visible as China deepens its reforms and, together with a lack of enthusiasm by local authorities, threatens the stability of any initiative towards progress.\textsuperscript{149}

Mainly due to economic decentralization, the infringement of counterfeiting and piracy occurs especially at the local levels, where it supports local economies.\textsuperscript{150} Shutting down counterfeiting and piracy means, in many instances, cracking down a pillar of a cornerstone industry that will bring about

\textsuperscript{144} Id. at 294.

\textsuperscript{145} See CONGRESSIONAL RESEARCH SERVICE, CHINA-U.S. TRADE ISSUES 12 (July 1, 2005) (stating that counterfeit goods are estimated to account for approximately 8% of China’s GDP); see also Press Release, European Commission, EU Strategy to Enforce Intellectual Property Rights in Third Countries-Facts and Figures (Nov. 10, 2004), available at http://trade.ec.europa.eu/doclib/docs/2004/november/tradoc_119898.pdf (noting that around 15-20% of all brand products sold in China are fakes, and that the portion has risen significantly in recent years).

\textsuperscript{146} Chen, supra note 2, at 17.


\textsuperscript{149} In the context of IPR enforcement, it is not surprising that the central government often works in earnest while local authorities remain unconvinced that results will follow. As a result, the central government faces domestic resistance in its effort to promote IPR protection.

\textsuperscript{150} See Willard, supra note 6, at 429-30 (illustrating the role of regionalism and impact of infringing activities by government owned entities).
problems of unemployment, dislocation, and social chaos, which are problems that the Chinese government monitors closely.\footnote{See Berkman, \textit{supra} note 6, at 19 (mentioning that the local authorities remain unwilling to enforce laws against local business pillars which serve as important sources of local revenue).}

\textbf{B. Stage Theory for IPR Protection}

An economy must reach a certain stage of overall development before it can commit substantial resources to research and development.\footnote{Allison \& Lin, \textit{supra} note 25, at 775.} As noted by John Allison and Lianlian Lin, "all developing countries pass through a stage of development where copying of products is widespread."\footnote{Douglas Clark, \textit{Intellectual Property Rights Protection Will Improve in China Eventually}, \textit{China Bus. Rev.}, 22, 29 (2000); \textit{see also} Assafa Endeshaw, \textit{A Critical Assessment of the US-China Conflict on Intellectual Property}, 6 \textit{Alb. L.J. Sci. \& Tech.}, 295, 300 (1996) (demonstrating the fact that the industrializing countries often borrow many things, from technology to legal concepts, from industrialized countries).} Both the United States\footnote{Barbara A. Ringer, \textit{The Role of the United States in International Copyright-Past, Present, and Future}, 56 \textit{Geo. L. J.} 1050, 1051 (1968) ("[U]ntil the Second World War the United States had little reason to take pride in its international copyright relations; but rather, [in fact, it] had a great deal to be ashamed of."); \textit{see also} Teresa Watanabe, \textit{Japan Sets Sights on Creativity}, \textit{L. A. Times}, June 10, 1990, A1, A36 (mentioning that United States passed a stage in copying European technology in its early years).} and Japan\footnote{Endeshaw, \textit{supra} note 150, at 300.} have passed through similar stages.

The development of the United States in the nineteenth century was largely based on the adoption of technological, economic, and legal policies from England and France.\footnote{Endeshaw, \textit{supra} note 150, at 300.} It was not until 1783 that the first legislation was adopted in Connecticut that addressed copyright issues.\footnote{Peter K. Yu, \textit{The Copyright Divide}, 25 \textit{Cardozo L. Rev.} 331, 338 (2003).} Between 1800 and 1860, almost half of the
bestsellers in the United States were pirated, mostly from English novels.\footnote{Id. at 341 (citing S.M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 2.18 at 25 (2d ed. 1989)).} Today, with its rapidly growing economic strength and technological sophistication, the United States is no longer the "notorious pirate" it was in the eighteenth and nineteenth centuries; rather, it has been converted from the most "notorious pirate to the most dreadful police."\footnote{Id. at 353.}

The American domestic entrepreneurs were "notorious pirates of British works of intellectual property,"\footnote{Griffin, supra note 2, at 187.} as were the Japanese.\footnote{See infra notes 170-209 for a detailed discussion.} The experience of imitation in China was similar to that of European countries before the emergence of the contemporary notion of authorship in the eighteenth century, as well as the United States in the nineteenth century, and Japan in twentieth century.\footnote{See generally MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS (1994) (examining the modern concepts of art, authorship and copyright which arose in Europe during the late eighteenth century).} China is "not alone in its apparent inability to surmount obstacles to effective intellectual property protection," and the IPR enforcement problem in China is not unique.\footnote{Warren Newberry, Copyright Reform in China: A 'TRIPs' Much Shorter and Less Strange Than Imagined? 35 CONN. L. REV. 1425, 1447 (2003).} To speed up this process will undermine the developmental bulwark, but beyond a certain point, allowing it to continue will also hinder economic growth.

Counterfeiting and piracy are special types of market transactions, where demand meets supply. In order to harness the limited purchasing power of low-income citizens, Chinese authorities often turn a blind eye to counterfeiting, because it is an insurmountable problem in the early stages of development.\footnote{See e.g., Seth Faison, China Turns Blind Eye to Pirated Disks, N.Y. TIMES, Mar. 28, 1998, at D1 (noting that Chinese custom officials pose little threat to copyright pirates).} Despite its dramatic economic development, China's per capita GDP of $5,000 ranks one-hundred and twenty-second in the
At such an undeveloped level, there is no exception to passing through this stage in China, although it may be possible to gain faster development and thus accelerate the process of transition.

C. Outlook For IPR Protection in China

Prospectively speaking, there should be an adaptive phase before China’s WTO accession will eventually result in the removal of the various impediments to an effective IPR enforcement regime and lead to a noticeable decrease in IPR infringement. In the short term, some predict that there may be an increase in the number of infringements, since China’s efforts to create an internationally competitive free market economy have simultaneously created an illegal market of counterfeits, and "unleashed a flood of products, both genuine and counterfeit, into the world market." China’s WTO accession will further boost its economic growth and foreign trade, including the trade of counterfeited and pirated goods.

At this transitional period in its development, China will need time to phase-in effective policies. During this period, if no politically influential domestic constituency favors the new policies, one can only expect non-implementation and robust domestic resistance. In the future, however, China’s WTO accession should lead to a decrease in the infringement of IPR. This decrease is likely because the growth of intellectual property infringement in China has "paralleled the growth of China’s economy and Chinese companies’ greater access to domestic and international markets" — both of which will continue to grow with WTO membership. When economic growth creates the

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166 See CHINESE ACADEMY OF SOCIAL SCIENCES REPORT, STUDY OF THE IMPACT OF MOVIE PIRACY ON CHINA’S ECONOMY, available at http://www.uschina.org/public/documents/2006/07/cass_piracyimpact_e.pdf (showing that 61% of Chinese believed that piracy will continue to increase while 39% believed that piracy levels will remain steady and none expects the market for pirated movies to shrink in the immediate future).
167 Yu, supra note 154, at 372-73.
168 Clark, supra note 150, at 130.
169 Id.
170 Id.
development of more sophisticated and competitive home grown enterprises, and the domestic enterprises display entrepreneurial enthusiasm to protect their own IPR, the intellectual property infringement levels will reach a plateau and start to decrease.

IV. The Stones from Other Hills: Experiences of Japan and Korea

As another Chinese phrase says, “The stones from other hills may serve to polish the jade” (ta shan zhi shi ke yi gong yu). East and Southeast Asian countries are heavily influenced by Confucian values and have also been the “scene of a tremendous shift of technology and wealth from West to East.” Accordingly, this article draws on the experience of other regional states, which not only share the same, or similar, cultural values to those found in China, but have also developed domestic standards of IPR protection. Of these, Japan and Korea are notable for their cultural similarities with China and their high levels of intellectual property protection.

A. The Japanese Experience

On one hand, Confucian norms of social harmony and moral precepts have permeated the intellectual life of Japanese citizens and have played a pivotal role in molding the Japanese culture as it exists today. On the other hand, Japan’s economic progress is closely tied to its effective intellectual property policy and management. If China is to start a new process for its IPR protection, it is worthwhile to model its process after those who have had similar experience.

1. A Glance Back at Japan’s IP Law and Policy

In Japan, economic development has been linked from the very start to the introduction of industrial property rights. The Meiji regime established in 1868 quickly discarded the feudal system

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171 Grand Chinese Dictionary [Hanyu Da Cidian], V1, 1155 (Shanghai 1994).
172 Vaughan, supra note 155, at 316.
and launched a comprehensive program of reform that significantly changed Japanese society. During the Meiji Restoration, a revolution in Japan which "restored" imperial rule and transformed Japan from a feudal society into a modern state, legal systems, sciences, and technology were introduced from Western Europe and North America. The rapid growth of the 1960s was made possible in large part by the introduction of foreign technology.

While the Japanese regime in 1721 issued a decree that made inventions a criminal offense, the first statute of monopolies was introduced in 1872 after Emperor Meiji had declared that both the administration and the population in Japan should commit themselves to making Japan an advanced nation. At the end of the nineteenth century, Japan became a member of both the Paris Union for the Protection of Industrial Property and the Berne Union for the Protection of Literary and Artistic Works. Japan thus paved the way for systemic legislation that indicated that IPR should play an important role in the country's national industrialization and cultural renaissance.

In terms of the legislation, although Japan has enjoyed the longest tradition of IPR in Asia with a comparatively affirmed notion of intellectual property laws, it only serves to illustrate the

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174 Id.
175 Carol Gluck, Japan’s Modern Myths, Ideology in the Late Meiji Period 17-23 (1985).
176 See Michio Morishima, Why Has Japan ‘Succeeded’? Western Technology and the Japanese Ethos 58-63, 160-67 (1982) (stating that, since the Meiji Restoration, Japan has had extensive contacts with the West, through which Japan broke with a long history of isolationism and paved the way for the adoption of western technologies).
177 See Heath, supra note 173.
early development of the Japanese economy. In fact, it is not surprising that Japan’s IPR legal regime had long been characterized as a diffusion of knowledge rather than a facilitating innovation. The first Director-General of the Japanese Trademark Registration and the Patent Office, the truly remarkable Korekiyo Takahashi, who became Prime Minister in 1921, wrote in his autobiography when visiting the United States Patent institutions in Washington DC, around the year 1900: “We have looked about us to see what nations are the greatest, so that we can be like them. We said: ‘What is it that makes the United States such a great nation?’[‘] And we investigated and found that it was patents and so we will have patents.” Interestingly, the major driving force for developing a Western-style IPR legal system in Japan during the Meiji Period was to promote Japan to become “an advanced nation,” as Emperor Meiji wished, or facilitate it into “a greatest nation,” as Premier Takahashi expected. The nationwide transplantation of an exotic intellectual property system in Japan was virtually a massive copying activity reflected by an ingrained habit of imitation.

Due to the lack of economic underpinnings for a strong IPR protection, during the early phase of economic development, compulsory licensing was frequently required for a patent holder and, “until 1938 a patent could expire in practice if the patent holder did not use the patent.” In the 1960s, the United States Patent Office normally approved or disapproved an application for a patent within eighteen months. In contrast, it took the

179 See Heath, supra note 173.


182 Hamada, supra note 180.

183 Vaughan, supra note 155, at 347.
Japanese Patent Office (JPO) an average of five to seven years, with the Kilby patent case being an important example. Also, the JPO required "full disclosure of the technology submitted in the application for the accommodation of imitation." In addition, although Japan had joined the Paris Union on July 15, 1899, as recently as the 1990s, the duration of patents in Japan could be shorter than twenty years, which is the minimum duration agreed to in the TRIPs Agreement. It was not until 1994 that patent law was amended and improved to guarantee at least 20 years after the application for the patent.

Strong IPR protection only came into being in Japan when external pressure was created by the United States and lobbying pressure was raised by the domestic industrial sectors. In this sense, it was only recently that Japan substantially came into harmony with international standards and embarked on a national undertaking with a view to the construction of a nation built on intellectual property.

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184 Id.
185 For a substantive introduction of and comment on the Kilby case, see id.; Dana Rohrabacher and Paul Crilly, The Case for a Strong Patent System, 8 HARV. J. L. & TECH. 263, 265 (1995) ("In 1961, Texas Instruments filed the basic patent in Japan for the integrated circuit, known as the 'Kilby patent' after its inventor, Jack Kilby. The JPO required that the application be divided into fourteen separate parts of which twelve were ultimately rejected. The first patent was not granted until 1977, approximately seventeen years after it was filed "during which time the Japanese semiconductor industry copied and export large quantities of chip products, earning billions of dollars in profit").

186 Vaughan, supra note 155, at 347.
187 Hamada, supra note 180.
188 Id.
189 Since 2002, Japanese government has introduced various institutional reforms in the area of intellectual property. The work has been promoted in accordance with the "Intellectual Property Policy Outline" in July 2002 and the "Strategic Program for the Creation, Protection and Exploitation of Intellectual Property" in July 2003, which defined concrete measures the government should take and priorities in establishing a "nation built on intellectual property" where intellectual property is used to create high-value added products and services with the aim of revitalizing the economy and society. See Intellectual Property Outline, supra note 181; Strategic Program for the Creation, Protection and Exploitation of Intellectual Property, Intellectual Property Policy Headquarters, July 8, 2003, available at http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017539.pdf.
2. Confucian Values and Intellectual Creation

In Japan, identifiable signs of Confucian values are numerous. The Japanese believe in a social and hierarchical order and collectivist ideology.\textsuperscript{190} The character of Confucianism in Japan is much more significant than that in China.\textsuperscript{191} For example, in Japan an employer can be treated as the author of a work that is completed by an employee on the job.\textsuperscript{192} In Europe, this system would be unacceptable.\textsuperscript{193} The European employer will, as in Japan, usually own the copyright, but the status of author is reserved to the human being who actually makes the work rather than the entity which pays for the creation.\textsuperscript{194} The European view "emphasizes the individual, rather than the organization to which he or she belongs,"\textsuperscript{195} but the "Japanese rule emphasizes the importance of the organization, cooperation[,] and teamwork, rather than the individual."\textsuperscript{196} Each view has a logic and history shaped by the culture in which it is embedded. However, within the diversity of its culture, each economy attempts to reach the same goal by different routes. The infrastructure of Confucian philosophy, based on the cardinal relationship and hierarchical order, has played a significant role in Japanese economic development\textsuperscript{197} and contributed substantially to its economic miracle after the Second World War.\textsuperscript{198} Japan’s economic success demonstrates that Confucian values can act and have acted as a positive role in its economic and cultural prosperity.\textsuperscript{199}

\begin{itemize}
\item \textsuperscript{190} Troyer, supra note 23, at 45, 51-52; see also Gluck, supra note 175, at 258-59.
\item \textsuperscript{191} Gluck, supra note 175, at 259.
\item \textsuperscript{192} Vaver, supra note 181, at 5.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} See Gluck, supra note 175, at 258-59, 286.
\item \textsuperscript{198} MORISHIMA, supra note 176, at 3-7.
\item \textsuperscript{199} Id. (explaining the importance of the role played in the creation of Japanese capitalism by ethical doctrines as transformed under Japanese conditions, especially the Confucian ethics of complete loyalty to the firm and to the state).
\end{itemize}
3. Tolerant IPR Policy and Economic Blooming

During the Second World War, Japan received foreign aid from Western Europe and the United States and had to rebuild from the ashes of war. This aid enabled Japan to obtain necessary investment and technology without having to build a sound intellectual property environment. Japan has "garnered the lion's share of this wealth" transfer from the West and has "accomplished this while in the course of converting itself from a country devastated by allied bombing during World War II into an industrial giant."^{200}

During the rehabilitation period, Japan's "meteoric technological rise was not based on Japanese innovation, but on the imitation of Western ideas."^{201} Based on this, Japan enjoyed a high level of prosperity by "providing cheap, high-quality, mass-produced products to the world."^{202} During the two big oil crises in 1973 and 1975, Japan showed remarkable resilience.^{203} Japan has "carefully orchestrated its economy to keep out foreign imports while encouraging the copying of Western technology."^{204}

Within this context, the Japanese government applied a relatively tolerant intellectual property enforcement policy and, as a result, counterfeiting and piracy were very common. It was during the postwar period that Japan seized a valuable developmental opportunity. In 1953, less than a decade after the war, the Japanese were able to overcome the devastation of the war, and exceed pre-war levels of prosperity.^{205} At the beginning of the 1960s, the Japanese Prime Minister Hayato Ikeda launched his ambitious "doubling the income" plan.^{206} Then, at the centennial of the Meiji restoration, when China was under a violent storm of Cultural Revolution, Japan's GNP climbed

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^{200} Vaughan, supra note 155, at 346; see also Gluck, supra note 175, at 258-59.
^{201} Vaughan, supra note 155, at 346.
^{202} Intellectual Property Policy Outline, supra note 181.
^{204} Vaughan, supra note 155, at 316.
^{206} See Hamada, supra note 180, at 7.
dramatically to become the second largest in the world, surpassing West Germany.\textsuperscript{207} It comes as no surprise that Japan did nothing different than what the United States did in copying European technology in its early years.\textsuperscript{208}

Japan's economic miracle led to a transition towards stronger intellectual property protection in response to lobbying groups within specific domestic sectors.\textsuperscript{209} As a major example, Yoshida Kogyo KK, famous maker of YKK zippers, found counterfeit YKK zippers imported from Korea and initiated a protracted six-year lawsuit against the copiers.\textsuperscript{210} Since then, the Japanese Ministry of Finance has organized the "Customs Information Centre," a "watchdog unit to monitor illicit copying" and to "combat intellectual property infringement."\textsuperscript{211} This gradually became more pervasive, and counterfeits of Japanese origin had almost entirely disappeared by 1970 due to the stringent efforts of the Japanese government to crack down on counterfeit goods and the steady growth of the local economy.\textsuperscript{212} However, a period of reversal was noticeable in the mid-1970s when Japan "faced a resurgence of counterfeit goods that flooded into the Japanese market."\textsuperscript{213} Notably, the rebound phenomenon occurred during the recession, on the heels of the oil crisis in the 1970s.

\textbf{B. The Korean Experience}

Like Japan, the Republic of Korea (Korea) is what might be called a typical Confucian country. Confucianism was introduced into Korea during the era of the Three Kingdoms (57 BCE-668 CE),\textsuperscript{214} and achieved status as the major political ideology and

\begin{itemize}
\item \textsuperscript{207} Id. at 7.
\item \textsuperscript{208} Vaughan, supra note 155, at 316-17.
\item \textsuperscript{209} See ISHINOMORI, supra note 205.
\item \textsuperscript{210} See Vaughan, supra note 155, at 349.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Masashi Kurose, Law Strengthened to Fight Flow of Counterfeit Goods, MANAGING INTELL. PROP. (Japan Special Focus), Mar. 2004, at xii, xii.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} In Korea, Confucianism has been integrated into Korean culture for a long time. The Three Kingdoms, Koguryo (37 BCE-668 CE), Paekche (18 BCE-660 CE) and Silla (57 BCE-935 CE), all left records that indicate the early existence of Confucian influence. See Key P. Yang & Gregory Henderson, An Outline History of Korean Confucianism: Part I: The Early Period and Yi Factionalism, 18 J. ASIAN STUD. 82, 82-
social system with the establishment of the Yi dynasty (1392-1910 CE). Confucianism in Korea is a conservative tradition, which has strongly captured people’s minds and imposed rules, models, and beliefs, while serving as a blueprint for integrating Korean social lives.

1. "Eastern Decorum" and Economic Miracle

Korean culture retains a strictly observed Confucian element. The traditional Confucian social structure, although changing, is still prevalent in modern Korean society. Confucianism was accepted so eagerly and in so strict a form that the Chinese regarded the Korean adherents as more virtuous than themselves. The Chinese see Korea as the "country of Eastern decorum," referring to the "punctiliousness with which the Koreans observed all phases of the doctrinal ritual."

Although this point of view is of some historical interest, more relevant to the discussion at hand is to what extent Confucian norms are presented in contemporary Korean society. Koreans value harmony, reverence for age, social stability, a respect for learning, and motivational force, and tend to be obedient in hierarchical orders, which appear to be compatible with dynamic

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84 (1958).

215 The Confucianism which the Yi dynasty adopted is known as Neo-Confucianism. The Neo-Confucianism began in the period of the Song dynasty (960-1279 AD) in China. See CHINA: A HISTORICAL AND CULTURAL DICTIONARY, supra note 8, at 230.


entrepreneurship in Korea. Confucian culture provides the tools with which Koreans interpret and give order to the world around them. It is a common point of view in Korea that the deeply ingrained Confucian mode of manners and social relations is still a predominant factor in interpersonal relations, organizational structures, and economic life. As a developing nation, Korea has obtained a positive response based on its ability to retain traditional values while establishing its domestic industries. It is an interesting phenomenon that the upsurge of interest in Confucian studies in East and Southeast Asian countries for the last few decades has generated a new dynamism in the Confucian tradition, paving the way for the emergence of the “third epoch” of Confucian humanism.

2. Weak IPR Protection and “Development Policy”

Traditionally speaking, Korea has not been a nation with an intellectual property notion in the modern sense. Intellectual


221 See Chaihark Hahm, Law, Culture, and the Politics of Confucianism, 16 Colum. J. Asian L. 253, 257 (2003) (asserting that Confucianism is multi-faceted and may mean different things to different audiences); William Shaw, Rights, Culture, and Policy: The Prevailing Model, in Human Rights in Korea: Historical and Policy Perspectives 1, 1-22 (William Shaw ed., 1991) (stating Confucianism provides the people with signs, symbols, and strategies: the tools with which to negotiate the world around them).

222 See Hahm, supra note 221, at 268. The author highlights developments on the peninsula beginning from end of the nineteenth century: the decline of Confucianism as a “living political philosophy” that began in the 1880s and sharply accelerated after the loss of Korean independence in 1910; the growth during the same period of “alternative philosophical, religious, or political traditions; the “militarized government and social control” by the Japanese from 1910 to 1945; and the “large, often politically significant military establishment since 1945.” Id.

223 After the 1960s, Korea found its role followed the Japanese example and developed into one of the “Four Mini Dragons.” Statistics show that “four decades ago [Korean] GDP per capita was comparable with levels in the poorer countries of Africa and Asia.” Today its GDP per capita is seven times India’s, sixteen times North Korea, and is “comparable to the lesser economies of the EU.” See The Central Intelligence Agency, The World Fact Book 297, 300 (2004).

224 See Newman, supra note 218, at 225-27.

225 Id.
property conceived and developed in Korea has long been regarded as an entrepreneurial device to attract investment and transfer of technology, and, similar to Japan, royalty payments have been a major element of the balance of payment. As a result, the effectiveness of Korea's government in keeping the integrity of IPR is incoherent. For example, the government requires very specific product information in order to provide certification of IPR, and this information needs to remain contained.226

In addition, the Korean government has applied a flexible intellectual property policy of incorporation of imitation into its "national development" and for a long time been considered as an example of a state in which "piracy" was regarded as merely a benign form of technology transfer.227 Accordingly, until the late 1980s, Korea had no effective IPR enforcement. For example, during the 1970s and early 1980s, Korea was almost entirely an importer of technology from developed countries, particularly from the United States, Japan, and Western Europe.228 The heavy dependence on Japanese technology has resulted in the fact that Korea shares similar industrial advantages, such as the automobile and electronic industries.229 Were it not for such tolerant IPR, it would not have been possible for local enterprises to have achieved such success.230 This practice has made tremendous contributions to Korea's economic boom.

In the area of IPR protection, Korea has had a similar experience to China and both have been repeatedly criticized by the United States. Korea was elevated to the Priority Watch List in the 2003 Special 301 Report of the U.S. Trade Representatives, which highlighted a series of continued concerns regarding the lack of adequate protection and enforcement of intellectual property, particularly the growth of online music piracy and

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226 Id.


228 Walter Arnold, Science and Technology Department in Taiwan and South Korea, 28 ASIAN SURV. 440 (1988).

229 Kim, supra note 227.

230 See id. at 7-8.
continued piracy of United States' motion pictures. Under external pressure, Korea has seen a major overhaul of its IPR regulations influenced by the TRIPs Agreement, and has furnished itself with relatively good intellectual property legislation and reasonable enforcement mechanisms.

3. From "Breaking" to "Preaching:" Role Shift in IPR Protection

Similar to the experience of Japan, the incorporation of piracy into "national development" policies facilitated domestic industrialization and related economic growth in Korea. However, by accumulating sufficient indigenous capabilities with extensive science and technology infrastructures, these two countries reached the later stage of the technological development where IPR protection became an important element in domestic industrial activities. Japan and Korea "could not have achieved their current levels of technological sophistication if strong IPR regimes had been imposed on them during the early stage of their industrialization." The same principle applied to the United States and Western Europe during their respective industrializations.

With the development of greater technological sophistication, more and more Korean companies consider IPR as an important part of the successful commercialization of their products and have made considerable investments into research and development. Research and development investment has seen a "quantum jump" from $28.6 million in 1971 to $4.7 billion by

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232 Heath, supra note 173.

233 Kim, supra note 227, at 5.

234 Id. at 7.

235 Id.

236 For example, for the last decade Samsung invested $35 billion on R&D. Samsung has recently launched an ambitious plan to spend $45 billion over the next five years on R&D, starting in November 2005. See Samsung Group Announces Investment Plan, ASSOCIATED PRESS, Nov. 8, 2005, available at http://www.marinelink.com/Story/ShowStory.aspx?StoryID=200804.
1990, and to $12.2 billion by 2000. During this period, the Korean economy recorded one of the world's fastest growth rates. As a percentage of GDP, research and development increased from 0.32 percent to 2.68 percent during the same period, surpassing that of many Western European countries. Korean companies have acted as enthusiastic advocates and effective preachers for appropriate protection for IPR. As Samsung and LG have become globally competitive in the technology sector, the Korean government has at last found leverage to punish counterfeiting and piracy and to protect IPR with an effective system of enforcement. Korea, one of the long-time leaders in piracy practices, came to understand the bite of illegal copying and has now become a genuine believer and supporter of IPR. The shift of this role relies mainly on the development of economic interests, which suggests that cultural values are less important market forces, contrary to what conventional theory has asserted.

About two decades ago, both China and Korea were considered to be a "pirate's paradise." While China can still claim this unflattering sobriquet, Korea is moving away from its ignominious free-riding days and has endeavored to establish a functional system of IPR protection regime. The different experiences of Korea and China provide a good perspective for comparative analysis. By examining Korea through a multifaceted lens, it provides a useful case for assessing the extent to which a developed economy is helped or hindered by "free riding," and provides China a precedent which may lead to a shortcut to the most direct and appropriate IPR management strategy.

C. Preliminary Reflections

Having applied the method of proof by contradiction, we can

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237 Kim, supra note 227, at 3.
238 Id.
239 Id.
240 See Alice H. Amsden, Asia's Next Giant, South Korea and Late Industrialization 3-5 (1992) (introducing Korea's conversion from a learner to an innovator).
241 Id.
242 See Vaughan, supra note 155, at 335.
easily conclude that, if Confucian philosophy were the cause of the enforcement problem in China, it failed to explain the current lower rates of counterfeiting and piracy in Japan and Korea which are equally, if not more, influenced by Confucian value than China. The significant difference is that both Japan and Korea have established stronger IPR regimes because of varying stages of economic development.  

Although some drawbacks of Confucian ethics may still exist, "Confucian elites have contributed to the social and political achievements of East Asian states such as Japan and Korea in the post-World War II era: rapid and relatively egalitarian economic growth, stable families, and crime-free streets." Confucian ethics have made positive contributions, both in fostering domestic economic development and in maintaining intellectual property in different ways. The critical question is how to preserve the advantages of Confucian ethics while minimizing its shortcomings.

The objective of establishing the WTO was to liberalize world trade and to harmonize trade policies to ensure fair access to world markets. While engaging in harmonization of national trade policies, the world trading system has promoted cultural harmonization simultaneously, for example, through its TRIPs standard. It is clear that TRIPs has gone beyond dealing with

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244 Arguably, it is true that, while Confucianism trusts in devotion and honor to seniors and ancestors, and emphasizes social order, these concerns in turn place a systemic pressure against argument and disobedience. As such, the role of critical thinking may be somewhat weakened.


246 *Id.*


248 See TRIPs, supra note 128. As the most comprehensive intellectual property agreement ever, the TRIPs Agreement aims to promote harmonization and standardization of approach to protection by providing minimum standards for the member states.
"trade related" intellectual property issues. As a result of TRIPs, a state initially pursues a variety of goals in addition to economic development, such as cultural autonomy, but the compelling rule-based international trade regime limits the ability of the nation to structure its own domestic laws, that often reflect the cultural values of that nation.\(^{249}\) In this context, we cannot ignore the fact that, in a multicultural society, it is inappropriate and unwise to strive for a unique cultural environment leading to intellectual property harmonization. Imposing a superseding international law in the name of trade harmonization tends to undermine the social values and cultural diversities reflected in domestic laws.\(^{250}\)

Like liberal values, which are widely shared by many East-Asian nations, "Confucian values and their political implications may well be applicable in non-Confucian societies that share similar political cultures and face similar political problems."\(^{251}\) In concrete terms, it might be important to promote a worldwide conception for intellectual property protection, but it might be equally, if not more, important to preserve traditional ethics from which indigenous diversity and intellectual knowledge are rooted. To overestimate or even misestimate the influence of Confucian values can create a misleading stereotype and form of cultural bias.

It is worth mentioning that there is a major difference between China and these two neighboring countries. First, like Japan, Korea has been "Americanized" to a certain degree since the end of World War II, and the legal regime, also like Japan, has long been heavily influenced by Western Civil Code based on the "Rule of Law" system.\(^{252}\) Second, culturally, the unilateral Confucian system in these two countries has developed into a mixed Confucian-Christian system.\(^{253}\) The westernization process has

\(^{249}\) Shin-yi Peng, The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective, 1 ASIAN-PAC. L. & POL’Y J. 1, 6 (2000).

\(^{250}\) Id.

\(^{251}\) Bell, supra note 245.

\(^{252}\) See PYONG-CHOON HAHM, Korea's Initial Encounter with the Western Law 1910-1948 A.D., in KOREAN JURISPRUDENCE, POLITICS AND CULTURE 137, 144-51 (1986).

made it much easier to make necessary adjustments.

While China shares the Confucian tradition with Japan and Korea, China’s unique socialist ideology, administrative decentralization, inadequate judiciary and huge but inefficient bureaucracy have made intellectual property enforcement rather difficult. Nonetheless, it is important to note that, for practical purposes, any approach to effectively analyzing and clarifying IPR issues in China must rest on a balanced interplay of political and cultural fundamentals. In other words, the enigmatic dilemma of socio-political reform has shaped a unique model of Chinese philosophies that have exercised indirect but decisive influence over the effectiveness of the enforcement. Even if it reaches an appropriate stage of economic development, without these “fundamentals,” the enforcement infrastructure will be endorsed neither by political will of the authorities nor by the cultural perception of the citizenry. The short answer is that only when China has carried out its socio-political reform systemically and integrated into international institutions will it be possible to ensure the endeavor goes further. That is also why this article supports policy makers in the West who try to promote the transformation of China in both economic and, probably more importantly, political areas.

V. Conclusion

China’s IPR enforcement insufficiency is not a traditional cultural phenomenon reflected by Confucian ethics. The intellectual property enforcement problem is not an actual outcome of Confucian philosophy and “to steal a book” is not an “elegant offense.” Rather, the Confucian ethics act as a unique moral foundation for intellectual property protection. Apart from the common reason of insufficient economic development, the intellectual enforcement problem in China is a unique political phenomenon resulting from the systemic dystrophy fundamental to Chinese institutional development. In a broader sense, it may be the source for recasting and strengthening legal enforcement in China as a whole. China is experiencing a critical transition—the prospect of a splendid economic landscape with political reform having lagged far behind. Although China has committed itself to a socialist “rule of law” state, without the spirit of liberal democracy, “rule of law” in China will unsurprisingly remain
symbolic and problematic. As a consequence, economic reform has not only brought about greater prosperity, but also created grievous crises. The cascading problems have, in many circumstances, frustrated the efforts of ordinary Chinese citizens to earn their living in normal ways. As a result, utilitarianism seems to dominate many people's minds throughout the country. In addition, the restriction of religious beliefs and the tough control over freedom of speech have contributed to the growing utilitarian impulse. In this context, there is no exaggeration that counterfeiting and piracy are by-products of imperfect political reform.

The reasons for the intellectual property enforcement problem in China are manifold and interdependent. However, the political aspect plays a decisive role. Despite the lack of economic strength and technological sophistication in support of a comprehensive IPR protection system, China has created an elaborate Western-styled IPR regime without social foundations to strengthen its adequate enforcement. Nevertheless, with enigmatic political dilemmas that rival its economic prosperity, the ultimate outcome of intellectual property enforcement largely depends on how China will contend with the social and political fragmentation that it currently faces. Preoccupation with China's potential for success stems largely from the highly authoritarian system and its absorbed promotion of coherent institutional reform and rule of law. However, to carry out such a reform in the world's most massive government bureaucracy will not be easy. Without help, it is unlikely that China will be able to make the necessary adjustments. The West should try to foster and facilitate shifts in both economic and sociopolitical domains. This is a problem for which there is no panacea. Any attempt for quick success and instant benefit may result in failure.