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## Enforcing Intellectual Property Rights: A Methodology for Understanding the Enforcement Problem in China

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# Enforcing Intellectual Property Rights: A Methodology for Understanding the Enforcement Problem in China

JUSTIN McCABE\*

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## I. INTRODUCTION

Intellectual property rights are neither protected nor enforced in strict uniformity throughout the world. However, it can be said that in most developed countries, intellectual property is preciously guarded, as evidenced by a plethora of intellectual property statutes, penalties for infringement, and consistent attempts to convince less-developed nations to adopt strong—or stronger—intellectual property protections.<sup>1</sup> Despite continued vigilance by developed coun-

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tries in bringing about increased international harmony among intellectual property regimes, some developing countries sustain questionable enforcement policies.<sup>2</sup> What the driving force is behind intellectual property enforcement policies—or more appropriately, the lack thereof—is a matter of disagreement.<sup>3</sup> In order to predict whether or not a country that is currently not enforcing its laws will enforce them in the future, it is undoubtedly necessary to understand the factors driving a country's current enforcement policy. For instance, cultural, economic, or political factors, or a combination

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views expressed in this article are the author's own and do not reflect the views of Downs Rachlin Martin PLLC.

1. To enhance protections for their own citizens' intellectual property, industrialized countries have engaged in multinational and bilateral treaties with less developed nations, attempting to improve and harmonize intellectual property laws. For example, membership to the World Trade Organization (WTO) requires the assent to several treaties regarding intellectual property and the promulgation of laws to provide adequate protections to intellectual property. See Kirsten M. Koepsel, *How Do Developed Countries Meet Their Obligations Under Article 67 of the TRIPS Agreement?*, 44 IDEA 167, 168–69 (2004). There are currently 194 independent states in the world and 153 of them are members of the WTO. U.S. DEPARTMENT OF STATE, INDEPENDENT STATES IN THE WORLD (2009), <http://www.state.gov/s/inr/rls/4250.htm>; WORLD TRADE ORGANIZATION, MEMBERS AND OBSERVERS (2008), [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

2. See Keshia B. Haskins, Note, *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1128–29 (1999) (noting that China and Mexico have many reasons not to enforce their copyright laws, including the profit to be obtained, protection of their own citizens from exploitation by industrialized countries, and a lack of concern for intellectual property generally).

3. Compare KONG QINGJIANG, WTO, INTERNATIONALIZATION AND THE INTELLECTUAL PROPERTY RIGHTS REGIME IN CHINA 5 (2005) (“[T]omorrow’s IPR [Intellectual Property Regime] may be no more than a logical extension of the political economy of today’s IPR regime.”), with WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 2 (1995) (“[I]mperial China did not develop a sustained indigenous counterpart to intellectual property law, in significant measure because of the character of Chinese political culture.”), and XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA 2 (1997) (noting China’s reluctance to enforce promulgated laws as a vestige of its “state-commanded social control efforts”).

thereof, may result in stricter enforcement practices, while others may discourage or delay them.

The differences between Chinese and U.S. laws and intellectual property policy development illustrate the underlying disparity between their perspectives on intellectual property rights. The United States is one of the most protective countries concerning intellectual property rights and has aggressively sought to improve intellectual property protections in China.<sup>4</sup> However, despite the United States' continued efforts and China's enactment of intellectual property laws, many still perceive China as one of the largest infringing countries in the world—illegally appropriating significant amounts of protected technology and copyrighted materials.<sup>5</sup> While legal commentators have routinely chastised China for its failure to enforce its intellectual property laws,<sup>6</sup> and have blamed this lack of enforcement on a myriad of factors,<sup>7</sup> they have not evaluated whether these factors are truly unique to China or whether they are individually, or in the aggregate, the driving force behind China's lack of enforcement. Nor have these commentators seriously addressed the ultimate question of whether China's enforcement practices will improve and what that means for intellectual property rights generally.

To fill this gap in understanding China's future enforcement practices, this paper suggests a methodology for determining whether, and to what extent, Chinese culture, as defined by its valuation of intellectual property, is the driving force behind its current intellectual property enforcement policy. The methodology proposes that two analyses, one historical and the other functional, provide valuable guidance as to the extent and nature of the influence Chi-

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4. See ALFORD, *supra* note 3, at 1 (“China . . . [has] taken major steps designed to bring [its] . . . intellectual property laws into close conformity with the expectations of the U.S. government, which had threatened to impose hundreds of millions of dollars in trade sanctions . . . .”); QINGJIANG, *supra* note 3, at 3–4 (noting pressure on China from western countries, especially the United States).

5. See Kate Colpitts Hunter, *Here There Be Pirates: How China is Meeting Its IP Enforcement Obligations Under TRIPS*, 8 SAN DIEGO INT’L L.J. 523, 525 (2007) (describing extent of China’s piracy).

6. See, e.g., *id.*

7. See, e.g., ALFORD, *supra* note 3, at 2 (Chinese political culture); QINGJIANG, *supra* note 3, at 5 (political economy); REN, *supra* note 3, at 2 (social control efforts); Haskins, *supra* note 2, at 1128–29 (general political expediency).

nese culture has on its current enforcement practices. The historical comparison requires an evaluation of past implementations of intellectual property regimes in China with its current implementation. The primary purpose of this appraisal is to construct a framework by which certain influences, such as Communism and the Cultural Revolution, may be shown, for instance, to have minimal effect on China's implementation of an intellectual property regime because of its non-existence at the time of previous attempts to implement an intellectual property regime. In addition, a historical recounting should afford insight into the societal understanding of intellectual property in China as it existed in prior periods, such as the early twentieth century and during the Communist period, and whether it is evolving today into a more Western conception.

The second prong of the methodology focuses on a functional comparison of the currently enacted patent laws in China and the United States. This functional comparison highlights differences between U.S. and Chinese laws and attributes that influence those differences. A strict functional comparison, however, may have significant flaws, especially when, as in the context of intellectual property, there is "inadequate theoretical groundwork" for the comparison.<sup>8</sup> As Xin Ren describes, there are many legal concepts that do not exist in traditional Chinese law, and thus "an exegetical approach that focuses on an analysis of Chinese written statutes—with references from the Western legal categories of presupposition and terminology—has often been applied to determine how these statutes might be interpreted in Chinese society."<sup>9</sup> Generally, Ren's concerns are shared by other comparative theorists.<sup>10</sup> However, these

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8. REN, *supra* note 3, at 7.

9. *Id.*

10. See, e.g., Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 161–62 (1998) (book review).

Discerning the meaning of laws requires more than literal comprehension of written text. Every legal system has its own taxonomy or intellectual framework in which the language of its laws is embedded. The full meaning of laws can be understood only by viewing laws through the prism of the intellectual framework in which they exist. Traditional comparative law usually begins its analysis, however, by choosing a substantive area of law (as defined within one system) and then comparing it to

concerns do not render a statutory comparison useless, especially when context may be found to bolster the interpretation which is, in part, what the previously described historical analysis attempts to provide.

The importance of comparing the laws of two countries, with adequate context, also provides an understanding as to the external influences on the laws themselves. As Roger Cotterrell opined:

[The] law can be considered to express or structure the experiences that make up the essential texture of social life . . . . [C]ontext is ‘assumed and reproduced in law as a bearer of traditions, or of ideological constructions, or forms of discourse.’ Thus, law, to a significant extent, actually constitutes social reality.<sup>11</sup>

Therefore, comparing Chinese intellectual property laws to those of a developed system, such as the United States, should reveal the current extent of various influences on the intellectual property system. In addition, depending on the differences between the current implementation of an intellectual property regime, as compared to prior attempted implementations, there may be a means to ascertain whether stronger enforcement practices are imminent.

Although many potential influences exist, there are two primary reasons to focus on whether or not culture is the driving force behind China’s lackluster enforcement practices. First, studies of developing countries’ intellectual property systems have stated that there is a typical progression for stricter enforcement of intellectual property rights.<sup>12</sup> Generally, a developing country is a net importer of intel-

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its supposed counterpart in another legal system. Comparison through this approach necessarily treats the objects being compared as relatively independent from the intellectual framework in which they exist. The main problem with a process that abstracts laws from their context is that it permits scholars to portend the results of their comparison.

*Id.* (footnotes omitted).

11. Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J.L. & SOC’Y 171, 176 (1998) (footnote omitted) (quoting David Nelkin, *Beyond the Study of “Law and Society”?* Henry’s Private Justice and O’Hagan’s The End of Law?, 1986 AM. B. FOUND. RES. J. 323, 325 (book review)).

12. See KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY ch. 4 (2000), reprinted in FREDERICK M. ABBOTT ET AL.,

lectual property.<sup>13</sup> Therefore, if the country strictly enforced strong intellectual property laws, it would severely hamper its economic development, as its citizens would be at a disadvantage while competing on a national stage.<sup>14</sup> However, as a country becomes more powerful economically, thus becoming an exporter of intellectual property, the country has greater reason to empower its intellectual property system to protect these rights.<sup>15</sup> Then, once a country becomes a significant exporter of intellectual property, the country will also be politically motivated to protect the country's assets and will provide the administrative resources necessary to raise the level of enforcement.<sup>16</sup> Thus, it is important to not focus on either economic or political motivations, as they are generally interdependent and will lead toward stronger intellectual property protections.<sup>17</sup> In the context of China specifically, since its economy is growing substantially and its political machinery has enacted intellectual property

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INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 113, 115 (2007); Jing "Brad" Luo & Shubha Ghosh, *Protection and Enforcement of Well-Known Mark Rights in China: History, Theory and Future*, 7 NW. J. TECH. & INTELL. PROP. 119, 119–20 (2009).

13. *E.g.*, QINGJIANG, *supra* note 3, at 8 (noting that in 1984 "China was primarily an importer of technologies, and simple economics dictates it leaving foreign technology unprotected").

14. Haskins, *supra* note 2, at 1128 ("[D]eveloping countries often struggle with creating strong intellectual property laws because upon creation of such laws in developing countries, industrialized producers appear to gain at the expense of consumers of developing countries." (citing Gabriel Garcia, Comment, *Economic Development and the Course of Intellectual Property Protection in Mexico*, 27 TEX. INT'L L.J. 701, 708 (1992))); *cf.* ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 634 (rev. 4th ed. 2007) ("Intellectual property, despite the name, was not valued for intellectual reasons at all [in the early history of the Republic], but because of mercantile and industrial applications. As such, this property was not a central concern of the law until the full-blown factory age" (quoting LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 257 (2d ed. 1985))).

15. QINGJIANG, *supra* note 3, at 9.

16. *See id.* (stating that as China's economic situation developed "there was strong motivation among China's leaders and officials to continue the gradual broadening of the scope of protection for patented inventions by foreigners, which, in the end, eliminated the practice of forced technology transfers").

17. *Id.*

laws that comport with international obligations,<sup>18</sup> one would expect that in time, China's enforcement practices would improve.

Secondly, the reason to focus on culture is that eliminating it as one of the driving forces will enable a negative inference that the enforcement regime in China will improve naturally—that is, assuming that there is not an economical meltdown or political unrest. In addition, if culture does strongly influence the enforcement of its intellectual property regime, an analysis of the scope of China's protection may offer insights as to the appropriate strength and necessity of industrialized intellectual property laws.<sup>19</sup>

## II. PHILOSOPHY OF INTELLECTUAL PROPERTY

Intellectual property laws protect intangible property, which is, in a broad sense, ideas.<sup>20</sup> Intellectual property laws generally, and patent laws specifically, are “attempt[s] to balance the rights of the community against the individual interests of inventors.”<sup>21</sup> Unsurprisingly, different societies have chosen to balance these two interests differently.<sup>22</sup> Generally, the first real patent “system”<sup>23</sup> is

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18. Andrew Jacobs & Bettina Wassener, *China's Growth Picks Up Speed But Raises Concerns*, N.Y. TIMES, Oct. 22, 2009, at B6, available at <http://www.nytimes.com/2009/10/23/business/global/23yuan.html>; see ALFORD, *supra* note 3, at 1.

19. There is evidence that U.S. intellectual property protections have gone too far; several recent court decisions have scaled back on United States patent holders' rights. See, e.g., *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 442 (2007) (limiting extraterritorial reach of 35 U.S.C. § 271 (2006)); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416–18 (2007) (increasing the scope of 35 U.S.C. § 103 to minimize the patentability of obvious improvements over the prior art); *In re Bilski*, 545 F.3d 943, 949 (Fed. Cir. 2008) (en banc) (limiting patentable processes), *cert. granted sub nom. Bilski v. Doll*, 129 S. Ct. 2735 (2009).

20. See ABBOTT ET AL., *supra* note 12, at 6.

21. MERGES ET AL., *supra* note 14, at 119.

22. See *Microsoft Corp.*, 550 U.S. at 455 (“Foreign conduct is [generally] the domain of foreign law, and in the area here involved, in particular, foreign law may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions.”) (alteration in original) (internal quotation marks omitted); G. GREGORY LETTERMAN, *BASICS OF INTERNATIONAL INTELLECTUAL PROPERTY LAW* 166 (2001) (“The various governments of the countries of the world may—and have—come to very different

thought to be a creation of the Venetians during the Renaissance period.<sup>24</sup> This first system mirrors the conventional patent systems today—with requirements for registration (novelty and usefulness), a set duration of monopoly afforded the inventor, and a path to remedy infringement by others.<sup>25</sup> However, in contrast to the U.S. patent system, the Venetians reserved to the Republic the right to use the invention without compensating the inventor.<sup>26</sup>

The Venetian system is just one example among many of various balances struck between the community and the inventor. Importantly, every sovereign has the right to strike or not to strike its own balance.<sup>27</sup> While small differences may be understandable, not striking a balance and therefore not granting intellectual property protections or not enforcing them, is not as unusual as it may seem from the outset. “[P]rotections provided to [intellectual property] are granted by governments as an award of a legal proprietary right to the creators as a compensation and inducement for what they have created.”<sup>28</sup> However, this award comes at a price to society.

First, the government creates a limited monopoly for the inventor.<sup>29</sup> “Under generally accepted economic theories of competition and the efficiencies of a market economy, monopolies are anathema

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conclusions regarding the minimum levels of inducement [to disclose inventions] that need be offered.”)

23. *But see* MERGES ET AL., *supra* note 14, at 117 n.3 (citing Malcolm Frumkin, *Early History of Patents for Invention*, 26 TRANSACTIONS NEWCOMEN SOC’Y 47 (1947) (claiming that the first patents may have been granted during the Byzantine Empire)).

24. *Id.* at 118.

25. *Id.*

26. *Id.*

27. *See* Annette Kur, *Applicable Law: An Alternative Proposal for International Regulation—The Max-Planck Project on International Jurisdiction and Choice of Law*, 30 BROOK. J. INT’L L. 951, 954 (2005) (“[The m]ost important among [the policy reasons] is the notion that the territoriality and lex protectionis principles are best suited to safeguard national legislatures’ freedom to regulate intellectual property matters having an impact on their territories . . .”).

28. LETTERMAN, *supra* note 22, at 4.

29. *See* *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 523 (1972), *superseded by statute on other grounds*, Patent Law Amendments Act of 1984, Pub. Law No. 98-622, 98 Stat. 3383, *as recognized in* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

and most efforts to create or maintain them are thwarted by action of law.”<sup>30</sup> Second, it is generally in the sovereign’s interest to disseminate and utilize ideas—“just as the fullest dissemination of ideas is deemed essential to a healthy scientific inquiry and to public democratic discourse.”<sup>31</sup> Lastly, a country, depending on its economy, political situation, educational and manufacturing capabilities, and culture, may not have the impetus to create intellectual property laws that would significantly harm its citizens or would be contrary to its view of intellectual property generally.<sup>32</sup>

These aforementioned concerns may be reinforced by the lack of “practical, rigorous, scientific examination of the actual economic consequences of the creation of [intellectual property] rights when compared with their absence which would irrefutably demonstrate that [intellectual property] rights are of public benefit.”<sup>33</sup> Thus, even when the government creates patent rights, it likely creates the rights

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30. LETTERMAN, *supra* note 22, at 7.

31. *Id.*

32. *See* Haskins, *supra* note 2, at 1128–29 (noting that China and Mexico have many reasons not to enforce their copyright laws, which includes the profit to be obtained, protection of its own citizens from exploitation by industrialized countries, and a lack of concern for intellectual property generally).

33. LETTERMAN, *supra* note 22, at 8. *But see* John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT’L ECON. L. 735, 736 (1999) (“Although knowledgeable observers have had their differences about whether the role of patents in encouraging technological advancement and commercialization outweighs their arguably anticompetitive exclusionary effects, today’s consensus is that the benefits of an appropriately tailored patent system more than counterbalance its costs.”); ROBERT J. SHAPIRO & KEVIN A. HASSETT, *THE ECONOMIC VALUE OF INTELLECTUAL PROPERTY* 5–6 (2005), available at <http://www.sonecon.com/docs/studies/IntellectualPropertyReport-October2005.pdf>. Shapiro and Hassett argue that economists have long understood that growth is linked to innovation and linking innovation to the strength of intellectual property laws. *Id.* For example, “[f]rom 1980 to 2002, the developing East Asian economies achieved growth averaging more than 7.4 percent per year, and the developing South Asian economies grew by an average of more than 5.4 percent annually. By contrast, Latin American economies with more restrictive foreign-investment policies and lax intellectual property protections grew by less than 2.5 percent per year over the same period.” *Id.*

begrudgingly and will attempt to limit the inventor's benefits in order to achieve the appropriate balance for its society.<sup>34</sup>

The theoretical underpinnings of patent law also present challenges to countries attempting to devise an intellectual property protection system. A patent, offered by the community, gives an inventor an exclusive monopoly on the use and sale of her invention for a limited duration, in exchange for the publication of the invention.<sup>35</sup> The common thought is that

inventions are public goods that are costly to make and that are difficult to control once they are released into the world. As a result, absent patent protection, inventors will not have sufficient incentive to invest in creating, developing, and marketing new products. Patent law provides a market-driven incentive to invest in innovation, by allowing the inventor to appropriate the full economic rewards of her invention.<sup>36</sup>

Thus, patent law “is intended to perform three functions: (1) to stimulate inventive activity; (2) to encourage investment in the products of inventive activity[;] and (3) to disseminate technical information to the public.”<sup>37</sup> However, at the crux of patent law is that the sovereign must decide to provide a right of ownership to a person who comes up with an idea.<sup>38</sup> This grant by the sovereign is unique when compared to conventional property rights.<sup>39</sup>

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34. See LETTERMAN, *supra* note 22, at 8.

35. See ABBOTT ET AL., *supra* note 12, at 7-8.

36. MERGES ET AL., *supra* note 14, at 127.

37. ABBOTT ET AL., *supra* note 12, at 7.

38. *Cf.* THE FEDERALIST NO. 43, at 238 (James Madison) (photo. reprint 2002) (E.H. Scott ed., 1898) (“The right to useful inventions, seems . . . to belong to the inventors.”).

39. In socialist and communist countries, the comparison does not surface because property in these societies is generally treated communally—there are no rights for the state to determine or protect. See ALFORD, *supra* note 3, at 56–57 (“[T]he Soviet model reflected traditional Chinese attitudes toward intellectual property . . . with regard to the belief that in inventing or creating, individuals were engaged in social activities that drew on a repository of knowledge that belonged to all members of society.”).

Typically, the sovereign's involvement in property disputes is to ensure a means for maintaining control by the rightful owner of the property in question, with the premise being that only one person can "exercise exclusive and full control over an item of tangible property."<sup>40</sup> In contrast, patent rights only allow for the exclusion of others to the idea—an idea that can be fully utilized by anyone besides the inventor without diminishing the ability of the inventor to use the idea.<sup>41</sup> Thus, the inventor is not directly "harmed" by others using the invention, but is placed in a precarious position of either "(a) not commercially exploit[ing] the idea in order to maintain its secrecy or (b) to use it and thereby share it with all others without receiving any compensation for the use by others of the idea."<sup>42</sup>

Given the unique features of patent law and its policy goals, it is difficult to analogize to more traditional property law concepts. Thus, it is reasonable to presume that it is harder for developing countries to rationalize completely, the benefits of a strong patent law system. If one tried to find a parallel to a more traditional property right, one could argue that a country's patent law is akin to protection offered to keep tangible property from trespass. However, while actions of trespass and infringement protect against the use of property by others, patent infringement never deprives the inventor of the idea's use. In addition, the primary policy behind patent laws is to promote and foster further invention—not to ensure the inventor maintains ownership.<sup>43</sup> While attempting to analogize intellectual property concepts to the law of trespass is just one possible comparison, the challenges of analogizing to traditional Western property law constructs are evident. For societies without Western conceptions of property law, one can imagine that there may be even

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40. LETTERMAN, *supra* note 22, at 2.

41. *Id.*

42. *Id.*

43. Although many patent systems, including the U.S. system, do recognize an ownership interest in patentable ideas, other systems, including China's, offer rewards to inventors rather than a limited monopoly. See Implementing Regulations of the Patent Law of the People's Republic of China R. 74 (promulgated by the State Council of the P.R.C., June 15, 2001, effective July 1, 2001), [http://www.sipo.gov.cn/sipo\\_English/laws/](http://www.sipo.gov.cn/sipo_English/laws/) (follow "Implementing Regulations of the Patent Law of the People's Republic of China" hyperlink) (last visited Nov. 3, 2009) [hereinafter Implementing Regulations].

greater difficulty rationalizing the implementation of an intellectual property law regime.<sup>44</sup>

Despite these concerns, most countries have implemented an intellectual property regime with varying degrees of success and with the purpose of participating in the global economy.<sup>45</sup> However, past implementations of an intellectual property regime in China have not succeeded, even though China has an extensive history of ingenuity and creativity.<sup>46</sup> Thus, understanding the influences that doomed prior attempts should indicate the possibility of success of the current implementation process. In addition, appraising prior implementations should allow for a reduction in the possible factors influencing the current lack of intellectual property law enforcement in China. Notably, there have been numerous attempts to implement an intellectual property regime in China,<sup>47</sup> thus only a few attempts will be evaluated here, and a more extensive evaluation of all past intellectual property regime implementations would be undertaken using the methodology proposed.

### III. ATTEMPTED IMPLEMENTATIONS OF PATENT LAWS IN CHINA

The United States has protected intellectual property rights since the founding of the country<sup>48</sup> and Western Europe developed intellectual property rights hundreds of years prior to the establishment of the U.S. system.<sup>49</sup> In contrast, China reintroduced intellectual property as a form of property in the 1980s,<sup>50</sup> with the adoption of specific patent law provisions in 1984.<sup>51</sup> Prior to this resurgence, there had been numerous attempts by the Chinese government, either

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44. See ALFORD, *supra* 3, at 2–3.

45. See Allison & Lin, *supra* note 33, at 736–37.

46. *Id.* at 742.

47. See *infra* Part III.

48. See U.S. CONST. art. I, § 8, cl. 8; THE FEDERALIST NO. 43, *supra* note 39, at 238–39 (stating the obvious—to Madison at least—benefits of intellectual property protections).

49. See MERGES ET AL., *supra* note 14, at 118 (discussing the Venetian system in the 1400s).

50. See Hunter, *supra* note 5, at 532.

51. QINGJIANG, *supra* note 3, at 3.

through trade negotiations or through the promulgation of laws, to implement an intellectual property regime.<sup>52</sup>

#### A. *Treaty of 1903*

In the nineteenth century, foreign nations, such as the United States and Great Britain, attempted, through treaty negotiations, to protect their citizens from intellectual property infringement by Chinese citizens.<sup>53</sup> Unsurprisingly, China did not assent to these treaties voluntarily and in most cases, the treaties were patently unfair to Chinese nationals.<sup>54</sup> The first bilateral patent treaty between the United States and China, signed in 1903, evidences this perception.<sup>55</sup> At the time of its ratification, it was deemed as “[undoubtedly] the most important convention made by the United States with any Oriental country.”<sup>56</sup> The Treaty of 1903, ratified without dissent in the U.S. Senate, accomplished many major goals—two of which were intellectual property ones—“the extension of the United States international copyright laws to China, and the promise from China to establish a patent office in which the inventions of citizens of the United States may be protected.”<sup>57</sup> Notably, the treaty provided *only* patent protection for American citizens: “[t]he terms of the treaty called for China to grant a limited term of patent protection to all American citizens holding U.S. patents, assuming the product to be protected was lawful to sell in China and did not copy previous inventions of Chinese nationals.”<sup>58</sup>

However, despite these actual inequities, there were tremendous economic and political advantages for China to sign the treaty. The beginning of the 1900s in China is described as a period of significant social disorder and a period of growing unrest by foreign merchants, resulting from unregulated infringement of foreign goods and

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52. See Allison & Lin, *supra* note 33, at 745–52 (discussing various implementations throughout the twentieth century).

53. *Id.* at 746.

54. See generally QINGJIANG, *supra* note 3, at 6.

55. *Id.* at 5 & 13 n.3.

56. *Treaty with China Ratified*, N.Y. TIMES, Dec. 19, 1903, at 1.

57. *Id.*

58. Allison & Lin, *supra* note 33, at 747.

trademarks.<sup>59</sup> To combat these pressures, China sought to appease foreign governments by negotiating agreements for the protection of intellectual property.<sup>60</sup> To improve the economic conditions, Chinese officials believed it vitally important to secure exports to Western countries and Japan.<sup>61</sup> In fact, Chinese officials believed “that a market of 200 million existed in the West and Japan for their products [and therefore] agreed to grant foreigners [intellectual property] protection in order to secure such protection [abroad] . . . for its subjects.”<sup>62</sup>

The signing of the Treaty of 1903 also sought to quell political unrest and to move China forward in the eyes of the world. One of the primary interests in the negotiations with these foreign powers was to “underscor[e] China’s sovereign equality as a first step in breaking down extraterritoriality.”<sup>63</sup> Thus, there were both economic and political motivations for putting forth a workable and enforceable intellectual property regime.

The perceived need for implementation of an intellectual property regime in the early 1900s parallels the current justification and rationale for its implementation in China; however, two critical features prevented its effective execution. First, the treaties were written too vaguely to be effective, leaving out significant details. The Treaty of 1903 “indicated that [intellectual property] protection would only commence after the Chinese government had established a patent office and adopted a patent law,” without specifying a required date for performance or providing any interim measures.<sup>64</sup> Second, the Chinese, at this point in their history, “were unlikely to

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59. See ALFORD, *supra* note 3, at 35–36.

60. See *id.* at 36.

61. *Id.* at 37.

62. *Id.* at 37 (last alteration in original) (internal quotation marks and footnote omitted).

63. *Id.* Extraterritoriality in this context means the imposition of foreign law on Chinese citizens by a foreign power in China. See *generally id.* at 33. Foreign intellectual property holders, prior to these negotiated agreements found that the only way to effectuate their rights in China was to resort to the offices in China that were under the government’s control. *Id.* at 35. An example would be the Imperial Maritime Customs Service that had been controlled by the British since its inception in 1854. *Id.*

64. *Id.* at 38.

have had any corresponding mental conception,” of intellectual property.<sup>65</sup> Apparently, these two features combined to doom the first attempt at patent law and while the failure to adequately lay out the principles of patent law has likely been addressed by China’s current patent law, the second flaw—the lack of understanding—appears to subsist.<sup>66</sup>

### B. *Patent Law in the Communist Era: Intermittent Regulations of 1950*

Communism in China began to become a true political force in the 1945–1949 time period, when Communists battled the Nationalist party for control of Chinese politics.<sup>67</sup> “Even prior to the Communist formation of the People’s Republic of China (P.R.C.) in 1949, the Communists had for several decades created Soviet-like systems in the areas they controlled.”<sup>68</sup> Communist policies generally treated property, including intangible property, as not available to individual ownership.<sup>69</sup> Thus, intellectual property was to be shared for the good of the community.<sup>70</sup> Commentators have noted that “[i]n the area of intellectual property law, the Soviet model proved more accessible to China than those used [in the past]. In large measure this was because of the ways in which the values that underlay the Soviet model reflected traditional Chinese attitudes toward intellectual property.”<sup>71</sup> China adopted, through provisional regulations in 1950, the Soviet “two-track” approach.<sup>72</sup> As described by Allison and Lin:

The law’s “first track” discouraged creation of property ownership in the invention, but instead called for the award of

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65. Allison & Lin, *supra* note 33, at 747.

66. See QINGJIANG, *supra* note 3, at 134 n.17 (“Statistics show that the Japanese, Americans, and Germans respectively fill out more than 400,000, 200,000, and 150,000 patent applications a year at home and abroad. In 2000, China received only 25,346 domestic patent applications and 30,343 foreign ones.”).

67. Allison & Lin, *supra* note 33, at 748.

68. *Id.* at 749.

69. *Id.* at 743–44, 749.

70. *Id.* at 749.

71. ALFORD, *supra* note 3, at 56.

72. Allison & Lin, *supra* note 33, at 749.

“certificates of invention” to creators of notable inventions. . . . The government held ownership of the intangible property rights in the invention and the corresponding right to exploit and disseminate it. . . .

The patent law’s “second track” provided for issuance of a true patent to the inventor, carrying with it the right to receive royalties from the invention’s use. . . . However, even those few inventions eligible for a patent were subject to state confiscation, entitling the inventor only to a certificate, if the government determined that the invention “concerned national security, or ‘affected the welfare of the great majority of people.’”<sup>73</sup>

Politically, this policy more closely adhered to traditional Chinese conceptions of the dissemination of information and provided a state control structure that allowed for a small group to exercise power to benefit society as a whole.<sup>74</sup> However, unlike the Soviet system, which crafted the second track of the two-track system to appease Western investors and promote foreign investment, the purpose of China’s implementation was to focus on “national reconstruction.”<sup>75</sup> As a result, despite the fact that there was an administrative system in place to carry out the patent law, the state maintained so much discretionary control over the patent process that intellectuals and engineers did not use the system to acquire patent protection.<sup>76</sup>

### C. *The Current Intellectual Property Implementation*

In more recent times, China has attempted to develop a system of intellectual property rights and protections, generally forced upon them by Western countries such as the United States in order to effectuate their own intellectual property policies.<sup>77</sup> China’s system

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73. *Id.* at 749–50 (footnotes omitted) (quoting ALFORD, *supra* note 3, at 58).

74. ALFORD, *supra* note 3, at 57.

75. *Id.* at 58.

76. *See* Allison & Lin, *supra* note 33, at 751 (noting that from 1950 to 1958 China only issued six certificates and four patents).

77. Hunter, *supra* note 5, at 526; *see also* QINGJIANG, *supra* note 3, at 3–4 (stating that the United States has tried to pressure China into expanding its scope of

has undergone numerous changes and enhancements since the first promulgation of the code protecting intellectual property rights (the details of China's intellectual property regime are discussed further below).<sup>78</sup> However, even with these changes the fledging patent program has not provided enough protection for some intellectual property advocates.<sup>79</sup> In addition, there exist streams of data indicating that blatant copying has not been curtailed despite the implementation of the current intellectual property regime.<sup>80</sup>

While China began to implement its current iteration of intellectual property rights with patent laws drafted in 1979 and subsequent enactment of the Patent Law of the People's Republic of China in 1984,<sup>81</sup> China's current patent protections have been involuntary.<sup>82</sup> Upon China's acceptance to the World Trade Organization (WTO) in 2001, it had to also agree to implement patent provisions that comported with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>83</sup> China has largely enacted the provisions necessary to comply with TRIPS,<sup>84</sup> including detailed provisions for enforcement, yet criticism abounds because the en-

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intellectual property protection). *See generally* LETTERMAN, *supra* note 22, at 167 (“[E]conomic and diplomatic pressures brought to bear by the wealthy major trading countries and by important private foreign investors and trading partners have induced many countries otherwise disinclined to adopt more extensive, more protective, and more effectively enforced patent laws to do so”).

78. *See* Hunter, *supra* note 5, at 557.

79. *See generally id.* (discussing whether China's implementation of the TRIPS agreement has affected its perceived failure to enforce intellectual property rights).

80. *See* Candace S. Friel, Note, *The High Cost of Global Intellectual Property Theft: An Analysis of Current Trends, the TRIPS Agreement, and Future Approaches to Combat the Problem*, 7 WAKE FOREST INTELL. PROP. L.J. 209, 211 (2007) (discussing China's infringement impact).

81. *See* QINGJIANG, *supra* note 3, at 7; Hunter, *supra* note 5, at 532–33.

82. *See* ALFORD, *supra* note 3, at 112 (“[T]he U.S. government repeatedly threatened the PRC with massive and unprecedented trade sanctions if China did not promise to devise legal protection . . . to America's liking.”).

83. Cynthia Smith, Note, *A Practical Guide to Chinese Patent Law*, 29 SETON HALL LEGIS. J. 643, 644–45 (2005).

84. *Id.* at 645 (citing DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 417–18 (2003)).

forcement of patent rights has been insufficient.<sup>85</sup> Notably, although economic conditions in China have tremendously improved, and political leaders have “realized that their economy must modernize by adopting fundamental market-based precepts or else face ultimate economic dysfunction,”<sup>86</sup> a Western conception of intellectual property appears not to have taken hold in China.<sup>87</sup> Thus, the question remains whether or not the current implementation will avoid the shortfalls of the previous attempts.

Unfortunately, the current implementation bears some of the hallmarks of the two aforementioned failed implementations. For instance, the Treaty of 1903 was largely ineffective because, as is the case currently, the Chinese government provided intellectual property laws not on their own impetus, but with Western encouragement.<sup>88</sup> Granted, the Chinese government believed, as it likely does today, that it was both politically and economically important, but those influences were not enough to change the traditional conceptions of intellectual property that were consistent with Confucian ideas of property rights.<sup>89</sup> In addition, while the current implementation contains, as will be discussed more below, the administration and laws necessary to implement an intellectual property regime, China’s patent laws have also included significant governmental control over inventions—control provisions that appear to parallel the Intermittent Regulations of the 1950s.<sup>90</sup> When these factors are considered along with the perpetual infringement occurring in China, there appears to be ample evidence that, despite the hope of better enforcement in China, the foundation for real change in Chinese culture has not been laid.

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85. Brigitte Binkert, Comment, *Why the Current Global Intellectual Property Framework Under TRIPS Is Not Working*, 10 INTELL. PROP. L. BULL. 143, 149 (2006).

86. Allison & Lin, *supra* note 33, at 787.

87. See QINGJIANG, *supra* note 3, at 129 (describing the low awareness of the intellectual property regime in China).

88. See Hunter, *supra* note 5, at 526.

89. See ALFORD, *supra* note 3, at 56–57.

90. See *supra* Part III.B.

Of course, China has undertaken other attempts to implement an intellectual property system in the past,<sup>91</sup> and thus, a complete understanding of the failures of these implementations may or may not support the contention that Chinese attitudes toward intellectual property have not changed. In addition, more information regarding the economic and political situations periods evaluated would also indicate whether or not the comparison between those implementations and the current one are accurate. However, based on this initial historical analysis, and the following functional analysis, Chinese culture may be considered a significant influence on the implementation of its intellectual property regime.

#### IV. TEXTUAL ANALYSIS: U.S. AND CHINESE INTELLECTUAL PROPERTY PROTECTIONS AND PROCEDURES

A complete understanding of the differences between Chinese and U.S. patent law requires both an appreciation of when an infringement occurs and how the process will aid a patent holder whose patent has been infringed.

##### *A. Infringement: As Defined and Limitations Thereto*

Infringement, broadly defined, is an act of “encroachment or trespass on a right or privilege.”<sup>92</sup> In the world of intellectual property, infringement is more specifically defined as “[a]n act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner.”<sup>93</sup> Direct infringement under U.S. law encompasses most acts that would interfere with the rights granted to the patent owner. 35 U.S.C. § 271(a) states: “Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or im-

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91. *See, e.g.*, Embassy of the United States, IPR Toolkit—Patents, <http://beijing.usembassy-china.org.cn/iprpatent.html> (last visited Dec. 2, 2009) (stating that the first patent law in China was developed in 1889 and that intellectual property rights may be traced back to at least the Tang Dynasty in 618–907 AD).

92. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1161 (1993).

93. BLACK’S LAW DICTIONARY 796 (8th ed. 2004).

ports into the United States any patented invention during the term of the patent therefor, infringes the patent.”<sup>94</sup>

In addition to the broad definition of infringement in U.S. law, a person can be held vicariously liable for infringement or found to have induced or contributed to infringement of a U.S. patent.<sup>95</sup> The practical effect of these provisions is to allow for a wide range of potential infringers and infringing activities, which in turn strengthens the right of the patent holder.

Similarly, China grants to the patent holder exclusive rights and provides a broadly worded law defining infringement in Article 11 of the Patent Law of the People’s Republic of China:

[N]o entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.<sup>96</sup>

A comparison with the U.S. counterpart reveals no sharp distinctions, but obviously, interpretations of each country’s law may vary. For instance, China’s proscription on “use, offer to sell, sell or import the product directly obtained by the patented process,” is arguably broader than the U.S. counterpart, which only provides this protection “if the court finds . . . that a substantial likelihood exists that the product was made by the patented process.”<sup>97</sup> These interpretative questions aside, the basic infringement provisions appear very similar. However, differences between the two laws are apparent when the scope of infringement—and more precisely, who may be liable—is more acutely evaluated. For instance, there is no textual counterpart in Chinese patent law that would find a basis of liability

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94. 35 U.S.C. § 271(a) (2006).

95. *Id.* § 271(c).

96. Patent Law of the People’s Republic of China art. 11 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, effective Apr. 1, 1985) [http://www.sipo.gov.cn/sipo\\_English/laws/](http://www.sipo.gov.cn/sipo_English/laws/) (follow “Patent Law of the People’s Republic of China” hyperlink) (last visited Nov. 3, 2009) [hereinafter Patent Law of China].

97. 35 U.S.C. § 295(1).

for vicarious, contributory, or the inducement of infringement. While these bases of liability are arguably peripheral to the scope of patent protection, U.S. patent holders have used these sources to more fully protect their patent rights from tactics employed by infringers.<sup>98</sup>

In addition to the narrower scope of liability offered under the Chinese patent law system, another distinction is that China has included defenses to infringement that are unavailable in the United States.<sup>99</sup> In the United States, there are few specific defenses to infringement. There are judicially created defenses, such as experimental use,<sup>100</sup> inequitable conduct,<sup>101</sup> or patent misuse,<sup>102</sup> which have generally been justified on public policy grounds. Statutorily described defenses are set out in 35 U.S.C. §§ 273 and 282.<sup>103</sup> Section 273 provides the very narrow defense of prior use of a business method patent.<sup>104</sup> The most commonly used defenses to infringement are encompassed in § 282, which allows an individual to make the argument that the patented claims<sup>105</sup> are invalid.<sup>106</sup> Invalidity may be established through bars to patentability, such as a finding of non-patentable subject matter,<sup>107</sup> prior public use,<sup>108</sup> or that the pat-

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98. *See, e.g.*, C.R. Bard, Inc. v. Advanced Cardiovascular Sys., Inc., 911 F.2d 670, 673 (Fed. Cir. 1990) (holding that contributory infringement, while providing an alternative basis for liability, is predicated on a finding of direct infringement).

99. *See infra* notes 118–21, 124 and accompanying text.

100. *See generally* MERGES ET AL., *supra* note 14, at 321–25.

101. *See generally id.* at 325–331.

102. *See generally id.* at 331–337.

103. *See* 35 U.S.C. §§ 273(b), 282 (2006).

104. *Id.* § 273(b) (stating that patents, which claim a method of doing or conducting business only, may not be enforced against certain prior users).

105. *See id.* § 101 (stating that patent claims are essentially the metes and bounds of an invention and detail what the “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement” that an inventor believes is his or her invention).

106. *See* § 282(2) (invalidity based on prior art); § 282(3) (invalidity based on failure to describe the invention clearly and with sufficiency).

107. *In re* Bilski, 545 F.3d 943, 949 (Fed. Cir. 2008) (en banc) (limiting patentable processes), *cert. granted sub nom.* Bilski v. Doll, 129 S. Ct. 2735 (2009).

108. *Evans Cooling Sys., Inc. v. Gen. Motors Corp.*, 125 F.3d 1448, 1452 (Fed. Cir. 1997) (holding that inventor’s patent was invalid due to prior public sale).

ented invention should not have been patented in the first place due to already patented prior art<sup>109</sup> or the obviousness<sup>110</sup> of the invention.

In general, Chinese patent laws encompass many of the same defenses that are available in the United States with regards to statutory bars to patentability involving prior art, failures in adherence to the patent process, or statutory bars to patentability.<sup>111</sup> However, the Chinese patent law system provides additional statutory defenses to infringement claims with vague limitations. Chief among these defenses is the general provision that prohibits the patenting of an invention “that is contrary to the laws of the State or social morality or that is detrimental to public interest.”<sup>112</sup> This nebulous and possibly *ad hoc* determination may invalidate patent rights previously attained in order to more fully promote, in the administrative agency or judiciary’s determination, “the development and innovation of science and technology, for meeting the needs of the construction of socialist modernization.”<sup>113</sup> China also reserves the right, when an invention “is of great significance to the interest of the State or to the

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109. *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282 (Fed. Cir. 2000) (“[I]nvalidity by anticipation requires that the four corners of a single, prior art document describe every element of the claimed invention, either expressly or inherently, such that a person of ordinary skill in the art could practice the invention without undue experimentation.”).

110. *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 422 (2007) (combining prior art references to hold that respondent’s patent was invalid for obviousness); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 24–25 (1966) (holding the petitioner’s patent invalid on the basis of obviousness).

111. *See generally* Implementing Regulations, *supra* note 43, at ch. IV. Note, however, that under Chinese law, the request for invalidity of a patent is handled in a separate proceeding from the infringement proceeding. *See id.* at R. 82.

112. Patent Law of China, *supra* note 96, at art. 5; *cf. id.* at art. 45 (“Where . . . any entity or individual considers that the grant of the said patent right is not in conformity with the relevant provisions of this Law, it or he may request the Patent Reexamination Board to declare the patent right invalid.”).

113. *Id.* at art. 1; *see* KARLA C. SHIPPEY, A SHORT COURSE IN INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS: PROTECTING YOUR BRANDS, MARKS, COPYRIGHTS, PATENTS, DESIGNS, AND RELATED RIGHTS WORLDWIDE 123 (2002) (“[T]he application and enforcement of laws related to individual IP rights is somewhat unpredictable and can depend on sudden shifts in state ideology.”).

public interest” and is in need of spreading and application, to allow for exploitation of the invention by “designated entities.”<sup>114</sup>

In addition to the *state interest* defenses, Chinese law authorizes two *innocent infringer* defenses unknown to U.S. law. One of these defenses authorizes an infringer who “before the date of filing of the application for patent . . . has already made the identical product, used the identical process, or made necessary preparations for its making or using [to] continue[] to make or use it within the original scope only.”<sup>115</sup> This defense is akin to one found in U.S. trademark law, which allows someone who has established a trademark in a geographic area to maintain the use of that mark if another entity registers the mark nationally.<sup>116</sup> However, there is no similar defense that allows for continued use in spite of actual infringement in U.S. patent law—a prior user of an invention may not be liable as an infringer, but only because the patent is *invalid* based on the prior public use.<sup>117</sup>

A second innocent infringer defense under Chinese law allows that

[a]ny person who, for production and business purposes, uses or sells a patented product or a product that was directly obtained by using a patented process, without knowing that it was made and sold without the authorization of the patentee, shall not be liable to compensate for the damage of the pat-

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114. Patent Law of China, *supra* note 96, at arts. 48–55. The United States may use any invention covered by a U.S. patent without getting a license. *See* 28 U.S.C. § 1498 (2006). However, the concern about the Chinese system appears to rest in the perception that the United States will use its march-in rights more judiciously given China’s past actions and socialist tendencies.

115. Patent Law of China, *supra* note 96, at art. 63(2). Notably, this defense is similar, but much larger in scope than 35 U.S.C. § 273, which is limited only to business method patents. *See* 35 U.S.C. § 273(b).

116. *See* MERGES ET AL., *supra* note 14, at 686–87 (citing *Weiner King, Inc. v. Wiener King Corp.*, 615 F.2d 512 (C.C.P.A. 1980)).

117. *See* *Woodland Trust v. Flowertree Nursery, Inc.*, 148 F.3d 1368, 1370, 1373 (Fed. Cir. 1998) (rejecting appellant’s claim of prior use and noting that “in order to invalidate a patent based on prior knowledge or use, that knowledge or use must have been available to the public”).

entee if he can prove that he obtains the product from a legitimate source.<sup>118</sup>

The complete scope of this defense is unclear. Apparently, however, it explicitly rules out a damage award for a patent holder whose product has been infringed upon mistakenly, but possibly does not preclude an injunctive remedy. Nonetheless, if this provision is interpreted broadly, it would provide a substantial basis of relief for potential infringers who do not make a patented product, but ignorantly sell or use it. It may create a perverse incentive, because this type of infringer would not be under an obligation to, and may not undertake, an investigation of its suppliers because the only penalty is a possible order to desist in selling or using the patented product.

#### B. *Infringement: Enforcement of Patent Protections*

“A patentee shall have remedy by civil action for infringement of his patent.”<sup>119</sup> This basic statement underscores the approach of the United States toward patent rights—so long as an inventor has secured a patent in the United States, the inventor can effectuate his rights through a civil proceeding in any of the federal district courts.<sup>120</sup>

Although the scope of infringement is limited to territorial principles—the infringement must have substantial contacts in the United States<sup>121</sup>—a patent holder has significant protections that will be enforced by the judiciary when prompted. There is no need to seek the other party out to try to reach a settlement or allow for the infringer to license the product from the patentee.<sup>122</sup> In essence, no

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118. Patent Law of China, *supra* note 96, at art. 63.

119. 35 U.S.C. § 281.

120. Federal district courts are courts of original jurisdiction and will hear all intellectual property cases in the first instance. 28 U.S.C. § 1338(a). However, all appeals from the judgment of a district court go to the Court of Appeals for the Federal Circuit. *See id.* § 1295.

121. *See* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 442 (2007) (limiting extraterritorial reach of 35 U.S.C § 271).

122. *See* 35 U.S.C. § 154 (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States . . . .”) (emphasis added). This is not to say that these situations do not oc-

one but the patent holder has a right to the invention unless authorized by the patent holder. In contrast, Chinese enforcement provisions have a different character and emphasis—one that arguably mandates negotiations by the parties prior to legal action and also allows for compulsory licensing under certain circumstances.

The Chinese patent system has developed a prescribed approach to patent disputes. Chinese law requires that “[w]here a dispute arises as a result of the exploitation of a patent without the authorization of the patentee, that is, the infringement of the patent right of the patentee, it shall be settled through consultation by the parties.”<sup>123</sup> Thus, the first step in resolving a patent dispute in the Chinese system is to engage the infringer and attempt to settle the dispute without resorting to litigation.

Interestingly, although this provision uses the word *shall*, the next sentence of the law appears to severely impinge on this mandate by indicating that “[w]here the parties are not willing to consult with each other or where the consultation fails” the patentee may seek either a legal or administrative determination of the infringer’s liability.<sup>124</sup> Besides the requirement of negotiation, however, it appears that an administrative or judicial proceeding will be conducted in much the same way as it would be in the United States, and similar remedies are available.

As in U.S. patent law, the scope of protection offered a Chinese patentee is determined by the claims in the patent,<sup>125</sup> and subject to any defenses to infringement.<sup>126</sup> An infringer may move to stay the proceedings in order to have the patent invalidated, but the court may not grant the stay if it determines the claim of invalidity is frivolous.<sup>127</sup>

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cur. Settlements are negotiated, and even encouraged, by the judiciary. *See, e.g.*, U.S. DIST. CT. VT. R. 16.3.

123. Patent Law of China, *supra* note 96, at art. 57.

124. *Id.*

125. *See id.* at art. 56 (“The extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims.”).

126. *See supra* notes 117–25 and accompanying text.

127. Smith, *supra* note 83, at 659 & n.123 (citing Several Provisions of the Supreme People’s Court on Issues Relating to Application of Law to Adjudication of

In the United States, the courts are authorized to issue permanent or preliminary injunctions as well as damage awards.<sup>128</sup> Damage awards are calculated by either assessing the lost profits incurred by the patent holder or by a reasonable royalty.<sup>129</sup> Similar remedies exist in the Chinese system. The administrative authority is apparently given all of the powers of a Western judicial officer and may order an injunction or mediate the damage award.<sup>130</sup> In addition, the patentee may apply for a preliminary injunction upon adequate showing “that the defendant is engaging or is likely to continue [to] engage in infringing activities and that irreparable harm will occur unless there is immediate intervention.”<sup>131</sup> Damages are calculated via one of three methodologies. The court may calculate damages according to the patentee’s actual losses, the infringer’s profits, or an appropriate multiple of the royalties of a hypothetical license.<sup>132</sup>

Although a patentee may be able to protect her interest through the administrative and court systems, the Chinese system allows for an administrative determination of compulsory licensing—in effect, an involuntarily elimination of some of a patent holder’s rights. A compulsory license significantly diminishes the rights of the patent holder by making his patent subject to exploitation by a third party regardless of whether the patent holder wishes to make his invention

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Cases of Patent Disputes arts. 9, 12 (promulgated by the Adjudication Comm. Supreme People’s Court, June 19, 2001), [http://www.cpahkld.com/Archives/Several\\_Provisions2.html](http://www.cpahkld.com/Archives/Several_Provisions2.html) (last visited Nov. 16, 2009)).

128. See generally MERGES ET AL., *supra* note 14, at 348–64.

129. *Id.* at 356.

130. Implementing Regulations, *supra* note 43, at R. 79; Patent Law of China, *supra* note 96, at art. 57. The administrative authority mediates disputes over: (1) the right to apply for a patent and ownership of the patent right; (2) the qualifications of the inventor or creator; (3) remuneration owed to inventors or creators of service inventions; and (4) remuneration owed for the exploitation of an invention in the period of time after the patent application, but before the grant of the patent right. Implementing Regulations, *supra* note 43, at R. 79; see also Smith, *supra* note 83, at 658 (“If the administrative authority determines that an infringement has occurred, he may order the infringer to stop the offending behavior.”).

131. Smith, *supra* note 83, at 659 (citing Patent Law of China, *supra* note 96, at art. 61).

132. See Patent Law of China, *supra* note 96, at art. 60.

available to the third party particularly or to the public generally.<sup>133</sup> In some instances there are limitations to the grant of a compulsory license. The grant of a compulsory license generally occurs at least three years after the patent's issuance.<sup>134</sup> In addition, the potential exploiter must show proof of previous reasonable requests for licensing<sup>135</sup> and that such requests have been denied or ignored for a reasonable period of time.<sup>136</sup> Finally, if the compulsory license is granted, the exploiter will still have to pay an exploitation fee to the patent holder.<sup>137</sup> Unsurprisingly, the Chinese system's allowance for "compulsory license[s]"<sup>138</sup> has caused concern to those who adhere to Western constructions of intellectual property rights.<sup>139</sup>

## V. CONCLUSIONS

Although an overview of the pertinent rules of provisions of each system indicates some relative harmony between the Chinese and U. S. patent law systems, the subtle differences allow for inferences as to the impetus behind the lack of enforcement. All of the differences noted—the decreased bases of liability, the numerous de-

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133. See BLACK'S LAW DICTIONARY, *supra* note 93, at 938 (defining a compulsory license as "[a] statutorily created license that allows certain people to pay a royalty and use an invention without the patentee's permission").

134. Implementing Regulations, *supra* note 43, at R. 72. Note that "where the public interest so requires, the Patent Administration Department . . . may grant a compulsory license to exploit the patent for invention," without concern for this limitation as Rule 72 of the Implementing Regulations applies to article 48, not article 49 of the Patent Law of China. Patent Law of China, *supra* note 96, at art. 49.

135. Patent Law of China, *supra* note 96, at art. 51.

136. *Id.* at art. 48.

137. *Id.* at art. 54.

138. See Implementing Regulations, *supra* note 43, at R. 72 ("After the expiration of three years from the date of the grant of the patent right, any entity may, in accordance with the provisions of Article 48 of the Patent Law, request the Patent Administration Department under the State Council to grant a compulsory license.").

139. See Tony Chen & Ann. W. Chen, *What Does the Third Amendment to China's Patent Law Mean to Pharmaceutical Companies?*, JONES DAY, Aug. 2008, available at [http://www.jonesday.com/pubs/pubs\\_detail.aspx?pubID=S5415](http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5415).

fenses, and the state control doctrines—point to the vestiges of the traditional understanding of intellectual property in China—that is, as more communal in nature rather than available for personal ownership. In evaluating these provisions in light of the historical analysis, there is agreement with those who believe that this communal conception of intellectual property was embossed on the Chinese culture, rather than an imposition of Communism on the current intellectual property system.<sup>140</sup> In addition, the historical analysis of the Treaty of 1903 indicates that, despite a positive economic and political climate, the successful implementation of an intellectual property regime appears to require more than the two aforementioned influences.<sup>141</sup>

This is not to say the economic or political considerations are unimportant in understanding the driving force behind intellectual property enforcement. Clearly, political stability and economic growth are important contributors to improving conditions in a developing country and are likely to move a developing country toward more protective policies with regard to intellectual property. The Treaty of 1903 may not have caused *sufficient* economic growth and political stability, but it is difficult to determine what level of sufficiency is necessary for intellectual property regime implementation. However, in attempting to understand the lack of enforcement in China, a growing economy and political stability are, as they possibly were in 1903, already in place. Therefore the question is: if China continues on its current trajectory economically and politically, will enforcement practices improve? The methodology proposed attempts to answer this question and appears, at first blush, to indicate that Chinese culture continues to strongly influence its laws and conception of intellectual property, and that it will delay, if not prohibit, effective intellectual property enforcement.

Some have argued that, despite China's unfamiliarity with patent law concepts, patience is all that is required to allow for better enforcement practices of China's intellectual property laws.<sup>142</sup> Truthfully, the Chinese patent system is ineffective against infringement

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140. See ALFORD, *supra* note 3, at 56.

141. See *supra* Part III.A.

142. See Allison & Lin, *supra* note 33, at 790.

when considered from a Western perspective, but any criticisms leveled at the Chinese patent system are necessarily premised on the presumptions of Western intellectual property policies—policies which may not necessarily be the best solution to the goals that intellectual property advocates hope to obtain. Focusing on the cultural influences on Chinese patent law brings to the forefront the balance between individual ownership and property distribution policies chosen by the Chinese after several attempted implementations. Thus, it may be worth considering, rather than trying to force China to do something that it simply cannot, that China has possibly struck a balance between intellectual property rights and society's needs that is clearly more in accordance with its own culture. Furthermore, this balance may be a model for the rest of the intellectual property world to consider.<sup>143</sup>

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143. *Cf.* *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 8–9 (1966) (“[Thomas Jefferson] rejected a natural-rights theory in intellectual property rights and clearly recognized the social and economic rationale of the patent system. The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge. The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given.”).