Consequences of Legal Transplantation: The Unique Justifications and Roles of Enforcement of Intellectual Property Rights in China

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Abstract

This research examines the unique justifications, roles, and unexpected consequences of the enforcement of intellectual property rights (IPR) transplanted from the United States to China, particularly at the criminal enforcement stage. Tracing their ideological and philosophical roots, justifications of IPR in China are compared to those of the United States. Above all, macro-level cultural and ideological economic, and political factors result in a general lack of IPR consciousness as natural and inalienable private property rights among Chinese.

For the very small proportion of the IP infringements that enter the criminal judicial system, statistical results partially support the hypotheses that the role of criminal enforcement of IPR in China is to prioritize collective interests and to serve political goals such as repressing activities that violate the socialist market order. Political factors play much more important roles in framing the targets of criminal enforcement in China than in the United States. These factors include state interference on behalf of tax interests in tobacco and alcohol industries and public policies to combat counterfeits that pose health and safety threats. Political factors have a strong impact in China due to the close intertwining of politics and law and the absence of judicial independence. Moreover, this particular case of indigenization of law demonstrates that law can be, and often is, used as an instrumental resource of the powerful.

1. Introduction

Intellectual property rights (“IPR”) enforcement in China is a hotly-debated topic that has induced widespread interest across a broad range of interest groups and perspectives due to the increasing value of IP, the immensity of the Chinese market, and more frequent business exchange between China and the rest of the world. Surprisingly, only a few empirical studies

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have been undertaken on this topic inside China; almost none on the criminal enforcement of IPR. The sustained high IP infringement rates in China in the past three decades have long annoyed the United States. For years, the United States has put China on the priority watch list in its annual Special 301 report. The United States has been persistently pressuring China to strengthen its IP enforcement and further criminalize IP violations through various means. Under the intense pressure, IP enforcement rates in China, including the number of criminal cases, have been rising rather rapidly, especially since 2005.

This research answers a set of key questions on the consequences of transplanting and enforcing IP laws in China. An important focus is on determining the justifications used for the protection of IPR in specific Chinese contexts at the IPR enforcement stage, particularly the criminal enforcement stage. Scholars of legal pluralism, law and development, and rule of law long have been curious about the various unintended consequences of legal indigenization in new contexts. This article helps guide Western businesspersons, policy-makers, IP practitioners, and academics toward understanding Chinese indigenous mindsets regarding rights, intellectual products, and IPR. The original concepts and justifications of the Anglo-American IPR model are at odds with Chinese holistic worldviews on human nature, individual rights, and intellectual products, as well as Marxist political economic analysis of IPR. Western IP laws transplanted to China do not mirror the cultural, economic and political contexts of Chinese society.

6 See infra Part III. A–B.
This article speaks to scholars of law and society in considering the different roles played by IP criminal enforcement in the United States and China; the contextual, industry-level, and political factors behind the criminal IPR enforcement strength, obstacles, and targets in the two countries; and the similarities and differences that emerge in comparing IPR criminal enforcement practice across the two countries.

This multidisciplinary research will also be of interest to scholars of China studies from various perspectives. China makes a unique case for the transplantation of IP law as a result of the country’s distinct contextual factors: its close intertwining of law and politics; the instrumental adoption of Western law to fulfill historically determined tasks, such as modernizing the nation; state control of multiple industries; the domination of state-owned enterprises (SOEs) in certain industries, and the policy of media censorship.

Part I of this article reviews literature on the empirical research on IPR protection and enforcement in China, including comparative studies on the criminal enforcement of IPR in China and other countries. It then provides an overview of the theoretical perspectives that guided the study: legal pluralism and law and development classics. Part II depicts the research questions and major hypotheses and explains data sources, types, and research methods.

In Part III, the law and society and cultural analyses suggest that attempts to justify IP protection in contemporary China face resistance due to a collision between, on the one hand, Anglo-American concepts of possessive individualism and natural rights and, on the other hand, Chinese holistic views about rights and intellectual products. Indigenous cultural, economic, political, and legal factors overwhelmingly decide the pervasive absence of IPR consciousness in Chinese society. The result is little observation of law by citizens and slack enforcement by the state. Even when acknowledged, IPR is commonly perceived as one of many interests involved in making a decision; other more significant or immediate interests often are prioritized.

Part IV describes the different foci and unexpected consequences of criminal enforcement of IPR in China. Statistical results partially support my hypotheses that the role of criminal enforcement of IPR in China is to prioritize collective interests and to serve politically prioritized goals such as repressing activities that seriously violate the socialist market order. A substantial percentage (44%) of Chinese criminal IP cases concern products with health or safety risks. In addition, 52% of Chinese trademark thefts and 11% of copyright thefts involve products of
regulated industries. Some of these industries also involve monopolization/domination by state-owned enterprises (“SOEs”), including tobacco, alcohol, most domestic pharmaceutical manufacture, and book publication industries. I also conducted a case study on tobacco counterfeiting to further put the statistical findings in contexts and explicate the deep roots of counterfeiting in an industry involving public health concerns and tightly controlled by the state. The frequent enforcement operations and the large number of administrative and criminal cases filed indicate the strong will of the government to crack down on tobacco illegalities. This is not only due to the public health threats tobacco counterfeits could incur but also to ensure monopolization of the tobacco market by SOEs and to protect state tax revenue.

Furthermore, Part V considers the theoretical implications of the findings for larger issues of legal transplantation and legal pluralism. This particular case of indigenization of law demonstrates that the law has easily been taken advantage of by the economic and political elite as an instrument of interest advancement and political control through business lobbying and state intervention. In addition, the unique foci and roles of IPR enforcement indicate that political factors comprise important determinants of enforcement in China, unlike in the United States. These factors include political interference by the state to protect state tax revenue in luxury goods (especially in the tobacco and alcohol industries) and public policies to fight against counterfeits posing health and safety threats. Political factors exert a much stronger direct impact in China, due to China’s lack of judicial independence and the close involvement of politics in law in that country. Finally, Part VI raises several policy recommendations for promoting more effective and just IPR enforcement and tackling food safety problems in the long run.

2. Existing Literature and Theoretical Perspectives

2.1 Existing Literature on Comparative Studies of IPR in China

The literature review covers works on comparative studies of IPR protection and enforcement in China including the criminal enforcement of IPR. Scant research exists on the primary concern of U.S. businesses, namely, IPR enforcement itself inside China, which tops the concerns of U.S. businesses. Most work on this topic concern the legislative history and legal

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7 INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, supra note 3.
analyses of IP legal codes in China, and Sino-US trade negotiations.\(^8\)

Building on the groundwork Alford, Mertha, and Dimitrov have laid, this article brings knowledge of the rapidly changing field of IPR enforcement in China into the present. While previous studies concentrated on analyzing obstacles to administrative enforcement, this article looks closely at the performance of criminal enforcement agencies, the priorities of criminal enforcement in action, and the forces shaping enforcement patterns. Taking a grounded-theory approach, this article is not confined to analyzing the impact of political, institutional, structural, and bureaucratic factors on the enforcement. Additionally, his article analyzes official U.S. datasets for about half of the federal criminal IP cases occurring from 2002 to 2007. It is thus far the most up to date and comprehensive quantitative study on this subject.

William Alford’s classical work\(^9\) elaborates on a rushed but vacillating law-making process undertaken in China with the initiation of an “open reform” (gaige kaifang 改革开放) policy under the pressure of both internal and external political forces. It asked why, during thousands of years of civilization, has China never developed anything similar to the Western IPR model? Answers lie in the Confucian teaching that rules and ideas come from nature, and in the critical role played by a shared past recorded in intellectual products for moral and intellectual elevation. The indispensability of communication with the past requires free communal access to nature’s self-expressions.\(^10\) Alford’s research focuses mostly on law-making and not on enforcement.

In more recent work, Peter K. Yu’s writings about the legislative, enforcement, and policy-making aspects of IP laws in China also aim to facilitate U.S. policy makers’ understanding of IPR from the indigenous Chinese perspective and contexts.\(^11\) Andrew Mertha and Martin

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\(^10\) Id. at 9–94.

Dimitrov have conducted research that complements that of Alford and Yu by using original empirical data. Both Mertha and Dimitrov concentrated on the impact of political models, administrative institutional structures, and bureaucratic incentives on the effectiveness of IPR enforcement, especially administrative enforcement.\(^\text{12}\) Mertha rejects Alford’s arguments concerning Chinese indigenous culture and social norms, while Dimitrov mostly ignores Alford.

This research completes and updates Alford’s cultural arguments in multidisciplinary contexts and examines them against empirical data from various sources. I agree with Alford that indigenous culture and social norms play a crucial role in explaining why transplanted IP laws were ignored and marginalized by both the public and enforcement agencies for decades after their introduction into China. The exceptionally high rates of piracy and counterfeiting in China throughout the early 1990s to the present support Alford’s cultural argument. Arguments based on institutional structures and bureaucratic incentives alone cannot explain the extensiveness and seriousness of the issue. Such arguments fall short of providing a nuanced understanding of the unique justifications for and roles of IPR enforcement in China.

In terms of research on the criminal enforcement of IPR, there is surprisingly little social-scientific and empirical study within the United States.\(^\text{13}\) Literature on the criminal enforcement of IPR in China is even scarcer. Dimitrov is the only scholar who has conducted systematic empirical work to describe and analyze the statutory bases, police structures, enforcement practices, barriers, and aggregate official enforcement statistics on the criminal enforcement of IPR in China.\(^\text{14}\) While successfully describing a large comparative terrain, Dimitrov’s research on criminal IPR enforcement lacks the benefits that a more targeted, in-depth analysis can offer. Like Dimitrov’s study, Mertha’s analysis of sources of resistance and barriers against criminalization is grounded solely in aspects of organizational structures and bureaucratic


\(^\text{14}\) DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12; DIMITROV, PIRACY AND THE STATE, supra note 12.
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incentives.15

2.2 Legal Pluralism and Law and Development Theories

Law and society literature offers important insights and analytical paradigms for analyzing the story of China’s IP law transplantation. In the past, legal pluralist studies advocated using the power of state law to modernize and fundamentally change indigenous social orders.16 More recently, others have pointed out that this social reform role of state law is limited.17

According to James Gardner’s law and development classic, the U.S. legal models transplanted to Latin America in the 70s were marginally impacted by the U.S. law and development programs.18 Transplanted models encountered strong resistance from local legal cultures, particularly from established legal institutions and personnel.19 Bits and pieces of the U.S. legal models were accepted only when there were similar internal legal changes already underway. These new legal elements reinforced and interacted with each other, taking on directions not necessarily intended or expected.20 Gardner’s findings manifest the importance of studying the impact of indigenous contextual factors, situational characteristics, and institutional arrangements on legal reform and indigenization.21

The stream of globalization has been accompanied by the transplantation of transnational business law and transnational legal culture. However, according to legal pluralist Brian Tamanaha, transplanted law does not necessarily mirror indigenous norms or social conditions as is the case in China.22 Transnational commercial rules derive from external market-based economic interests and concerns, which often are in conflict with local norms and practices. Some transnational commercial rules are developed to promote business interests or to restrict or

15 MERTHA, supra note 1, at 202–09 (Cornell Univ. Press 2005).
18 Id.
19 Id.
21 Id.
avoid the state’s power to control economic affairs within its sovereignty. Since IPR is an important part of the transnational business law, Tamanaha’s arguments can also apply to IP laws and enforcement model transplanted to China.

Tamanaha suggests another reason law does not mirror society is the expansion of administrative law. The majority of IP infringements in China are processed by administrative agencies, such as the Administration of Industry and Commerce (“SAIC”) and Copyright Bureau. Applying Tamanaha’s arguments, these administrative IP laws, regulations, and policies could often be used as instruments to balance interests and promote policies and social changes, rather than reflect social norms.

According to Tamanaha, “[w]hen mirroring is low and monopolization is high, the law will be more subject to capture and instrumental use by select groups, especially the economic or political elite (often including the legal professionals).” On the one hand, in the context of IP enforcement in China, the state and enforcement agencies could directly incorporate indigenous norms or politically prioritized goals into IP law enforcement. On the other hand, top corporations, their IP attorneys, and trade associations might get involved in the capture and instrumental use of the IP enforcement system through agency participation.

3. Research Questions, Data, and Methods

3.1 Research Questions

This article addresses a set of key questions about the consequences of legal transplantation in China in terms of the public’s perception of IPR and its enforcement. It relies on the analysis of summary judgments of IP theft cases, aggregate official enforcement statistics, documentary data, and in-depth interviews. Previous research indicates that protecting private property rights was one of the major justifications of IPR in the United States. Due to the abundance of empirical research and legal analyses and their fairly consistent conclusions on this topic, this research will not test this conclusion again. If the mainstream justification of IPR in the United

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23 Id.
24 Id.
25 Id.
26 Id.
States is to protect private individual rights, what are contemporary Chinese perceptions of the protection and enforcement of IPR? In what ways and to what extent do major contextual factors affect the enforcement of IPR in Chinese local contexts?

With respect specifically to the narrower aspect of the criminal enforcement of IPR, how are ideological/contextual differences in the way IPR is justified in the United States and China manifested at the criminal enforcement stage? Does the criminal enforcement of IPR serve different roles in the two countries?

Criminal enforcement of IPR could serve some unique functions for the Chinese government. The Chinese government uses IPR transplanted from the West to repress activities that “seriously violate socialist market order”; it specifies this purpose in the 1997 Criminal Code. New forms of illegal enterprise have accompanied the burgeoning of the Chinese market economy and the emergence of new economic opportunities. The 1997 version of the Criminal Code defines numerous economic crimes, including IP crimes, to help the government regulate the seemingly untamable market. The list “Offenses of the Infringement of IPR” is found under Chapter Three, “Offenses of the Violation of Socialist Market Order,” of the Criminal Code—not under Chapter Five, “Offenses of Encroachment upon Property.”

This study hypothesizes that not only in the Criminal Code but also at the enforcement stage the main goal of criminal enforcement of IPR in China is to repress activities “seriously violating socialist market order,” not to protect private property rights. The above hypotheses is tested by analyzing the types of IP infringements upon which the administrative and criminal judicial systems focus, IP infringement victim profiles, objectives, and targets of “strike-hard” campaigns and enforcement operations, and surveys of the public and company perceptions of IPR, infringements and enforcement.

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28 Id. at 168–200.
29 See infra Part III. A–B.
31 Id.
32 Id.
33 Id.
3.2 Data and Methods

This study is designed as a comparative research study across China and the United States. The U.S. case represents the original IPR concepts and legal model growing out of classical liberalist and individualistic ideas in the context of the law’s home country. The Chinese case represents an important example of the indigenization and appropriation of the Anglo-American IPR model in the local Chinese context. I compare the two in order to detect the unique roles and consequences of legal appropriation and modification manifested through IPR enforcement in China as well as factors within the contexts where legal change takes place.

I used six types of empirical data: (1) summary judgments of 376 Chinese criminal IP cases,34 (2) U.S. official annual statistics on about half of all IP criminal cases containing rich individual case information,35 (3) news reports on 239 U.S. IP thefts,36 (4) aggregate official statistics on IPR criminal and administrative enforcement in both countries,37 (5) in-depth interviews with IP practitioners in China, and (6) various kinds of documentary data.

34 The databases of the summary judgments come from the largest publicized Chinese summary judgment databases. The author searched various databases, including the Beijing University Lawyee website, and Chinalawinfo.com. An additional number of summary judgments were obtained directly from district courts. See generally Zhanjian Tushuguan (湛江图书馆) [Zhanjiang Library], Beida Fayi Anli Shujuke Jieshao (北大法宝案例数据库介绍) [The Introduction to Beijing University Lawyee Case Database], ZJLIB.COM (2008), http://www.zjlib.com/2008/bdfy.htm.
35 The U.S. datasets on criminal enforcement are located in the “standard analysis files” (SAF) available from the Federal Justice Statistics Resource Center website. Among them, the “Defendants Sentenced” files (data name: SC09OUT) from the U.S. Sentencing Commission has been used for this research. See BUREAU OF JUSTICE STATISTICS, DEFENDANTS SENTENCED UNDER THE GUIDELINES 2002–2009, SC02OUT–SC09OUT (Urb. Inst.) hereinafter, STATISTICS, DEFENDANTS SENTENCED UNDER THE GUIDELINES 2002–2009.
I have collected almost all available summary judgments of Chinese criminal IP cases from books, court periodical reports, online legal databases, and court Web sites. A Chinese summary judgment is a legal document written by the presiding judge or judges after a case is closed. It contains essential information and rulings about the crime, the defendants, the victims, and the case outcome. Considering the particular scarcity of IP criminal cases, the overall sample of over 300 criminal IP cases is substantially diverse for analysis. Given the absence of other, more reliable data sources, these court documents offer valuable source data.

In addition, I conducted about 30 in-depth interviews in Beijing (summer 2010) with trademark and copyright agents, IP attorneys, judges, law enforcement officials, law professors, and senior researchers. I obtained informative interviews with several top officials at copyright enforcement agencies and their research centers, with judges in Beijing high courts and lower-level courts, and with researchers at the Intellectual Property Center of the China Academy of Social Sciences. All respondents are top experts in their fields. This interview information has been essential for interpreting the quantitative-analysis findings and considering the policy implications of this study.

The U.S. datasets on criminal enforcement are located in the “standard analysis files” available from the Federal Justice Statistics Resource Center Web site. U.S. official annual statistics from 2000 to 2007 contain rich individual case information, with 487 variables at the individual offender and offense levels. These datasets contain information on the vast majority of


38 Most of the summary judgments come from the largest publicized Chinese summary judgment databases—the Beijing University Lawyee Web site, See generally Beida Fayi [Lawyee], Beida fayi fayuan anli caipan wenwu [Beida fayi fayuan anli caipan wenwu] [Summary judgments of court cases], LAWYEE.COM (2008), http://www.lawyee.com/Case/Case.asp, and the Chinalawinfo web site. See Beida Falü Xinxiwang [北大法律信息网], Beida fajia: sifa anli [Beida fajia: sifa anli] [Chinalawinfo judicial cases database], CHINALAWINFO.COM (Sept. 1, 2008), http://vip.chinalawinfo.com/Case. These two databases collect available Chinese summary judgments from various publications. See generally Zhanjian Tushuguan, supra note 34.

39 Lu Hong, Legal Responses to Trafficking in Narcotics and Other Narcotic Offenses, 18 CHINA INT’L CRIM. J. REV. 212, 219 (2008).

the felony defendants of IP thefts in the federal criminal justice system. About half of all IP theft defendants were processed by the federal system.  

Moreover, I have collected news releases on 239 IP thefts from 2002 to 2010 to serve as complementary data for the official datasets. These news reports provide additional information on types of offenses, detailed crime descriptions, victim characteristics, and investigation processes for individual IP theft cases. These sets of variables, combined with those coded from the official datasets, are very similar, and thus highly comparable with the variables from the Chinese summary judgment dataset.

Additionally, aggregate official enforcement statistics in China and the United States are provided annually by numerous enforcement agencies and judicial institutions in government reports or agency Web sites. Finally, this study also uses various published documentary sources in both countries.

I conduct my analyses from broad law and society and cultural perspectives. For the quantitative part of this research, I offer descriptive analyses of the data using Access and SPSS, and I provide tables and graphs to demonstrate patterns that emerged from the results. The most crucial steps were to ensure the comparability of variables measured and coded separately for the Chinese and U.S. datasets and to accurately interpret the statistical results. Since the datasets combined from U.S. official annual statistics on IP theft cases are secondary data, I carefully examined the measurement and coding for each selected variable in its provided codebook and recorded some. I coded the variables for the original texts of the Chinese summary judgments and U.S. news reports on IP thefts.

4. A Comparative Analysis of Perceptions and Justifications of IPR in the United States and China

4.1 Possessive Individualism and Classical Liberalism in the United States

William Fisher noticed that John Locke’s labor theory of property rights provided one of the most widely used justifications for the establishment of IPR models by summarizing previous research analyzing legal documents from U.S. IP cases. Locke argues that a person who labors upon resources that are neither owned nor “held in common” has a natural property right to the

41 See Motivans, supra note 13.
42 U.S. Dep’t J., Supra note 36.
43 Fisher, supra note 27, at 170–74.
fruits of his labor. It is only through human labor that raw materials become useful, and this justifies private ownership of the final product by the laborer. This presumption of self-ownership laid the ground for the notion of private property rights. Later, labor theory was applied to IPR. Scholars argue that labor plays an essential role in the creation of IP products, and the raw material, such as ideas, facts, and methods, are resources “held in common”.

Locke’s labor theory reflects an individualistic, rational, and utilitarian view of human nature and the relationship between humans and property (nature). Locke’s view was later labeled “possessive individualism.” The natural conditions of human beings, in Locke’s eyes, include laboring upon natural resources with substantial autonomy and individually enjoying the fruits of his labor. For the sake of self-preservation, humans are justified in being self-interested and rational. An individual is also considered as being self-sufficient, independent, and self-determined, with his own unique personality.

Modern private property systems developed in the seventeenth and eighteenth centuries through intertwining with other classical liberalistic ideas carrying a strong individualist orientation. These classical liberalistic ideas include the private sphere of free market and civil society and the rights-bearing individual. These ideas were later borrowed to advocate the expansion of the scope of IPR. For example, Locke’s theory was the foundation of Adam Smith’s theory on free market economics; contemporary liberalists consider private IPR part of the free market. In the view of liberalists, even though each individual makes self-interested, autonomous decisions, these decisions would eventually produce the best result for both the individual and the society through the “invisible hand” of the free market.

After extensive review, Robert Merges also summarized that it was inconclusive whether social utilitarianism, as spelled out in the U.S. constitution, justified IPR protection. Instead, Merges recognized the “(1) Lockean [‘labor theory’ of] appropriation, (2) Kantian [liberal] individualism, and (3) Rawlsian attention to the distributive effects of property” as the major

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44 Id. at 184–86.
45 Id. at 184.
46 Id. at 184–86.
48 Id. at 1327–32.
49 Id. at 1326.
50 Compare MERGES, supra note 27.
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justifications behind IP law.\textsuperscript{51} Kant emphasizes “the unique contribution of each creative person” in producing intellectual products and, thus, the state acknowledges individual freedom and autonomy by recognizing IPR.\textsuperscript{52}

In the 18th century the concept of “romantic authorship” was expressed by Edward Young, William Wordsworth, and others.\textsuperscript{53} In the “romantic authorship” discourse, not only the “labor” but also the “originality” of the author entitle him the ownership of his work. The author was romanticized as a genius, full of talent and creativity.\textsuperscript{54} “Originality in mental labor as opposed to manual labor enabled the author to claim not merely the physical object produced, but the literary or artistic expression itself”.\textsuperscript{55} According to this “romantic authorship” discourse, even the tiniest spark of originality should be protected since the work embodies the author’s personality, and personality always contains something unique.\textsuperscript{56} Hence, the “romantic authorship” discourse is, again, built on the assumption of individuality.\textsuperscript{57}

The Lockean justifications of property rights including IPR are tightly linked to the classical liberalistic conception of “rights” in general. Based on the assumption of a common human nature, natural-law theory postulates the existence of a set of universal natural rights. Natural rights have been asserted on several premises, such as religious principles, moral rules, or philosophical reasoning.\textsuperscript{58} John Locke\textsuperscript{59} invoked natural law to support the protection of private property, stating that if the ruler failed to safeguard life, liberty, and property, people could justifiably overturn the existing state and build a new one. Classical liberals considered rights to be superior to interests, and individual rights more precious than collective welfare, social harmony, and public order. Rights are also stressed over duties or virtues.\textsuperscript{60}

\begin{thebibliography}{99}
\bibitem{51} See id.
\bibitem{52} Id.
\bibitem{53} Aoki, supra note 47, at 1322–26.
\bibitem{54} Id.
\bibitem{56} See id. at 249; see also Fisher, supra note 27, at 171–72, 174.
\bibitem{57} See Aoki, supra note 47, at 1322–27.
\bibitem{58} See generally TAMANAH, supra note 22; JEREMY WALDRON, THEORIES OF RIGHTS 11–76 (Jeremy Waldron ed., Oxford Univ. Press 1984).

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Later, scholars raised several impassable critiques of the liberal individualistic view of IPR. First, the distinct characteristic of IP from regular property makes the exclusive possession of such properties through ownership rights appears unjustifiable. Fisher\(^{61}\) points out that although food and shelter are exhaustible and thus cannot be enjoyed in common; the consumption of intellectual products is not exclusive. They can be possessed and enjoyed by many people, at the same time or not, without being exhausted.\(^{62}\)

Second, the earliest copyright was not meant to grant property rights or ownership but was only intended to regulate the copying of literary works. For instance, in the 16th century, the English Crown granted a monopoly to the Stationers’ Company, prohibiting unauthorized replication of literature; the monopoly aimed to execute the “sovereign suppression of heterodox and critical ideas”.\(^{63}\) The Stationers’ Company later lobbied Parliament to detach censorship from copyright. Thus, copyright protection was extended to all published work, not just those registered on the list. Other early copyright laws were designed to promote the dissemination of ideas by encouraging book publishing and circumscribing competition for a limited period of time. Moreover, the law protected only the physical literary work, not the expression or ideas contained in it.\(^{64}\) A widely promoted argument today within the debates over the expansion IPR is that information itself can be owned; however, throughout history, copyrights, like private ownership of property, have never been so absolute.

### 4.2 Chinese Holistic View of Nature, Rights, and Intellectual Products

Chinese philosophies endorse a holistic perspective on self and nature, self and group, or individual and the state instead of taking a polarized view.\(^{65}\) Confucians believe that there is an organic relationship and close interconnection between nature and humankind. Because man is part of nature, the justifications for human behaviors must be found in the functioning of nature.\(^{66}\) Taoism recommends a deep appreciation of nature and the simplicity of life; it

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\(^{61}\) Fisher, *supra* note 27.

\(^{62}\) *Id.*

\(^{63}\) Aoki, *supra* note 47, at 1328.

\(^{64}\) *Id.* at 1328–29.


\(^{66}\) ALFORD, *supra* note 9, at 9–29.
emphasizes establishing a harmonious relationship between the two. The world is simply too complex and intertwined for rigid rules and control.67

Chinese philosophers also conceptualize the individual in markedly different ways. Confucians believe human nature is good and that humans are highly malleable for enlightenment.68 The primary goal of an individual is to achieve self-fulfillment by cultivating virtue and inspiring empathetic feelings for others. A person’s own moral sentiment is the basis of fostering proper relationships with one’s family, the state, and the whole world. By meeting one’s duties and expectations as required by the specific relationship in which one is involved, an individual finally realizes self-fulfillment.69 Hence, the individual in Confucian eyes is highly ethical and social.

When individuality becomes disagreeable within the highly complicate and normalized requirements of role fulfillment, meeting one’s duty should be the priority. Anyway, Confucianism acknowledges unique personal characteristics. The Confucian also accommodates subjectivity (in the sense of introspection and solitude) in self-improvement, but has never considered the unique qualities of individuals as something to be refined or enhanced. Moreover,70

Richard Nisbett commented, “individual rights in China were one’s share of the rights of the community as a whole”.71 The Chinese translation for the word “right” is quan li 权利, meaning “power and profit”;72 Confucians taught restraint in relation to power and profit. Moreover, the translation of “individual rights” carries the dark intonation of “self-interest.”73 Because of a strong emphasis on role fulfillment and mutual obligations, complying with obligations according to one’s status is the prerequisite for entitlements.74 Similar to its attitudes toward individuality, Chinese traditional culture does not encourage the pursuit of mere individual interests and profit, nor does it prohibit such business.75

67 MUNRO, supra note 65, at 22.
68 HANBAO MA, LAW AND TRADITIONS IN CONTEMPORARY CHINESE SOCIETY 4, 46–48 (Nat'l Taiwan Univ. 1999).
69 Id.
70 MUNRO, supra note 65, at 1–34.
72 HANBAO MA, supra note 68, at 13–14, 55–56.
73 Id. at 55–56.
74 MUNRO, supra note 65, at 13, 48.
75 MUNRO, supra note 65, at 1–34.
As a result, Chinese seldom resort to an “individual rights” discourse to justify entitlements. Instead, they argue for one’s share of the common interests, community welfare, or the obligation of the public authority to grant them entitlements. Moreover, communal interests and harmonious relationships are often prioritized. Individuals are expected to sacrifice their own interests if the redistribution of communal interests or the maintenance of harmonious relationships so requires.\(^{76}\)

Klaus Mühlhahn concluded the prolonged absence of individualism and individual rights in the Chinese criminal judicial system from imperial times to the early modern legal reform period.\(^{77}\) After the imperial period, “the individual became to be viewed as a resource to be incorporated by the nation-state and to be appropriated for its projects of national strengthening,” rather than as a force to check state power.\(^{78}\) The results of China’s most recent vehement attempts to introduce individual rights protection and adversarial elements into its inquisitorial criminal procedure model remain futile.\(^{79}\)

As discussed in the literature review section, William Alford specifically explores the question of “why Chinese civilization . . . did not generate more comprehensive protection for its intellectual creation”.\(^{80}\) The answer lies in the Confucian vision of the nature of civilization and of the crucial role played by a shared past for self-improvement. According to Confucian doctrines, “[R]ules used by the ancients were not invented by them, but really created by Nature”.\(^{81}\) Nature’s self-expressions were recorded in past intellectual products. The necessity of communication with the past for moral and intellectual elevation requires free communal access to previous literature. The need to interact with the past raises questions about any attempt to restrict access to others’ work and to gain profits from such a monopoly.\(^{82}\)

Chinese have not believed that individual labor or originality justifies private ownership either of a work itself or of literary or artistic expression. Since rules and ideas come from nature, originality is realized when applying natural rules to specific contexts. Individuality

\(^{76}\) HANBAO MA, supra note 68, at 12–14.


\(^{78}\) Id. at 245.

\(^{79}\) MIKE McCONVILLE, CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL ENQUIRY 425–53 (Edward Elgar Pub. 2011)

\(^{80}\) ALFORD, supra note 9, at 3.

\(^{81}\) McCONVILLE, supra note 79, at 27.

\(^{82}\) Id. at 29.
might demonstrate only subjectivity or differences of personality or personal habits, but not the fundamental differences of human nature.\footnote{Munro, \textit{supra} note 65, at 1–34.}

Similar to the early British copyright law, the main purpose of early restrictions on unauthorized replication of important works in imperial China was not to protect individual copyrights but to preserve political order and social stability by controlling the diffusion of ideas and banning heterodox works.\footnote{Alford, \textit{supra} note 9, at 9–29.} The state was not concerned about the pirating or unauthorized editing of others’ work. Similarly, the state’s implicit and occasionally explicit support for guild efforts to protect trade names should be interpreted as preserving social harmony by maintaining market order and preventing consumer fraud, instead of protecting individual trademark rights.\footnote{McConville, \textit{supra} note 79, Ch. 1.}

Modern Chinese mainstream ideologies in general and IPR concepts in particular are also molded by Marxist philosophy of dialectic materialism; its theories on society, social change, and alienation in capitalist market economy; and its political-economic analysis of IPR as both a superstructure and an ideology.\footnote{Qu Sanqiang (曲三强), \textit{Qieshi Jiushi Tou: Luen Zhongguo Chuantong Wenhua Yu Zhishi Chanquan} (窃书就是偷：论中国传统文化与知识产权) [\textit{Stealing A Book Is Theft: On Chinese Traditional Culture and IPR}] 73–94 (Zhishi Chanquan Chubanshe (知识产权出版社) 2006) (China).} Marx’s philosophy of dialectic materialism hinges on his view of human nature. Marx believed that human nature is adaptable and rooted in everyday labor. In the process of labor, human beings transform themselves. Marx did not believe that how one works is entirely personal and individual; instead, he argued that work is a social activity. Human beings are different from other animals in that they adapt to various natural environments by creating the corresponding social environment. They plan their actions, organize collective efforts, and make sense of their experiences in the form of culture.\footnote{See \textit{generally} Karl Marx, \textit{Capital, Volume 1: A Critique of Political Economy} 53–210, 241–87, 486 (Ben Fowkes Trans., Int’l Pub. 1967) (1887); \textit{See \textit{generally} John R. Sutton, Law/Society: Origins, Interactions, and Change} 61–98 (Sanford Robinson & Cindy Bear eds., Pine Forge Press 2001).} Hence, Marx emphasizes the social, open, and creative aspects of human nature.

Marxism holds a materialist and scientific perspective toward the relationship between humankind and nature.\footnote{Id.} After decades of public education and political propaganda to promote
Marxism since the establishment of the People’s Republic of China, Marx’s philosophy of dialectic materialism has become the mainstream worldview of the vast majority of the Chinese.

In addition, Marxist political economy proposed an economic base / superstructure model of society. The economic base determines the superstructure, but only in a general and limiting way; meanwhile, the superstructure also shapes the base.\(^9\) For instance, the model of private property ownership, including IPR, is a legal construct and thus part of the superstructure. The legal protection of IPR is not only the precondition of capitalist market economy, but it also defines the way the game can be played.\(^9\)

In a capitalist society, IPR was created as a tool to structure the relations of production.\(^9\) The purpose of IPR protection is not to provide incentives for innovation and creation. Instead, the legal protection of IPR ensures that capitalists can obtain ownership of intellectual properties, put them into production, and secure most of the profits. As market products, intellectual products are no longer produced purely for human use but to induce as much market exchange as possible.\(^9\)

IPR—especially copyrighted works involving books and other copyrighted works—is also a type of ideology.\(^9\) The ruling class not only controls society’s means of production but also dominates the mainstream ideology in accordance with the best interests of their class. This is because the ideology of a society holds an important political function in a capitalist society: it confuses alienated groups and can create what Engels called “false consciousness,” such as the fetishism of commodities.\(^9\)

Marxism and socialism still have profound influence in China. This is manifested not only in the ideology and worldview of the 1.3 billion Chinese; it also is embodied in multiple aspects of Chinese economic, legal, and social practices. The entrenched impact is symbolized by such slogans as “the development of a socialist market economy with Chinese characteristics,” “the construction of socialist rule of law,” and “the construction of a socialist harmonious society.” Such Marxist and socialist elements are either directly stated in Chinese legislation or

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\(^9\) Id. at 61–98.
\(^9\) QU SANQIANG, supra note 86, at 73–94.
\(^9\) Id.
\(^9\) Id.
\(^9\) Id.
\(^9\) SUTTON, supra note 87.
government reports or are manifested in the processes of policy implementation and law enforcement.

4.3 Public Perceptions and Enforcement of IPR in China at the Macro Level

4.3.1 Lack of Consciousness of IPR as Private Property Rights

At the macro level, broader-level ideological, cultural and economic factors directly lead to the pervading lack of awareness of IPR, especially for copyright, as private property rights in Chinese society. The result is epidemic disregard of law by citizens and neglectful implementation by the authority. Even when taken into consideration, IPR is usually perceived as mere one of many interests involved; other more vital or direct interests often are prioritized.

The major result of the East-West collision concerning the different justifications of IPR is the marginalization of IPR as private individual rights. Foremost, many Chinese are apathetic if not openly hostile and resistant to IP laws and regulations. People do not comply with IP laws because they are in direct conflict with both indigenous social norms and their self-interests as public users of intellectual products. There have been many public surveys in China that I will discuss later on common conception of IP law, motives in infringing IPR, and the effectiveness of anti-infringement campaigns.

As the result of vehement educational and propaganda campaigns carried out by the government, the majority of Chinese now have some basic knowledge about IP, IP infringement, and IP law.95 Despite that, piracy and counterfeiting are rampant, and an unusually high percentage of people would not hesitate to buy pirated or counterfeit goods.96 Chinese largest panel survey related to copyright protection, “National Reading and Purchasing Tendency” (quanguo guomin yuedu yu goumai qinxiang 全国民阅读与购买倾向), found that 46 percent

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of the respondents admitted buying pirated goods in 2003 (China Publication Scientific Research Center Research Team 2004).\(^97\)

Furthermore, Zhiqiang Zhang’s张志强\(^98\) survey on Nanjing urban citizens reveals that as many as 44 percent of respondents thought that the government advocacy of purchasing products carrying genuine copyright by the government “does not fit in with the reality and contexts of China.” These public perceptions towards piracy, pirates, and the effect of anti-piracy enforcement uncover obvious indifference if not an openly antagonistic attitude toward others’ copyrights, and a condoning or supporting attitude toward piracy.

Many Chinese domestic companies lack the awareness and mechanism to protect their IPR. Zhang Jun张俊 and Yang Weiguo杨为国\(^99\) surveyed 466 staffs in companies of various types of ownership and found that a much higher proportion of foreign companies and joint ventures established sufficient management systems for the protection of IPR than did SOEs; domestic private companies were least likely to establish any kind of IPR protection management mechanism.

Moreover, due to inadequate awareness of IPR protection, Chinese domestic private companies seldom apply for their own IPR. For example, there were 11,740 research development projects in Zhejiang province in 2002 but only 3,570 patent applications that year; as a result, the majority of the findings of these research projects were not protected by IP law. What’s worse, less than 10 percent of products made by companies in Zhejiang carry the company’s own brand; most are made by Original Equipment Manufacturing (tiepai shengchan贴牌生产) for the brands of others. Without enough capital and resources and thus the competitive advantage to establish their own IPR, Zhejiang private businesses have become


\(^98\) Zhang Zhiqiang, supra note 95, at 133.

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notorious for infringing others’ trademarks and exporting their counterfeits all over the world. In addition, instead of bringing their complaints to court, infringed companies tend to resort to administrative agencies for remedy, which usually are less costly but not as effective. Even in civil lawsuits, companies often fail to take advantage of effective procedural remedies, such as the preliminary temporary injunction, because they do not want to spend money to hire the best IP counselors.100

Because consumers do not have an adequate consciousness of IPR, pirates and counterfeiters successfully appeal to their appetites for cheaper software, movies, name-brand apparel, leather goods, and other products; this produces widespread piracy and counterfeiting on the streets. China experienced over 90 percent piracy rates for decades before 2005 (see Figure 1). In 2011 the 77 percent piracy rate still was rather high, considering the worldwide average was 42 percent and the United States’ rate was only 19 percent.101

There is no calculated counterfeiting rate for China readily available for research, but one can have some idea of the rampanty of counterfeits from Chinese government reports and enforcement statistics. In Figure 2, both the annual number of total administrative trademark cases and the number of trademark counterfeit and infringement cases (shangbiao qinquan jiaoma o anjian 商标侵权假冒案件) handled by Administration of Industry and Commerce (“AIC”) rose fairly consistently from 1996 to 2008. The number of trademark counterfeit and infringement cases processed by AIC in 2008 was about two times that of 2000.

100 TONG ZHAOHONG ( 童兆洪), MINYING QIYE YU ZHISHI CHANQUAN SIFA BAOHU (民营企业与知识产权司法保护) [JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS INVOLVING PRIVATE ENTERPRISES] (Zhejiang daxue chubanshe 2006) (China).

101 See BUSINESS SOFTWARE ALLIANCE, supra note 2; BUSINESS SOFTWARE ALLIANCE, EIGHTH ANNUAL BSA AND IDC GLOBAL SOFTWARE PIRACY STUDY: PRESS RELEASE ON CHINA (Bus. Software Alliance 2012).
Figure 1. PC Software Piracy Rates (in Percentages) in China, 1994–2008\(^{102}\)

\[^{102}\text{See BUSINESS SOFTWARE ALLIANCE, supra note 2.}\]
Figure 2. Trends of the Numbers of All Administrative Trademark Cases vs. Trademark Counterfeit and Infringement Cases (shangbiao qinquan jiaomo anjian 商标侵权假冒案件) Processed by AIC

Note:
AICTMcases = trademark counterfeit and infringement cases processed by AIC;
AICcases = the number of all administrative cases processed by AIC.

4.3.2 IPR as an Interest Instead of Rights

Second, under the influence of Marxist philosophy of dialectic materialism and political economy, China emphasizes entitlements or economic priorities instead of rights. Hence, in situations that IPR is recognized or protected to some extent, the recognition or protection is rationalized not as natural or inalienable private property rights but as one of the many

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103 See GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (国家工商行政管理总局 [GEN. ADMIN. INDUS. & COMM.] 2003–2009 ZHONGGUO GONGSHANG XINGZHENG GUANLI NIANJIAN (中国工商行政管理年鉴) [CHINA INDUSTRIAL AND COMMERCIAL ADMINISTRATION YEARBOOK] 726–729 (Beijing Gongshang Chubanshe (北京工商出版社) 2003–2009), (the table on the basic conditions of trademark violations processed by AIC and the table on the basic conditions of trademark counterfeit and infringement cases processed by AIC).
entitlements or interests of the parties involved as they are weighed against other interests. In enforcement, other politically or socially consequential economic or collective interests are often prioritized. For example, local enforcement agencies often prioritize regional economic development, raising employment rates, and public sentiment over IPR protection. Such an interest-based orientation might be reasonable or requisite at times, but often is unjust and narrow-minded.

Public surveys have found that IPR is acknowledged by Chinese citizens mostly as a type of interest out of rational calculation. In the 2010 Hong Kong IP public survey, 97 percent of the public considered it very / quite necessary to protect IPR in Hong Kong; however, among these who considered it necessary, the top reason was to “protect the interests of inventors / encourage creativity” (75 percent); 16 percent answered to “protect the interests of manufacturers / IP right owners,” and only 16 percent mentioned “protecting private property.”

Those who do not purchase pirated or counterfeit goods were asked their reasons for not buying them. Nearly half (48 percent) quoted the reason “no need to buy / not interested in pirated or counterfeit goods”—this can be interpreted as signifying that a variety of genuine goods are affordable and available to these consumers. Other frequently-cited reasons included: “poor quality of pirated or counterfeit goods” (26 percent) and “guaranteed quality for genuine products” (11 percent). In contrast, only 19.6 percent mentioned “it is immoral / wrong to infringe others’ IP rights.”

Economic calculation and weighing of multiple interests can contribute to disregard or violation of IP law. The majority of people (86 percent) in China’s “National Reading and Purchasing Tendency” Survey admitted they bought pirated products because they were much easier to afford; 44 percent cited convenience to purchase as another important reason.

More importantly, all IPR administrative enforcement agencies and criminal judicial institutions in China have multiple administrative responsibilities beyond enforcing IP law, except the Copyright Administration. Tackling IP infringements is seldom their priority. As a result, such an interest-driven approach is inevitable at the enforcement stage.

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104 H.K. INTELL. PROP. DEPT., supra note 95.
105 Id. at 56–57.
106 ZHONGGUO CHUBAN KEXUE YANJUSUO KETIZHU, supra note 97.
For instance, AIC, the main administrative enforcer of trademark law, is an enormous and powerful agency with various responsibilities; trademark registration and protection are only a small portion of its administrative duties. Some of its other responsibilities include: overseeing economic practices of industrial and commercial enterprises; boosting production, raising employment and securing the implementation of the national economic development plan; processing enterprise and business registration; inspecting groups, units, enterprises, and undertaking units (shiye danwei 事业单位) to ensure legitimate production; and so on.\textsuperscript{107} Given so many responsibilities, the resources and personnel AIC devotes to managing trademark administrative affairs are highly restricted.\textsuperscript{108} More importantly, these other responsibilities of AIC, such as promoting local economic growth and stimulating employment, often get in the way of tackling IP infringements. What is worse, some narratives relate that some AIC officers connive with local counterfeit markets and street vendors in order to collect business license inspection fees and other regulatory fees.\textsuperscript{109}

Major obstacles to IPR enforcement in China include the following: the widespread sluggish enforcement in general, local protectionism, regional disparities, low rates of criminal case transference and prosecution, and soft administrative sanctions that have minimal deterrent effect.\textsuperscript{110} These obstacles are largely due to enforcement agencies’ ranking other politically or socially prioritized economic or collective interests—such as local economic growth—over the protection of IPR. For example, tobacco manufactures not only provide lucrative tax revenues for the local government but also contribute to regional economic growth and employment. As a result, some local officials are uncooperative in regards to, or actively subvert, the Tobacco Monopoly Bureau’s enforcement operations.

Tremendous regional disparity exits in China in terms of geographic openness, economic development stages, and living standards of urban and rural areas, east and west, and coastal and

\begin{footnotesize}
\textsuperscript{107} GUOJIA GONGSHANG XINGZHENG GUANLI ZONGJU (国家工商行政管理总局) [GEN. ADMIN. INDUS. & COMM.] 2011 ZHONGGUO GONGSHANG XINGZHENG GUANLI NIANJAN (中国工商行政管理年鉴) [CHINA INDUSTRIAL AND COMMERCIAL ADMINISTRATION YEARBOOK]. (Beijing Gongshang Chubanshe (北京工商出版社) 2011).

\textsuperscript{108} MERTHA, supra note 1.

\textsuperscript{109} Id.

\textsuperscript{110} Id. at 118–63; DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 260–83; YU, INTELLECTUAL PROPERTY, ECONOMIC DEVELOPMENT, AND THE CHINA PUZZLE, supra note 11, at 24–34; Yu, THE SECOND COMING OF INTELLECTUAL PROPERTY RIGHTS, supra note 11, at 16–26.
\end{footnotesize}
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inland localities. Under the allure and pressure of faster economic growth, businesses, government officials, and even IP practitioners generally believe that it is unavoidable to steal IPR (of either foreign companies or top domestic companies from other regions) in order to grow economy. As long as these businesses pay taxes and contribute to the local economy, local government officials frequently openly tolerate or even encourage infringements.111

4.3.3 Other Prioritized Political Interests and Social Welfare

In the context of Chinese holistic understanding of entitlements and intellectual products, the tackling of IP infringements in China is frequently justified as facilitating political interests, public welfare, and public policies instead. These policies include regulation of the socialist market economy and controlling certain markets monopolized by SOEs. This orientation to public policies, collective interests, and state politics are stated explicitly in news articles and government reports as the goals of IP infringement “strike-hard” campaigns and specialized enforcement operations. These priorities also are reflected in official enforcement statistics published by major IP agencies and my analysis of summary judgments of criminal IP cases. The following Results section details evidence in support of these arguments.

5. Results: Different Foci and Unexpected Consequences of Criminal Enforcement of IPR in China

Statistical analyses reveal apparent patterns of similarities and differences in terms of the foci of criminal enforcement between China and the United States. Above all, statistical analysis manifests an extremely high concentration of protected victims in a handful of economically / politically powerful companies in a few particular industries.112 In the U.S. sample, these companies are large corporations with the biggest market shares; in the Chinese sample, they are large SOEs or companies of foreign interest (see Table 1).113 Moreover, despite the vastly different macro-level factors and the big picture of rampant infringements and ineffective enforcement in China, the industries and profiles of victimized trademark companies of foreign interests in my Chinese sample are very similar to those of the victims in the U.S. sample. The

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112 Haiyan Liu, supra note 96, at 153–66.
113 Id.
industries of the infringed-copyright products in China are even more similar to those of the United States.\footnote{Id.} However, important differences in terms of the enforcement foci remain between the two countries.

5.1 Products with Health or Safety Threats

Counterfeits raising health concerns have become a prominent and notorious problem in China and occupy tremendous attention of both the criminal and administrative enforcement agencies.\footnote{See generally Wu Heng (吴恒), Zhichu Chuangwai: Miandui Shipin Anquan Weiji, Ni Yingyoude Taidu (掷出窗外: 面对食品安全危机, 你应有的态度) [Throwing Them out the Window], ZCCW.INFO (Jan. 8, 2015), http://www.zccw.info/; see also CHEN CHUANYI (陈传意), TIANDI RENXIN: ZHONGGUO DAIJA ZHILIE BEIWANGLU (天地人心: 中国打假治劣备忘录) [HEAVEN AND HELL IN THE HUMAN HEART: THE MEMO OF CRACKING DOWN AND GOVERNING FAKE PRODUCTS IN CHINA] 58–127 (2006) (China) (providing vivid narratives of cases of various counterfeit drugs and poisonous food in China).} As a perspective, 19 percent of U.S. trademark thefts belong to this category; while as many as 63 percent of the Chinese counterfeit cases involve products that could incur health risks (see Table 2). Products with safety concerns do not seem to be as big a focus of enforcement as those with health threats. Counterfeits that might trigger physical harm or health concerns are inferior quality food (tobacco, alcohol, salt, and other food), drugs and other medical products, dietary supplements, and personal care products (hair care products and toothpaste). Counterfeits that pose potential safety risks include automobiles, auto parts, construction materials, and certain home electronics (relay sockets, electronic wiring, and residual current circuit-breakers).

Several large-scale enforcement operations and programs have been initiated since 2009 against pharmaceutical counterfeiting. Nevertheless, although 43.5 percent of criminal IP cases in China concern products posing health or safety threats (see Table 2)—which looks like a sizable proportion—46.7 percent of those cases are tobacco and alcohol counterfeits, while other equally serious types of counterfeits comprise much smaller percentages. For instance, all other food counterfeits make up only 5.5 percent of all criminal cases carrying public welfare threats in China; pharmaceuticals and other medical counterfeits constitute just 4.4 percent.

China prioritizes heavy crackdowns on crimes that seriously undermine the socialist market economy. This strong public welfare focus is an intentional and unique characteristic of Chinese criminal IP law and enforcement. The Chinese government repeatedly emphasizes such priorities in IP agency work reports and propaganda material for enforcement campaigns. These announced enforcement priorities turn out to be consistent with the actual enforcement targets.

Table 1: Comparison of Victim Characteristics between Chinese and U.S. Criminal IP Case Samples

<table>
<thead>
<tr>
<th>Percentage of Victims Involving …</th>
<th>State-Owned Enterprises</th>
<th>Companies of Foreign Interests</th>
<th>Domestic Private Companies</th>
<th>Top Brands/ Copyrights</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>49.4% (N=162)</td>
<td>44.4% (N=162)</td>
<td>6.7% (N=162)</td>
<td>89.7% (N=343)</td>
</tr>
</tbody>
</table>


118 See id.

119 Xingfa, supra note 30.


121 The Chinese data come from the dataset of summary judgments of criminal IP cases in China from 1994 to 2009. The U.S. data used are the collected news releases on IP criminal cases from 2002 to 2010.
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Percentage of Victims Involving ...

<table>
<thead>
<tr>
<th></th>
<th>State-Owned Enterprises</th>
<th>Companies of Foreign Interests</th>
<th>Domestic Private Companies</th>
<th>Top Brands/ Copyrights</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>0 (N=239)</td>
<td>Many Multinational Corporations</td>
<td>Majority</td>
<td>Over 99%</td>
</tr>
</tbody>
</table>

Table 2: Comparison of Percentages of Cases concerning Products of Political or Public Priorities between the Chinese and the U.S. Criminal IP Cases122

<table>
<thead>
<tr>
<th>Products Involving ...</th>
<th>Number of Cases</th>
<th>Political or Public Priorities</th>
<th>Including ...</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Health Concerns</td>
<td>Safety Concerns</td>
</tr>
<tr>
<td>China IP Thefts:</td>
<td>375</td>
<td>43.5%</td>
<td>27.7%</td>
</tr>
<tr>
<td>Copyright</td>
<td>210</td>
<td>19.5%</td>
<td>0</td>
</tr>
<tr>
<td>Trademark</td>
<td>165</td>
<td>74.5%</td>
<td>63%</td>
</tr>
<tr>
<td>U.S. IP Thefts:</td>
<td>239</td>
<td>8.8%</td>
<td>5.4%</td>
</tr>
<tr>
<td>Copyright</td>
<td>178</td>
<td>0.5%</td>
<td>0</td>
</tr>
<tr>
<td>Trademark</td>
<td>61</td>
<td>29.4%</td>
<td>19.1%</td>
</tr>
</tbody>
</table>

5.2 State Regulation of State-owned Enterprise Monopolized Markets

In the Chinese IP criminal case sample, 49% of the victims are SOEs, which means that as many as 88.5% of the domestic corporate victims are SOEs. (see Table 1). This is a rather high percentage considering state-holding companies constitute only 3.3% of all registered corporations in China in 2012.123 In addition, these SOEs converge in only a few industries that are monopolized by SOEs and are tightly controlled by the state: tobacco, alcohol, and book industries.

While tobacco and alcohol counterfeiting can sometimes cause serious harm,124 this does not explain why such cases receive far more enforcement attention in comparison to other similarly dangerous crimes, such as food counterfeiting. As a matter of fact, most counterfeit cigarettes

122 Id.
124 See CHEN CHUANYI, supra note 115, at 58–78.
and alcohol do not create greater health problems than the genuine products.\textsuperscript{125} Most of the counterfeit or illegal cigarettes are smuggled top luxury brands or cigarettes manufactured by well-equipped underground factories. Some are low-end cigarettes posing as luxury brands.\textsuperscript{126} Only a very small proportion is handmade or made with inferior quality tobacco.\textsuperscript{127} Similarly, most counterfeit alcohol products pose as top luxury brands while using either low-end or homebrewed alcohol.\textsuperscript{128} Only extremely rare cases involve industrial alcohol, which is a deadly poison.\textsuperscript{129}

This unusually high percentage of SOE victims indicates that the Chinese government has used criminal IP law to ensure state tax revenues instead of protecting the private IPR of domestic companies. Chinese governmental agencies have exploited not only trademark offenses but also the offense of the production or transaction of inferior commodities and the offense of unlawful business operation to crack down heavily on tobacco and alcohol counterfeiters, to ensure the monopolization of tobacco and alcohol markets by SOEs and their governmental regulation, and to protect state tax revenue.\textsuperscript{130}

In addition, the state frequently has used anti-piracy crackdowns and the law against unlawful business operation to enforce media censorship.\textsuperscript{131} Although the majority of publications seized by the Anti-pornography and Illegal Publications Office (“APIPO”)—the most powerful agency handling most of the antipiracy enforcement—are pirated, the designated responsibilities of APIPO are to sweep away pornography, to strike out against illegal publications (\textit{sao huang da fei} 扫黄打非), to supervise publishing activities, and to regulate and macro-control the publication industry.\textsuperscript{132} Anti-piracy is not the priority of either the regular work of APIPO or the anti-piracy crackdowns in which APIPO has collaborated with the Copyright Administration and other agencies. Not until 2003, and only under intense

\textsuperscript{125} \textit{Id.}
\textsuperscript{126} Si Yu (思雨), \textit{Jia Yian de Jiben Leixing} (假烟的基本类型) [\textit{The Basic Types of False Smoke}], REALLY100.NET (Apr. 13, 2010), http://www.really100.net/index_new/show_news.asp?id=9342.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} See CHEN CHUANYI, supra note 115, at 58–78.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} Haiyan Liu, supra note 20, at 213.
\textsuperscript{131} See MERTHA, supra note 1, at 202–09.
\textsuperscript{132} \textit{Id.}
international pressure, did the APIPO and the Copyright Administration start to transfer more piracy cases for criminal processing.133

5.3 Additional Regulated Products

In addition, in the Chinese sample, 51.5 percent of trademark thefts and 10.5 percent of copyright thefts involve products of governmentally controlled markets (see Table 2). The strict government control of markets is a phenomenon unique to the Chinese economy. Besides tobacco and alcohol, these products also include pharmaceuticals produced by domestic manufactures and book publication.134

In total, as many as 74.5 percent of the Chinese trademark thefts involve infringed products, either with public welfare concerns or in governmentally controlled markets. In addition, 19.5 percent of the Chinese copyright thefts involve products that are considered prioritized enforcement targets (see Table 2), such as pornographic optical disks, textbooks, and complementary material. These socially or politically prioritized enforcement targets in the Chinese sample also include salt, agricultural resources and equipment, optical disk production lines, and Olympic products. The retail of salt is strictly regulated in China due to health concerns. Counterfeit agricultural resources and equipment all involve public welfare concerns.

In addition, pornographic optical disk publications are illegal in China. Finally, the government regulates and inspects optical disk production lines to crack down on the manufacture of pirated audio-visual products. In comparison, only 29.4 percent of the trademark thefts and almost none of the copyright thefts in the U.S. dataset involve these prioritized industries, and they are all counterfeits that could incur health or safety risks (see Table 2).

5.4 Administrative Enforcement Targets and Foci

Aggregate official enforcement statistics show that administrative agencies handle the vast majority of IP infringements; the proportion comprised by criminal IP cases is the tiny tip of that iceberg.135 Based on aggregate statistics gathered from AIC and from Administration of Quality Supervision, Inspection, and Quarantine (“AQSIQ”) concerning counterfeit enforcement, the majority of counterfeits processed administratively either carry health or safety threats or involve

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133 See Haiyan Liu, supra note 4, at 137, 146.
134 Optical-disk markets are not listed because software, audio-video, and gaming industries are not as strictly regulated.
135 See Haiyan Liu, supra note 4, at 141.
other public welfare concerns. This orientation to public policies, collective interests, and state politics are also stated explicitly and widely in news articles and government reports as the targets of IP infringement “strike-hard” campaigns and specialized enforcement operations.

In addition, the distribution of products of administrative cases is much more widespread and diffuse compared to the distribution of counterfeit merchandise in the Chinese criminal case sample: various products belong to many more industries and some of them have significant shares; however, they do not appear in the criminal case sample. For example, as noted above, 59.5 percent of the counterfeits processed by the AQSIQ in 2007 either carried health or safety threats (food, construction material, personal care products, and automobile parts) or involved other public welfare concerns (agricultural resources, cotton, and other fiber products) (see Table 3). The top industries subject to counterfeits processed by AQSIQ are food, construction material, and agricultural resources. In addition, a variety of products in these industries are involved. Compared to the high concentration of tobacco, alcohol, and personal care products among criminal trademark cases, tobacco counterfeiting makes up only 0.2 percent of the AQSIQ cases; alcohol and drinks together constitute 5.9 percent; and cosmetic and personal care products comprise only 0.6 percent (see Table 3). AIC also initiates special enforcement operations to crack down on counterfeit of shoddy food, agricultural products, pharmaceuticals, and construction material every year.

In contrast with trademark counterfeiting, the distribution of administrative piracy cases is very similar to that of criminal copyright cases in my Chinese sample. This is expected because piracy vendors always carry numerous copyrighted works of multitude authors or producers, and they respond to market demands. Enforcement raids and seizures can seldom specifically target a single type of product or products of a particular category. The only exception is textbook piracy—a high percentage among the criminal cases—which is one of the enforcement priorities in China due to its public welfare concerns; and textbook piracy is more likely to be processed criminally.

136 Guojia Gongshang Xingzheng Guanli Zongju, supra note 103, at 163–79. See Zhongguo Zhiliang Jiandu Jianyan Jianyi Ju, supra note 120.
137 Id.
138 See Zhongguo Zhiliang Jiandu Jianyan Jianyi Ju, supra note 120.
139 See generally Guojia Gongshang Xingzheng Guanli Zongju, supra note 103.
Table 3: Percentage Distribution of Industries of Counterfeit Cases Processed by AQSIQ, 2007

<table>
<thead>
<tr>
<th>Industry of Infringed Products</th>
<th>Concluded Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food</td>
<td>44874</td>
<td>25.3%</td>
</tr>
<tr>
<td>(Among Food) Alcohol and Drinks</td>
<td>10501</td>
<td>5.9%</td>
</tr>
<tr>
<td>Construction Materials</td>
<td>35821</td>
<td>20.2%</td>
</tr>
<tr>
<td>Agricultural Resources</td>
<td>15723</td>
<td>8.9%</td>
</tr>
<tr>
<td>Cotton and other Fiber Products</td>
<td>4237</td>
<td>2.4%</td>
</tr>
<tr>
<td>Automobile Parts</td>
<td>3471</td>
<td>2.0%</td>
</tr>
<tr>
<td>Cosmetic Products</td>
<td>1111</td>
<td>0.6%</td>
</tr>
<tr>
<td>Fake Trademarks, Signs, or Packaging</td>
<td>587</td>
<td>0.3%</td>
</tr>
<tr>
<td>Tobacco</td>
<td>365</td>
<td>0.2%</td>
</tr>
<tr>
<td>Other</td>
<td>71466</td>
<td>40.2%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>177655</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>

5.5 Case Study of Counterfeiting in the Tobacco Industry

As many as 35.2% of all trademark theft cases in China involve tobacco, the highest rate for all trademark thefts. As a type of luxury good whose manufacture and distribution are tightly controlled by the state, tobacco products, especially name-brand cigarettes, yield tremendous profits for the companies and exceptionally high tax revenues for the government. As a result, cigarette trademark owners and enforcement agencies have great incentive and abundant budgets to initiate costly criminal processing in order to deter counterfeiters.

The State Tobacco Monopoly Bureau (“STMB”) is a specialized administrative agency with monopoly power over the production, distribution, retail, importation, and exportation of tobacco and tobacco products in China. Several other powerful administrative agencies also frequently engage in cracking down on tobacco counterfeiting. The frequent enforcement operations and the resulted large numbers of administrative and criminal violations processed each year.

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140 See Zhongguo Zhiliang Jiandu Jianyan Jianyi Ju, *supra* note 120.
141 See Haiyan Liu, *supra* note 4, at 137, 158.
demonstrate the determination of the government to crack down on tobacco illegalities. The government agencies and criminal judicial system exploited not only trademark offenses but also the offenses of production or transaction of inferior commodities and of unlawful business operation to crack down on tobacco and alcohol counterfeits, thus ensuring monopolization of the tobacco and alcohol markets by SOEs and to protect state tax revenue. However, due to the high incentives to counterfeit, the effects of these intensive enforcement efforts are modest. Finally, enforcement agencies practices such as the “case-handling fees” may not all be corrupt according to the law. However, “guanxi” and under-the-table payments could at least lead to severely unequal treatment before the law and the capture of enforcement agencies by a small number of rich and resourceful top foreign companies.

Tobacco taxes have been the largest source of state tax revenues for more than a decade. In 2012, tobacco business tax revenues were RMB 864.9 billion (Chinese Yuan, about 114.2 billion dollars), about 7.86% percent of the total state tax revenue.\(^\text{144}\) In addition, the annual growth in the total amount of tobacco taxes has been substantial. In 2014, tobacco business tax revenues amounted to RMB 1051.8 billion (about 175.3 billion dollars) which was a 10.02% increase from year 2013.\(^\text{145}\) These taxes are collected separately by both the central and local governments.

### 5.5.1 Fragmented Market and Regional Trade Barriers

The U.S. tobacco market is extremely concentrated in comparison to the fragmented Chinese tobacco market: there are 1,317 different cigarette brands in China, most of which are known only locally.\(^\text{146}\) The market share of the top four cigarette brands in China in 1999 was only 17.5%, while in the United States it was 97.5%.\(^\text{147}\) Local governments can derive great benefit from promoting their local tobacco industry; this creates an incentive for establishing regional trade barriers.

\(^\text{144}\) Wang Wanying, supra note 142.
\(^\text{145}\) Xie Juan (谢涓), Zhongguo Yancaoye Shuili Shou Chao Wan Yi; “Zhonghua” Yi Nian Chao 1200 Yi (中国烟草税利首超万亿 "中华"一年超1200亿) [China’s Tobacco Tax Revenues First Surpassed RMB 1,000,000,000,000,000; the Tax Revenues from “Zhonghua” Cigarettes Alone Were Over RMB 120,000,000,000], 163.COM (Jan. 15, 2015, 16:06 PM), http://news.163.com/15/0115/16/AG0UISS200014SEH.html?baike.
\(^\text{146}\) DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 192.
\(^\text{147}\) Id.
Driven by tax incentives, local governments are highly motivated to either make farmers grow tobacco, or, especially, operate local tobacco factories that carry their own brands. Some localities opened tobacco factories without the approval of the STMB.\textsuperscript{148} Hence, when a local tobacco product cannot compete with cigarettes from other regions, local government has a strong incentive to promote sales of local brand cigarettes. The local TMB can establish quotas on the sales of non-local cigarettes in the area, or the local government can directly erect regional trade barriers.\textsuperscript{149} Since the manufacture of tobacco is monopolized by SOEs and the distribution of tobacco products is strictly controlled by local TMBs, some localities conveniently use their administrative power to enforce regional trade barriers to restrict the entrance and distribution of non-locally produced cigarettes.\textsuperscript{150}

### 5.5.2 Motivations and Problems Contributing to Tobacco Counterfeiting

Planned production, distribution quotas, and regional trade barriers limit the supply of non-local cigarettes in a region. Counterfeiting increases when the supply of popular brands of cigarettes does not meet consumer demands. This also contributes to the illegal transfer of genuine brands into regional markets. Selling counterfeit cigarettes is much more profitable than legal sale.\textsuperscript{151} A set of tobacco processing and cigarette manufacturing machinery costs less than RMB 500,000; however, one machine can produce enough tobacco to generate RMB 20,000 in net profit in one day.\textsuperscript{152} By not paying taxes, counterfeiters gain an extremely high profit.

Some other systematic factors also contribute to widespread tobacco counterfeiting. Foremost among them is heavy local protectionism, which exists in many areas where tobacco counterfeiting flourishes.\textsuperscript{153} Tobacco counterfeiting businesses can boost the local economy. In the current economic reform era, the central state has given up much of its pre-reform power and control over local governments. They have allowed local governments and administrative agencies considerable discretion to pursue their own economic initiatives.\textsuperscript{154}

\textsuperscript{148} DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 191.
\textsuperscript{149} DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 193.
\textsuperscript{150} Id.
\textsuperscript{151} CHEN CHUANYI, supra note 115, at 135.
\textsuperscript{152} Id.
\textsuperscript{153} CHEN CHUANYI, supra note 115, at 128–32, 136–37.
\textsuperscript{154} Id.
According to Chen’s account\(^{155}\), in numerous incidents local thugs brutally beat law enforcement officers from upper-level STMBs, damaged their vehicles, and by force seized tobacco, raw material, and machines. They destroyed account books and other evidence and even incited the masses to block armed police in order to continue their violence. During these incidents, local government officials simply have disappeared, remained indifferent, or intentionally delayed help. These are extreme but repeated cases.\(^{156}\) In most incidents of local protectionism, informants tipped off the infringers about the raids; they then could remove all evidence and flee.\(^{157}\) Some local government officials openly expressed hostility toward STMB enforcement officers’ closing down local tobacco manufacture; others complained about the obstacles they face when asked to cooperate with enforcement.\(^{158}\)

Corruption, misconduct, and neglect of duties by administrative agency officials further exacerbate tobacco counterfeiting.\(^{159}\) STMB is supposed to control the trade of tobacco raw material and of tobacco processing and cigarette manufacturing machinery; however, counterfeitters manage to purchase these items through illicit means, sometimes by bribing STMB officials.\(^{160}\)

### 5.5.3 Enforcement Practices

STMB also is the designated main administrative enforcer in cigarette counterfeiting. According to China Tobacco Yearbook, STMB has been strengthening its Department of Monopoly Supervision and Administration (专卖监督管理司). Recently, the department designated with the responsibility to tackle tobacco counterfeiting.\(^{161}\) STMB also actively seeks cooperation from other administrative agencies. The agencies frequently involved in enforcement are AQSIQ, AIC, and the Public Security Bureau (“PSB”).\(^{162}\) Despite vehement enforcement by these agencies and the investment of tremendous resources and personnel each

\(^{155}\) Id.
\(^{156}\) Id.
\(^{157}\) DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12 at 220–23.
\(^{158}\) CHEN CHUANYI, supra note 115, at 137.
\(^{159}\) Id. at 135, 139.
\(^{160}\) Id.
\(^{161}\) See generally GUOJIA YANCAO ZHUANMAI JU (国家烟草专卖局) [STATE TOBACCO MONOPOLY BUREAU], ZHONGGUO YANCAO NIANJIAN 2008 (中国烟草年鉴 2008) [CHINA TOBACCO YEARBOOK 2008] § Zhuannai Jiandu Guanli (专卖监督管理) [Market Monopoly Supervision and Management] 239 (Beijing, Zhongguo Jinji Chubanshe (北京:中国经济出版社) 2009).
\(^{162}\) DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 209–13.
year, the effects of these enforcement efforts are modest due to the high incentives to counterfeit.\footnote{See generally GUO JIA YANCAO ZHUANMAI JU, supra note 161, at 237–39.}

Official data directly refute Dimitrov’s unsubstantiated argument that local governments and administrative agencies do not tackle tobacco counterfeiting seriously,\footnote{DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 200–01.} especially the counterfeiting of nonlocal brands. The distribution table of types of illegal tobacco seized by STMB and its local offices in 2007 (see Table 4) indicates that the vast majority of seized products is counterfeit or shoddy tobacco products (90.6%), while only a small proportion (9.4%) are listed as “(genuine) Tobacco Entered the Market through Illegal Channel” (非正常渠道卷烟).\footnote{Data on the amount and proportion of smuggled tobacco are unavailable. See generally GUO JIA YANCAO ZHUANMAI JU (国家烟草专卖局) [STATE TOBACCO MONOPOLY BUREAU], ZHONGGUO YANCAO NIANJIAN 2007 (中国烟草年鉴 2007) [CHINA TOBACCO YEARBOOK 2007] $\S$ Zhuanmai Jiandu Guanli (专卖监督管理) [Market Monopoly Supervision and Management] 189–91 (Beijing, Zhongguo Jinji Chubanshe (北京: 中国经济出版社) 2008).}

In addition, the summary judgment case sample I collected for this study shows that although certain localities might be keener on cracking down on counterfeit cigarettes carrying local brands than on those with nonlocal brands, the brands of seized counterfeit cigarettes are generally national top brands and are fairly diverse.\footnote{The data come from the summary judgments of criminal IP cases I collected in China from 1994 to 2009.}

Local protectionism does pose a serious obstacle to enforcement in certain areas; however, it is only likely to exist in vicinities where counterfeit activities are rampant.\footnote{CHEN CHUANYI, supra note 115, at128–32, 136–42.} Local protectionism does not mean countrywide indifference to nonlocal brands of counterfeit cigarettes, especially when local TMB enforcement teams across the country have to abide by the consistent internal regulations of STMB.\footnote{Guojia Yancao Zhuanmaiju, supra note 143.}

Regional differences exist in the foci of local law enforcement. For example, Anhui province seems to have a serious problem with nonlocal cigarettes’ illegally entering the regional market, most likely because the rationed supply of nonlocal cigarettes cannot meet market demands. In 2005 in Anhui, compared to the average national percentage, a much greater proportion (58.7%) of the seized tobacco products were cigarettes that illegally entered the regional market (非法流入烟) (see Table 5). Almost all the rest (40.5%) were counterfeit and
shoddy tobacco products. In contrast, smuggled tobacco only constitutes a tiny proportion of the total (0.8%) (see Table 5). Anhui is an underdeveloped region. As a result, taxes collected from tobacco manufacture and transaction constitute a great part of local governmental revenues. Consequently, Anhui local governments and TMB offices have a high incentive to promote the sales of local cigarettes while restricting the marketing of nonlocal brands.

All administrative enforcement agencies mentioned above can transfer tobacco violations that reach criminal thresholds to the PSB for criminal processing. However, only a small proportion of the tobacco counterfeit cases actually enter the criminal judicial system. For example, although STMB is the main enforcer tackling tobacco violations, AQSIQ and its local offices also administratively processed 365 tobacco cases in 2007; it transferred only 1 case for criminal processing. In 2007, the STMB and its local offices transferred 5,009 cases for criminal processing; among them, 3,940 cases were filed. Offenders in 3,490 cases ended up convicted or/and sentenced. Offenders of 198 cases were punished by re-education through labor and 7,026 people in total were detained.

The enforcement agencies and criminal judicial institutions utilize various offenses with harsh punishments to deal with tobacco counterfeiters and violators. A great proportion of the over 4,000 tobacco violations criminally prosecuted in 2007 involve the selling of counterfeit cigarettes. However, the prosecution did not charge the offenders in all of these cigarette counterfeiting cases with trademark offenses; it charged most of them with the production or transaction of inferior commodities or with unlawful business operation. Counterfeit cigarettes tend to be inferior to genuine brands. Since the manufacturing and selling of tobacco products


170 See Zhongguo Zhiliang Jiandu Jianyan Jianyi Ju, supra note 120.

171 GUOJIA YANCAO ZHUANMAI JU, supra note 165.

172 I include only criminal cases involving counterfeit tobacco (which might also be inferior) in my Chinese case database, and exclude those under the Offense of Unlawful Business Operation for selling genuine brands of tobacco without TMB certificates. The Chinese data analyzed comes from the largest publicized Chinese summary judgment databases. The author searched various databases, including the Beijing University Lawye website and Chinalawinfo.com. An additional number of summary judgments were obtained directly from district courts. See generally Zhanjian Tushuguan, supra note 34.

173 Id.
need TMB-approved certificates, any activity conducted without a certificate might constitute unlawful business operation. Both offenses incur harsher punishments than does the offense of trademark theft. In comparison, only 904 cases were concluded under various IP offenses in total in 2007; only a small proportion of these IP thefts involved tobacco counterfeiting.\textsuperscript{174}

**Table 4. Distribution of Different Types of Illegal Tobacco Seized by STMB in 2007** \textsuperscript{175}

<table>
<thead>
<tr>
<th>Type of Tobacco</th>
<th>Big Boxes of Cigarettes (1 box contains 500 packs and 1,000 cigarettes)</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counterfeit or Shoddy Tobacco</td>
<td>928000</td>
<td>90.6%</td>
</tr>
<tr>
<td>Tobacco Entered the Market through Illegal Channel (非正常渠道卷烟)</td>
<td>96500</td>
<td>9.4%</td>
</tr>
<tr>
<td>Tobacco Leaf or Cut Tobacco</td>
<td>28000 (ton)</td>
<td></td>
</tr>
<tr>
<td>Smuggled Tobacco</td>
<td>NA</td>
<td></td>
</tr>
</tbody>
</table>

**Table 5. Distribution of Different Types of Illegal Tobacco Seized in Anhui Province in China in 2005** \textsuperscript{176}

<table>
<thead>
<tr>
<th>Type of Tobacco</th>
<th>Big Boxes of Cigarettes (1 box contains 500 packs and 1,000 cigarettes)</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counterfeit or Shoddy Tobacco</td>
<td>11820</td>
<td>40.5%</td>
</tr>
<tr>
<td>Tobacco Illegally Entered the Regional Market (非法流入烟)</td>
<td>17111</td>
<td>58.7%</td>
</tr>
<tr>
<td>Smuggled Tobacco</td>
<td>230</td>
<td>0.8%</td>
</tr>
<tr>
<td>Total Illegal Tobacco</td>
<td>29161</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

The involvement of so many powerful administrative agencies in the enforcement of tobacco violations suggest the determination of the government to crack down on tobacco illegalities. Empirical data show that tobacco counterfeits have become the single top category among all counterfeit cases charged under “Unlawful Business Operation” and “Production or Transaction of Inferior Commodities.”\textsuperscript{177} For instance, 90.2% of the unlawful business operation cases involving trademarks in the several major Chinese criminal case databases I checked are tobacco

\textsuperscript{174}Id.

\textsuperscript{175}2007 is the only year the most complete data are available. See GUOJIA YANCAO ZHUANMAI JU, supra note 165.

\textsuperscript{176}Zhao Hongshun, Supra note 169.

\textsuperscript{177}See generally Zhanjian Tushuguan, supra note 34.
counterfeit cases. About 70% of the criminal cases brought against the production or transaction of inferior commodities are tobacco counterfeit cases, according to the judicial summary database of Lawyee. The rest 25% of the cases of production or transaction of inferior commodities concern counterfeit alcohol. These percentages are strikingly high, given how many other types of counterfeit products can be subject to these two charges. The figures demonstrate that the Chinese government, STMB, and the criminal judicial system exploited not only trademark offenses but also the offenses of production or transaction of inferior commodities and of unlawful business operation to crack down on tobacco and alcohol counterfeits, thus ensuring monopolization of the tobacco and alcohol markets by SOEs and to protect state (both central and local governments) tax revenue.

5.5.4 Case-handling Fees: Pervasive Corruption or Common Practices?

Dimitrov points out that rights owners frequently have to pay case-handling fees or treat enforcement officers with post-raid banquets and entertainment in karaoke bars and massage parlors. Some trademark agents and attorneys also boasted of their close personal relationship (guanxi) with enforcement agency officials. Moreover, some firms provide enforcement agencies with evidence or whatever legal or material (vehicles, personnel, money, or other resources) assistance they need to facilitate investigations.

Dimitrov harshly chastises these practices of “case-handling fees” and special treatments as corruption that leads to “piecemeal, expensive, and ineffective” enforcement. Some of the interactions that result in favoritism can be categorized as “clientelism,” in which “a sustained pattern of reciprocal (and usually illicit) exchange [exists] between a state patron and a non-state client based on personal ties and conducted via informal networks.” These acts may not all be corrupt according to the law. However, “guanxi” and under-the-table payments could at least lead to severely unequal treatment before the law and the capture of enforcement agencies by a small number of rich and resourceful top foreign companies.

178 Id.
179 DIMITROV, PIRACY AND THE STATE, supra note 12, at 146–81; MERTHA, supra note 1, at 165.
180 Interview with an IP attorney (July 7, 2010); interview with an IP judge (July 6, 2010); interview with an IP attorney (June 23, 2010).
181 See id.
182 DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 12, at 244.
Some trademark agents and attorneys commented that the practices noted above were so common they should not be considered corruption.¹⁸⁴ These practices are necessary, as the reasoning goes, because enforcement agencies with limited institutional capacity often hesitate to spend large sums of tax-payer money to initiate preliminary investigations of less serious infringements.¹⁸⁵ As long as the “case-handling fees” are collected by the organization and are spent to process the case, instead of being treated as bribes by individual governmental officials, they are not viewed as “corruption,” according to law.¹⁸⁶

During my interviews, these trademark practitioners point out that the banquet and entertainment activities are common Chinese ways of networking to build relations with authorities.¹⁸⁷ Sometimes practitioners have to pay the expenses of these social activities out of their own pockets instead of out of the company’s account because they are considered “personal expenses” spent socializing with friends.¹⁸⁸ Formal rules and procedures are often meticulous, bureaucratic, and slow.¹⁸⁹ Thus, legal practitioners cut corners and seek favorable treatment through personal networking.¹⁹⁰ However, these extra-legal practices such as “case-handling fees” and entertaining with enforcement officers might contribute to unequal treatment before the law and the capture of enforcement agencies by a small number of companies.

Large companies with ample resources and especially large companies which are repeated players generally benefit more from these unequal and extra-legal practices than they are hurt by them.¹⁹¹ The tobacco industry is dominated by large SOEs, which have direct ties with the government.¹⁹² As a result, these SOEs can initiate negotiations on policy issues prior to the government’s promulgation of policies.¹⁹³ In contrast, these practices place individual infringers and small companies, especially people from the lower class, the unemployed, or members of a floating population,¹⁹⁴ at an apparent disadvantage. This pattern of winners and losers in the

¹⁸⁴ Interview with a government official in the National Copyright Administration of China (July 5, 2010).
¹⁸⁵ See id.
¹⁸⁶ Interview with an IP attorney (June 23, 2010); Interview with an IP attorney (July 6, 2010).
¹⁸⁷ See id.
¹⁸⁸ Id.
¹⁸⁹ Id.
¹⁹⁰ Id.
¹⁹¹ KENNEDY, supra note 183, at 96–127.
¹⁹² See KENNEDY, supra note 183, at 64–77.
¹⁹³ Id.
¹⁹⁴ Floating population refers primarily to migrants in China without local household registration status through the Chinese Hukou system.
process of IPR enforcement is clearly shown in the profiles of the protected victims and convicted offenders in my case samples.  

### 5.5.5 The Enforcement of Foreign Tobacco Counterfeiting

Smuggled tobacco products are illegally imported foreign cigarettes, but foreign cigarettes only occupy a small proportion of the Chinese tobacco market. To protect a strictly planned domestic tobacco industry, the Chinese government long ago banned foreign tobacco companies from doing business in China. STMB has approved no additional joint-venture tobacco factory for decades because the production capacity of domestic factories has already exceeded consumer demand. The annual volume of imported foreign tobacco approved by STMB has been consistently lower than 10% of the Chinese tobacco market, and the tariffs are high. Chinese customs cracks down heavily on smuggled tobacco.

Finally, Dimitrov points out that for the STMB or state AIC, tackling foreign counterfeit cigarettes is not as important a priority as tackling counterfeit cigarettes of domestic brands. For instance, AIC maintains a national list of well-known domestic trademarks, including those of tobacco brands, while no such list exists for foreign trademarks.

The alcohol industry is very similar to the tobacco industry in general. The SOEs monopolize the manufacture of alcohol, which yields high tax revenue for the state. The alcohol market is highly fragmented with numerous local brands; however, the central governmental has opened up alcohol distribution. Thus, distribution quotas and regional trade barriers are no longer supposed to exist. Foreign alcohol can now easily enter the Chinese market.
market, thus joining in the market competition.\footnote{Yi Dapeng (衣大鹏), Waibu Jingzheng Huanjing Riqu Jilie (外部竞争环境日趋激烈) [The Competition from Foreign Alcohol is Becoming More and More Fierce], CNWINENEWS.COM (Sept. 5, 2011, 10:14 AM), http://www.cnwinenews.com/html/201109/5/20110905101439119776.htm.} This will eventually greatly alleviate the rampant alcohol counterfeiting.

6. Theoretical Implications

These results in terms of the unique foci and roles of IPR enforcement partially sustain my initial hypotheses and manifest that the important functions of IPR enforcement in China are to prioritize state interests and public welfare and to serve political goals such as media control. In contrast, the primary goal of criminal enforcement of IPR in the United States is to protect private property rights.\footnote{Haiyan Liu, supra note 96 at 162–65, 174–78.} This instant section considers how my findings contribute to an understanding of the enforcement of IPR in developing countries and explores their theoretical implications for larger issues of legal transplantation and legal pluralism.

The unique foci and roles of criminal enforcement in China confirm that the social reform role of state law, and policies is highly limited and has taken some unexpected turns in the indigenous contexts. Larger-scale economic and cultural factors overwhelmingly determine the pervasive absence of IPR consciousness among Chinese. IPR is commonly perceived as a type of interest instead of natural and inalienable private property right. In addition, Chinese citizens and enforcement agencies often prioritize more significant or immediate interests ahead of IPR, such as local economic interests and public sentiment.\footnote{Id.} This particular case of indigenization of law also demonstrates that law can be, and often is, used as an instrumental resource of the powerful.\footnote{Haiyan Liu, supra note 4, at 141–142.}

The Chinese government relies heavily on proactive administrative rather than reactive civil enforcement.\footnote{See supra Part III. C.} These proactive enforcement efforts often turn out to be ineffective and irrelevant at the local level because they face pervasive citizen apathy and frequent local protectionism; these problems are complicated by the extensive regional variations in China.\footnote{Donald Black hypothesizes that when there is an open conflict between an official legal system...
and social norms, a reactive legal system tends not to be mobilized; this places pressure on the government to engage in proactive control strategies.\textsuperscript{211} Chinese enforcement officers regulate businesses, inspect markets, and patrol the Internet to look for piracy and counterfeit vendors, in addition to responding to reported cases.\textsuperscript{212} Proactive enforcement mechanisms can impose aggressive legal reform upon a detached population; however, “it is always difficult to ascertain whether a proactive control process is following, repressing, or leading moral change in the mass of citizens”\textsuperscript{213}

Against the backdrop of rampant piracy and counterfeiting and of slack and ineffective enforcement, only a tiny proportion of infringements successfully enter the criminal judicial system. The types and rates of cases processed in a proactive system can easily be affected by agency priorities, resource limitations, and political interference.\textsuperscript{214} Unlike a reactive system that has to respond to citizens’ claims, Chinese public agencies have virtually unlimited discretion not to pursue certain cases.\textsuperscript{215} Consequently, the actual foci and roles of IP enforcement were distorted in relation to the intentions of reformers and raised serious concerns about equal enforcement.\textsuperscript{216} The vast majority of the copyright thefts in my case sample are only misdemeanors involving some small scale of piracy. One official at the National Copyright Administration admitted that anti-piracy crackdowns were sporadic, short-lived, and superficially result-oriented; these enforcement operations did not target big cases and the roots of the problem.\textsuperscript{217}

\begin{thebibliography}{99}
\bibitem{211} Donald J. Black, \textit{The Mobilization of Law}, 2(1) \textit{J. LEGAL STUD.} 125, at 141 (1973).
\bibitem{213} Black, \textit{supra} note 211, at 146.
\bibitem{216} \textit{See supra} Part IV.
\bibitem{217} Interview with a government official in the National Copyright Administration of China, personal communication (July 5, 2010).
\end{thebibliography}
Additionally, Chinese criminal IP law is transplanted and does not mirror the social norms and legal culture of Chinese society. Since IPR regulations and the criminal enforcement of IPR are monopolized by highly specialized professionals—IP agents and attorneys, private investigators, and personnel from administrative and criminal agencies—the law has easily been taken advantage of by the economic and political elite as an instrument of interest advancement and political control through business lobbying and state intervention. This coincides with Tamanaha’s argument that when law does not mirror a society, the law will be more subject to instrumental use by select groups, especially the economic or political elite.\(^{218}\)

Moreover, the unique foci and roles of IPR enforcement indicate that political factors comprise important determinants of enforcement in China on the ground, unlike in the United States. These factors include political interference by the state to protect state tax revenue in luxury goods (especially in the tobacco and alcohol industries) and public policies to fight against counterfeits posing health and safety threats. In addition, enforcement agencies prioritize the tackling of infringed products such as agricultural resources, textbooks, and complementary material, out of other public welfare concerns.

Finally, strict media control and importation restrictions on foreign books, periodicals, audio-visual publications, and other media products highly limit citizen’s access to these publications through the legal channel; pirates take full advantage of this situation.\(^{219}\)

Political factors exert a much stronger direct impact on the Chinese criminal judicial system than on that of the United States, due to China’s lack of judicial independence and the close involvement of politics in law. China does not have a tradition of legal formalism;\(^{220}\) its judiciary emphasis on substantive justice contrasts sharply with that of the relatively independent and powerful U.S. legal system.\(^{221}\) Politics and law are much more closely intertwined in China.\(^{222}\)

\(^{218}\) Tamanaha, infra note 22, at 235–36; Haiyan Liu, supra note 96, at 162–65, 174–78.


\(^{220}\) See generally Stanley B. Lubman, Bird in a Cage: Legal Reform in China After Mao 11–39 (Stanford Univ. Press 1999) [hereinafter Lubman, Bird in a Cage].


\(^{222}\) See Lubman, Bird in a Cage, supra note 221, at 11–39; see generally Lubman, Bird in a Cage, supra note 220 (reviewing some of the major characteristics of Chinese legal institutions as they have developed since the initiation of legal reform after Mao, including the unique characteristics of Chinese legal system).
China neither emphasizes nor seriously practices notions of judicial independence, judicial review, and rule of law. The court as an institution is much weaker than local governments, administrative agencies, and other judicial agencies.

Moreover, Western laws have been borrowed by the Chinese government as instruments to fix indigenous problems. Economic laws in the United States, including IPR laws, are considered to serve the functions of resolving disputes; promoting predictability and certainty in economic and civil affairs; and protecting private rights, among others. In contrast, China does not have a rational law system in the Weberian sense, where the consistent and strict function of rules and procedures is highly respected. The transplantation of Western laws was voluntarily initiated by the Chinese government, motivated by a set of such historically determined political goals as modernization of the country, development of a socialist market economy, introduction of foreign investment and advanced technology, and maintenance of market order. As a result, the Chinese government can easily use the legal system, including IP laws and the criminal justice system, to serve its policy priorities, public welfare, or other political goals.

On the books, the criminal enforcement of IPR seems a legal action that could be influenced by legal factors and by enforcement agencies’ structures and activities. Empirical scrutiny reveals, however, that the actual foci of enforcement are largely determined by industry-level business factors, political priorities, and public welfare concerns. This confirms David Sugarman’s views on the possible consequences of legal transplantation that is not a good match: when, in practice, the legitimacy of the law is not acknowledged, decisions to observe or enforce the law by citizens and state officials can be influenced by numerous extra-legal factors.

7. Policy Recommendations

Previous analysis illustrates that current rampant IP infringements in China arise in the context of entrenched economic, cultural, political, legal, and institutional factors and interests. It is unreasonable to expect enforcement agencies with limited institutional capacity to make

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223 See Lubman, Bird in a Cage, supra note 220.
224 Id.
225 See generally Sutton, supra note 87.
227 Id. at 548–56.
228 Haiyan Liu, supra note 96.
fundamental changes to these macro-factors in a short period of time. However, Chinese law has granted IP owners comprehensive rights and high-level protection as required by the TRIPS Agreement.230 These legal changes are unlikely to be reversed. Considering various public policy, social justice, and current development points, the practical goal is to promote better IPR protection while reducing instrumental usage by the state, business capture, and the consequent abuse of taxpayers’ money.

Foremost, in order to reduce infringements, the more effective solution than proactive enforcement is to cultivate the IPR consciousness of citizens and companies and encourage the claiming and mobilization of private rights by private entities. It will not be an easy task. Only large-scale and sustained education and outreach programs for rights owners, the populace, and especially the younger generation are likely to reshape people’s conceptions of IPR; though one has to question the legitimacy of converting people radically away from their indigenous social norms. It will take at least a whole generation for new ideas and norms to be indoctrinated.

The Hong Kong government’s extensive, successful anti-infringement efforts set a useful example.231 According to a Hong Kong public survey, the percentage of Hong Kong people who claimed that they often / sometimes / seldom bought pirated or counterfeit goods has been consistently dropping—from 61.9 percent in 1999 to 29.3 percent in 2010.232 The 2010 survey also found that more than half of the Hong Kong population (52.8 percent) considered that the IPR protection measures imposed by the government improved the protection of IP rights a lot / a little.233 Most Hong Kong citizens believe that the problem lies with people’s perceptions and consciousness of IPR. As a result, many thought that the government should put more resources into IPR education and promotion in schools (46.8 percent) and mass media (44.8 percent).234

Moreover, the concentration of IP thefts in the tobacco, alcohol, and publication industries speaks strongly to how easily the Chinese government can intervene in the criminal judicial system and use various enforcement resources in creative ways to openly work for state interests and to control the media. Chinese citizens lack the power to supervise governmental activities

231 H.K. INTELL. PROP. DEP’T, supra note 95, at 87.
232 Id. at 54.
233 Id. at 87.
234 Id. at 89–90.
and to ensure the use of its enforcement powers to serve state interests only. Such abuse of public resources is unfair to taxpayers and to IPR owners whose rights deserve to be enforced.

Most problematically, current punitive enforcement in these areas does not address the roots of rampant piracy and tobacco and alcohol counterfeiting. These problems are grounded in incentives embedded in broader-level industry arrangements, state politics, and enforcement institutions; and some of these problems call for large-scale reforms or fundamental overhaul of the system. For example, if the government does not loosen up the strictly regulated quota system for tobacco distribution, counterfeiting and the illegal transfer of brands of tobacco to areas where there are shortages are bound to continue due to high profitability. Regional trade barriers and local protectionism will persist as long as local governments have strong interests (enormous tax revenue) in promoting local tobacco industries (including the unapproved manufacture or counterfeiting of cigarettes). Also, the Chinese people will have to buy pirated DVDs of most U.S. blockbusters as long as state policy prohibits their importation and distribution. Copyright enforcement will continue to rely on sporadic campaign-style crackdowns and be superficially result-oriented until local anti-piracy enforcement teams and civil IP tribunals under the prefecture level are extensively established to handle consistent, regular enforcement and to focus on habitual offenders and large-scale infringements.235

Finally, in terms of food safety issues, China should continue using administrative and criminal trademark laws to tackle food safety violations and food counterfeits. There have been numerous notorious food poisoning or unhealthy food incidences in China, and food safety has become a huge concern of the public.236 Feng New Media (fenghuang xin meiti 凤凰新媒体) conducted an online public survey on this issue. Among the 13,770 respondents, 96.5 percent expressed the concern that they no longer know what food is safe to eat; only 1.2 percent considered the food they eat as safe. When asked about the reasons for frequent encounters with poisonous or unhealthy food, 43 percent of respondents answered “inadequate or underdeveloped monitoring mechanisms,” 25 percent considered the sanctions violators receive not severe enough, and 20 percent agreed the situation was caused by the greed and immoral pursuit of

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235 Haiyan Liu, supra note 20, at 216–32.
236 See generally Wu Heng, supra note 115; see also Ghazi-Tehrani, K. Adam & Henry N. Pontell, Corporate crime and state legitimacy: a case study of the 2008 Chinese melamine milk scandal 6 (Apr. 23, 2014) (Paper presented at a public talk at the University of Macau) on file with the University of Macau library system).
profit by some merchants. Among respondents, 83 percent agreed that the state lacks a set of fully developed food safety standards and merchants take advantage of inadequate monitoring mechanisms. On the one hand, the public attributes blame and responsibility for the problem primarily to governmental enforcement agencies and argues that instead of regulating after incidents are exposed and the harm done, agencies should provide a set of effective standards and supervising mechanisms. On the other hand, the government chastises unscrupulous merchants for being excessively greedy and lacking a moral conscience.

It is understandable that law and regulations tend to lag behind innovations in criminal activities. Enforcement agencies, mainly the AQSIQ, have limited institutional capacity. Hence, it is unreasonable to expect the agency to solve every emerging violation right away. In addition, China has been experiencing high unemployment rates, unprecedented income inequality, and tremendous regional disparity in economic development. Thus, the pressure and temptation to make a decent living by whatever means possible are high for some people. However, these excuses do not justify either the persistence of prominent food safety issues that seriously concern the public or the ineffective enforcement people now experience.

The seriousness of the issue contributes to the public’s high expectations, and the government has unshakeable responsibility to protect the fundamental welfare of its citizens. Thus, I suggest that in order to cope with limited institutional capacity and bureaucratic inertia, the Chinese government should use whatever administrative and legal personnel and resources applicable, including the criminal justice system and trademark offense provisions, to target unsafe and unhealthy food, not only tobacco and alcohol counterfeits. Of course, criminal sanctions should be reserved as the last resort. The fundamental solutions lie in raising public awareness and the ethical level of the manufactures and businesses, providing adequate training and education of industry workers, establishing full-fledged food safety standards, and improving monitoring and inspection mechanisms.

Similar to China, the United States has specific laws and specialized agencies to deal with illegalities posing a threat to public health and safety in various industries, including food; however, food poisoning and contamination continue to be pervasive problems. The Food and

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Drug Administration (“FDA”) is responsible for assuring that foods (except for meat) are safe, wholesome, sanitary, and properly labeled.\(^{238}\) In addition to the Meat Inspection Acts of 1906, the 1967 Wholesome Meat Act demands that states must at least meet federal inspection standards.\(^{239}\)

Each year, contaminated food plays a role in about 5,000 American deaths and 76 million cases of food poisoning.\(^{240}\) A group of experts testified to Congress that a fundamental overhaul of the US food protection system is required.\(^{241}\) While there are 7,000 federal meat inspectors, other food processing plants are inspected only about once every 10 years.\(^{242}\) More inspectors, more thorough inspection, and enhanced sanitation requirements are desperately needed. Newspapers often have reports of recalls of food because of health concerns. Baby food is not immune from problems, either.\(^{243}\) Environmental groups found pesticide residues in 53 percent of tested baby food in 1995, which could cause serious, lifelong damage to health.\(^{244}\) Meanwhile, new problems keep emerging with the development of biology and agriculture. Increasingly numbers of Americans are becoming worried about inadequate testing of genetically modified foods and have switched to organic food; the standards and credibility of eco-labeled food, then, have become another issue for concern. Aside from the widely debated arguments about genetically modified food in general, there are issues of more serious health concerns. For example, the recombinant Bovine Growth Hormone, a genetically engineered hormone manufactured by Monsanto and injected into cows to force them to produce more milk, has sparked a controversy nationwide. This bioengineered hormone is known to cause a number of problems with the milk, including raising levels of pus, antibiotic residues, and a cancer-accelerating hormone. The FDA failed to regulate and correct the situation (Bestmeal.info 2011, Schmid 2003).\(^{245}\)

\(^{242}\) Id.
\(^{243}\) ROSTOFF, supra note 239, at 110–11.
\(^{244}\) Anita, Manning, Baby Food Has Traces of Pesticide, USA Today, July 26, 1995, at D1.
Enforcement agencies in the United States long have been vehemently criticized for colluding with big businesses, seriously lacking institutional capacity in important enforcement areas, and being especially lenient with corporate and white-collar offenders. For these reasons, the US government should also use various administrative and judicial resources to better regulate such consequential problems.

8. Conclusion

The theoretical analyses on the justifications of IP protection suggest that IP laws transplanted to China are largely marginalized due to a collision between, on the one hand, Anglo-American concepts of possessive individualism and natural rights and, on the other hand, Chinese holistic views about rights and intellectual products. Consequently, there is a general lack of IPR consciousness in Chinese society. Citizens seldom observe the law and government enforcement is sluggish. Even when acknowledged, IPR is commonly perceived as one of many interests involved; other more significant or immediate interests often prevail.

For the tiny proportion of the IP thefts that end up being processed criminally, statistical analyses reveal that an important role of the criminal enforcement of IPR in China is to protect collective interests and state tax revenues and to serve political goals instead of protecting the private individual rights. This legal transplantation and indigenization story demonstrates that law can easily be used as an instrument of the powerful political or commercial elite.

Additionally, political factors have greater impact on the targets of criminal enforcement of IPR in China than in the United States as the result of the interference of politics in law and the absence of judicial independence. These political factors include state interference on behalf of tax interests and public policies to combat counterfeits that pose health and safety threats.

Currently, the practical goals for China are to promote IPR protection while reducing business capture and instrumental usage by the state. In order to achieve these goals, the root solutions are to develop IP-related industries, to cultivate the IPR consciousness of citizens, to encourage the mobilization of private rights by private entities, and to allow citizen supervision of governmental activities.

In terms of food safety issues, China should continue using administrative and criminal trademark laws to tackle food safety violations and food counterfeits. The seriousness of the issue contributes to the public’s high expectations, and the government has unshakable
responsibility to protect the fundamental welfare of its citizens. The United States is not immune from food safety problems, while new problems keep emerging with the rapid innovation of biological and agricultural practices.