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## A Half-Century Of Scholarship On The Chinese Intellectual Property System

Peter K. Yu

*Texas A&M University School of Law*, [peter\\_yu@msn.com](mailto:peter_yu@msn.com)

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# A Half-Century Of Scholarship On The Chinese Intellectual Property System

**Keywords**

Modern Patent Law, WIPO, Trade Act of 1974, Chinese intellectual property system.

# A HALF-CENTURY OF SCHOLARSHIP ON THE CHINESE INTELLECTUAL PROPERTY SYSTEM

PETER K. YU\*

*Today, the Chinese intellectual property system has garnered considerable global policy and scholarly attention. To help develop a more sophisticated, complex, and nuanced understanding, this Article reviews the past five decades of English-language scholarship on the system. It begins by creating a taxonomy of this body of literature based on the most common method—chronology. It then turns to an alternative method of organizing and categorizing scholarly literature—disciplinary focus. The second half of the Article identifies the continuing challenges to researchers studying the Chinese intellectual property system. It further explains why it is important for intellectual property scholars to study China and for China scholars to study intellectual property developments. The Article concludes with some observations on the future directions in scholarship on the Chinese intellectual property system.*

## TABLE OF CONTENTS

Introduction.....	1046
I. A Chronology-Based Taxonomy.....	1052
A. Prehistoric Development.....	1052
B. Imitation and Transplantation.....	1058
C. Standardization and Customization.....	1064

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\* Copyright © 2018 Peter K. Yu. Professor of Law, Professor of Communication, and Director, Center for Law and Intellectual Property, *Texas A&M University*. The Author would like to thank the past and present members of the *American University Law Review*, which has published a number of his works on the Chinese intellectual property system. He is also grateful to Mark Cohen for his valuable comments and suggestions. This Article is dedicated to those who anticipate the importance of Chinese intellectual property law and policy before the subject has garnered wide policy, scholarly, and public attention and to those who courageously embrace research projects in this area even when they fall outside the mainstream.

D. Integration and Assimilation .....	1074
E. Indigenization and Transformation.....	1079
F. Closing Observations.....	1087
II. An Interdisciplinary Turn .....	1090
A. Philosophy and Culture .....	1092
B. Economics, Innovation, and Cultural Industries.....	1098
C. Politics and International Relations .....	1107
D. Summary .....	1117
III. Lessons .....	1117
A. China Scholars.....	1117
B. Intellectual Property Scholars .....	1120
IV. Challenges.....	1125
V. Future Directions.....	1133
Conclusion .....	1139

#### INTRODUCTION

The first modern Chinese intellectual property law was established in August 1982, offering protection to trademarks.<sup>1</sup> Although that law was primitive by today's standards, it launched China's journey into the world of modern intellectual property protection. Two years later, China adopted a modern patent law,<sup>2</sup> which has since been revised three times and is currently undergoing yet another revision.<sup>3</sup> In the early 1990s, China also adopted a copyright law<sup>4</sup> and a law against unfair competition.<sup>5</sup> While the former is currently being amended for the third time,<sup>6</sup> the latter recently underwent its first complete

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1. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983) (China) [hereinafter 1982 Trademark Law].

2. Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985) (China).

3. Since its adoption, the Patent Law has been amended in September 1992, August 2000, and December 2008. The fourth revision of the Patent Law is currently under consideration.

4. Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (China) [hereinafter 1990 Copyright Law].

5. Law of the People's Republic of China Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) (China).

6. Since its adoption, the Copyright Law has been amended in October 2001 and February 2010. The last amendment was not a complete overhaul, but was adopted

overhaul.<sup>7</sup>

In December 2001, China became the 143rd member of the World Trade Organization (WTO).<sup>8</sup> Such membership requires the country to, among other obligations, abide by the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>9</sup> (TRIPS Agreement), the most comprehensive intellectual property agreement ever adopted by the international community. In the past decade, China has also actively participated in the negotiation of bilateral, regional, and plurilateral trade agreements,<sup>10</sup> including most notably the Regional Comprehensive Economic Partnership (RCEP).<sup>11</sup>

Today, the Chinese intellectual property system has garnered considerable global policy and scholarly attention. Based on the statistics compiled by the World Intellectual Property Organization (WIPO), China had the world's second largest number of international applications filed through the Patent Cooperation Treaty<sup>12</sup> in 2017, behind only the United States.<sup>13</sup> Among corporate applicants, China-based Huawei Technologies and ZTE Corporation had the first and

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primarily to implement a WTO panel report. See Peter K. Yu, *The TRIPS Enforcement Dispute*, 89 NEB. L. REV. 1046, 1097–98 (2011) (discussing the amendment of Article 4 of the Chinese Copyright Law in an effort to comply with the WTO panel report).

7. Law of the People's Republic of China Against Unfair Competition (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 4, 2017, effective Jan. 1, 2018) (China).

8. Press Release, World Trade Org., WTO Ministerial Conference Approves China's Accession (Nov. 11, 2001), [https://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](https://www.wto.org/english/news_e/pres01_e/pr252_e.htm).

9. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

10. See *infra* text accompanying notes 288–95 (discussing the scholarship covering these topics).

11. For the Author's discussions of the RCEP negotiations, see generally Peter K. Yu, *TPP, RCEP, and the Crossvergence of Asian Intellectual Property Standards*, in GOVERNING SCIENCE AND TECHNOLOGY UNDER THE INTERNATIONAL ECONOMIC ORDER: REGULATORY DIVERGENCE AND CONVERGENCE IN THE AGE OF MEGAREGIONALS 277 (Peng Shin-yi et al. eds., 2018); Peter K. Yu, *TPP, RCEP and the Future of Copyright Normsetting in the Asia-Pacific*, in MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC? JUXTAPOSING HARMONISATION WITH FLEXIBILITY (Susan Corbett & Jessica Lai eds., forthcoming 2018); Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT'L L. 673 (2017).

12. Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

13. *Who Filed the Most PCT Patent Applications in 2017?*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic\\_pct\\_2017.pdf](http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2017.pdf) (last visited May 9, 2018).

second largest volume of international patent applications, respectively.<sup>14</sup> For the same year, China ranked third in the number of international trademark applications<sup>15</sup> under the Madrid Agreement Concerning the International Registration of Marks and its related protocol.<sup>16</sup>

Despite these rather impressive figures, many policymakers, commentators, and industry representatives continue to question the quality of patents issued by the State Intellectual Property Office of China (SIPO).<sup>17</sup> They also lament the country's inadequate levels of intellectual property protection, which do not compare favorably with those offered by other world leaders, such as the European Union or the United States.<sup>18</sup> Only last year, the United States Trade Representative

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14. *Id.*

15. *Who Filed the Most Madrid Trademark Applications in 2017?*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic\\_madrid\\_2017.pdf](http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2017.pdf) (last visited May 9, 2018).

16. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 (revised at Stockholm July 14, 1967); Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989, S. Treaty Doc. No. 106-41.

17. As Dan Prud'homme observed,

While patents are exploding in China and certain innovation is also on the rise, patent quality has not proportionately kept up and in fact the overall strength of China's actual innovation appears overhyped. Statistical analysis . . . not only reveals concerning trends in the quality of China's patents at present, but suggests that while patent filings in China will likely continue to notably grow in the future, patent quality may continue to lag these numbers.

DAN PRUD'HOMME, DULLING THE CUTTING-EDGE: HOW PATENT-RELATED POLICIES AND PRACTICES HAMPER INNOVATION IN CHINA 1 (2012) (emphasis omitted). *See generally* Mark Liang, *Chinese Patent Quality: Running the Numbers and Possible Remedies*, 11 J. MARSHALL REV. INTELL. PROP. L. 478 (2012) (questioning the quality of Chinese patents and offering suggestions for reform).

18. *See, e.g.*, China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy, at xiv, Inv. No. 332-519, USITC Pub. 4226 (May 2011) (Final) [hereinafter ITC Report], <https://www.usitc.gov/publications/332/pub4226.pdf> (estimating that "firms in the U.S. [intellectual property]-intensive economy that conducted business in China in 2009 reported losses of approximately \$48.2 billion in sales, royalties, or license fees due to IPR [intellectual property right] infringement in China"); INT'L INTELLECTUAL PROP. ALL., 2017 SPECIAL 301 REPORT OF COPYRIGHT PROTECTION AND ENFORCEMENT 6 (2017), <http://www.iipaweb.com/rbc/2017/2017SPEC301CHINA.PDF> ("China's legacy of piracy continues to distort the market, including by severely depressing licensing revenues, and its continued pursuit of policies that deny fair and equitable market access to U.S. content producers and distributors threatens to undermine the progress that has been achieved."); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 SPECIAL 301 REPORT 28 (2017), <https://ustr.gov/sites/default/files/301/2017%20Special%20301%20Report%20FINAL.PDF> ("Serious challenges in China continue to confront U.S. intellectual

(USTR) launched an investigation of China under section 301 of the Trade Act of 1974.<sup>19</sup> This investigation focused on Chinese laws, policies, and practices in the areas of intellectual property, innovation, and technology development.<sup>20</sup> In the past two years, the USTR also placed Alibaba's Taobao on his list of notorious online markets.<sup>21</sup>

Regardless of one's assessment of the Chinese intellectual property system, there is no denying that China has made considerable progress since the establishment of its modern intellectual property system in the early 1980s. Indeed, no other country in history has achieved as much in the intellectual property field in only three short decades.<sup>22</sup> To a large extent, China is now entering a new, and somewhat unprecedented, stage of development that warrants serious review and rethinking. Not only has the country moved away from utilizing legal transplants to modernize its intellectual property system,<sup>23</sup> it has also

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property (IP) right holders with respect to adequate and effective protection of IP, as well as fair and equitable market access for U.S. persons that rely upon IP protection.”).

19. Section 301 permits the U.S. President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests. *See* 19 U.S.C. §§ 2411–2420 (2012); *see also* Press Release, Office of the U.S. Trade Representative, USTR Announces Initiation of Section 301 Investigation of China (Aug. 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/august/ustr-announces-initiation-section> [hereinafter Section 301 Investigation Press Release].

20. Section 301 Investigation Press Release, *supra* note 19.

21. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 20–23 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>; OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2016 OUT-OF-CYCLE REVIEW OF NOTORIOUS MARKETS 12–13 (2016), <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

22. *See* CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 568 n.13 (2008) (quoting Árpád Bogsch, the former Director General of WIPO, as reportedly saying in 1994 that “China has accomplished all this at a speed unmatched in the history of intellectual property protection”); Peter K. Yu, *Building the Ladder: Three Decades of Development of the Chinese Patent System*, 5 WIPO J. 1, 15 (2013) [hereinafter Yu, *Building the Ladder*] (describing China's effort to “build its present patent system from the ground up” in only three decades as “a feat that no country has ever achieved”); Peter K. Yu, *Trade Secret Hacking, Online Data Breaches, and the China Cyberthreat*, 2015 CARDOZO L. REV. DE NOVO 130, 139 (stating that China “has built a new intellectual property system from the ground up faster than any other country in history”); Jack Valenti, Letter to the Editor, *China's Pirated Disks*, N.Y. TIMES, Apr. 3, 1998, at A26 (stating that “China has accomplished what no other country has achieved” when it seized over seven million video compact disks in response to the USTR's pressure).

23. As I noted in an earlier article,

[T]he development of the Chinese intellectual property system has changed

reached a crossroads that requires the country to devise its own intellectual property strategy.<sup>24</sup>

As I noted in a recent special issue on the first thirty-five years of the Chinese intellectual property system, that system is now entering the proverbial middle age.<sup>25</sup> It will therefore be interesting to see whether the system will start hitting its prime or facing a hard-to-predict mid-life crisis.<sup>26</sup> Should the system hit its prime, it will make China an even stronger global competitor than it is today. Such competition in turn will lead to even more intense scrutiny. By contrast, if the system is facing the proverbial mid-life crisis, its developments will become erratic and perplexing. These developments will equally attract attention. In short, regardless of its developments, China will feature prominently in future international intellectual property debates.

To help develop a more sophisticated, complex, and nuanced understanding of the Chinese intellectual property system, this Article reviews the past five decades of English-language scholarship on the system. Part I creates a taxonomy of this body of literature based on the most common method—chronology. This Part contends that the scholarship in the past half-century can be separated into five broad phases that at times have been punctuated by isolated major incidents. Each phase contains a fairly distinctive body of scholarship.

Part II turns to an alternative method of organizing and categorizing scholarship on the Chinese intellectual property system—disciplinary focus. While most scholarship in this area has focused on law and policy, this Part identifies three other broadly defined multi-disciplinary clusters

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from actively transplanting laws from abroad to introducing amendments that are specifically tailored to rapidly changing local conditions. Although China will continue to borrow from foreign models and experiences, the country's intellectual property system, to a large extent, has already aged beyond the point where it can benefit significantly from copying models from abroad. Instead, the country needs to start exploring models that would best suit its needs, interests, conditions and priorities while figuring out how to improve these models to maximize their benefits.

Peter K. Yu, *When the Chinese Intellectual Property System Hits 35*, 8 *QUEEN MARY J. INTELL. PROP.* 3, 6 (2018).

24. See STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, *OUTLINE OF THE NATIONAL INTELLECTUAL PROPERTY STRATEGY* (2008) [hereinafter *NATIONAL INTELLECTUAL PROPERTY STRATEGY*], [http://www.gov.cn/english/2008-06/21/content\\_1023471.htm](http://www.gov.cn/english/2008-06/21/content_1023471.htm) (providing the outline of a new national intellectual property strategy).

25. See Yu, *supra* note 23, at 3 (“[A]s far as the *modern* Chinese intellectual property system is concerned, it would not be too far-fetched to suggest that the system began in the early to mid-1980s and is now entering, or approaching, its middle age.”).

26. See *id.*



within which an expanding body of scholarship has emerged: (1) philosophy and culture; (2) economics, innovation, and cultural industries; and (3) politics and international relations. Described as the interdisciplinary turn in scholarship on the Chinese intellectual property system, this Part not only highlights the scholarship's growing richness, diversity, and sophistication, but also its increasing inter- and multi-disciplinarity. The latter development is particularly interesting because scholarship on the Chinese intellectual property system became more inter- and multi-disciplinary just when intellectual property scholarship in other areas moved in the same direction.

Part III identifies the continuing challenges to researchers studying the Chinese intellectual property system. Taking note of the considerably improved environment for undertaking research in this area, brought about in part by the transparency requirements of the TRIPS Agreement,<sup>27</sup> this Part contends that the challenges confronting researchers on the Chinese intellectual property system have greatly reduced. Nevertheless, many challenges still remain and have continued to hinder researchers in this area.

Part IV explores why it is imperative to study the Chinese intellectual property system and its rapidly changing developments. This Part underscores both the need for intellectual property scholars to study China and for China scholars to study intellectual property developments. This Part shows that scholarship on the Chinese intellectual property system should be seen as facilitating a two-way dialogue. This dialogue not only allows China scholars to explore how the country addresses an issue that is of great importance to the outside world, but also enables intellectual property scholars to examine a system that has become increasingly influential at the global level.<sup>28</sup>

Part V concludes with some observations on the future directions in scholarship on the Chinese intellectual property system. While these observations build on nearly two decades of my research and are undeniably personal, they draw on developments that have already begun in the area of Chinese legal scholarship or intellectual property scholarship in general. By exploring these future directions, this

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27. See TRIPS Agreement, *supra* note 9, art. 63 (detailing the transparency obligations).

28. See Peter K. Yu, *Editorial*, 8 *QUEEN MARY J. INTELL. PROP.* 1, 2 (2018) (“[D]evelop[ing] a more holistic, sophisticated and nuanced understanding of the past three decades of intellectual property developments in China . . . is particularly important considering that not only have global intellectual property developments influenced China, but Chinese intellectual property developments have also begun to influence the globe.”).

Article aims to convey the impression that scholarship on the Chinese intellectual property system will only become richer, more diverse, and more sophisticated in the future. Such richness, diversity, and sophistication are certainly not what many early scholars on the Chinese intellectual property system expected when they started studying this system a half-century ago.

## I. A CHRONOLOGY-BASED TAXONOMY

Chronology provides the easiest method to create a taxonomy of scholarship on the Chinese intellectual property system. Thus far, fairly distinctive bodies of scholarship have emerged in five disparate phases: (1) prehistoric development; (2) imitation and transplantation; (3) standardization and customization; (4) integration and assimilation; and (5) indigenization and transformation. This Part discusses each phase in turn and shows how these phases are interrelated, episodic, and cyclical. Section I.F offers four closing observations linking the five phases together.

### A. *Prehistoric Development*

The first phase concerns those intellectual property developments that occurred before the establishment of the modern Chinese intellectual property system. While this phase is described as “prehistoric development”—due largely to the Article’s specific focus—whether this phase is categorized as prehistoric or simply historical will largely depend on perspective and focus. The further back in history researchers trace the Chinese intellectual property system to indigenous notions,<sup>29</sup> the

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29. As Ken Shao observed, it has been highly difficult to locate information about early indigenous intellectual property notions in China:

[I]nformation about China’s intellectual property is scarce and cannot be found in a single discipline. For instance, to perceive the emergence of Chinese copyright in the 11th and 12th centuries, one needs to observe the expansion of the commercial publishing industry and, in that, discover judicial recognition of copyright claims. For trademark, the focus should be on analysing the scale and nature of Chinese commodity economy. This has already been extensively examined by economic historians, and its inherent link with the unique distinctive nature of trade marks in the context of the commodity economy has been observed. Although on the one hand there is no evidence to suggest that China had ever adopted an indigenous patent practice, on the other hand property rights or know-how for inventions and technologies had existed for thousands of years. To understand this, one should liberate the definition of intellectual property from the limitations of modern intellectual property laws. Accordingly, only a highly interdisciplinary approach can knit together the rich variety of sources of information to form

less they would prefer the term “prehistoric development.”

As with any historical research involving prehistory, determining when prehistory ends and history begins is not that difficult. Given this Article’s focus on the modern Chinese intellectual property system, the prehistoric phase understandably ended with the system’s establishment. Notwithstanding this logical endpoint, it remains unclear when prehistory actually began. Indeed, because this phase could go back as far as the researcher’s interests and attention allow, this Section merely offers suggestions on some possible starting points.

Although Western commentators widely believe that indigenous notions of intellectual property rights did not exist in China<sup>30</sup> before foreign powers introduced these rights through gunboat diplomacy, trade pressures, legal assistance, or other forceful means,<sup>31</sup> Chinese scholars have questioned those beliefs, which they find culturally

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more comprehensive arguments.

Ken Shao, *History is a Key Decoder: Why China Aims at Re-Emerging as a Global Leader of Innovation*, 29 *LAW IN CONTEXT: A SOCIO-LEGAL J.* 117, 123 (2013) (footnote omitted).

30. See, e.g., R. Michael Gadbaw, *Republic of Korea*, in *INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 272, 275 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (“This cultural gap is typical of many East Asian countries, where the historical attitude toward intellectual property is noticeably different from that in the West.”); John R. Allison & Lin Lianlian, *Evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery*, 20 *U. PA. J. INT’L ECON. L.* 735, 737 (1999) (“In . . . tracing of Chinese attitudes toward invention and discovery, one can see that a culture deeply embedded with traditions completely antithetical to the patenting of inventions and to the granting of property rights in other forms of intellectual products has recently moved toward recognition of the necessity of a modern patent system.”); William Hennessey, *Deconstructing Shanzhai—China’s Copycat Counterculture: Catch Me if You Can*, 34 *CAMPBELL L. REV.* 609, 639–61 (2012) (discussing the Chinese culture’s focus on masters, rather than creators); Patrick H. Hu, “Mickey Mouse” in China: *Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 *B.U. INT’L L.J.* 81, 104 (1996) (“[P]unishing copyright violation contradicts traditional Chinese moral standards.”); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 *BUFF. L. REV.* 1, 11 (1998) (“The Soviet model reflected traditional Chinese attitudes toward intellectual property and expounded the socialist belief that by inventing or creating, individuals were engaging in social activities based on knowledge that belonged to all members of society.”); Wang Liwei, *The Chinese Traditions Inimical to the Patent Law*, 14 *NW. J. INT’L L. & BUS.* 15, 36–56 (1993) (discussing those Chinese traditions that were inimical to a new patent law and how Mao Zedong and other Chinese leaders utilized these traditions).

31. See PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 3 (2d ed. 2003) (noting that substantive intellectual property protection arrived “with such inventions and novel ideas as the gunboat, opium, ‘most favoured nation’ trading status and extraterritoriality”).

stereotypical at times.<sup>32</sup> The most informative source documenting the existence of indigenous notions of intellectual property rights in China is a Chinese-language anthology put together by Zhou Lin and Li Mingshan.<sup>33</sup> Covering the Song, Yuan, Ming, and Qing dynasties and the Republican and Communist eras, this highly valuable volume collected historical documents that showed indigenous copyright notions in China.<sup>34</sup>

Thus far, most scholarship on the Chinese intellectual property system traced the system's origin to the late Qing period. For example, some commentators emphasized the laws adopted by the Qing government, such as the Great Qing Copyright Law of 1910 (*Da Qing Zhuzuoquan Lu*).<sup>35</sup> Meanwhile, others traced the system earlier to new measures introduced during the short-lived Hundred-Day Reform (1898)<sup>36</sup> or the somewhat territorially limited Taiping Rebellion

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32. For criticisms of culture-based claims regarding the Chinese intellectual property system, see generally Ken Shao, *Chinese Culture and Intellectual Property: Let's Realise We Have Been Misguided*, 4 WIPO J. 103 (2012) [hereinafter Shao, *Chinese Culture*]; Ken Shao, *The Global Debates on Intellectual Property: What if China Is Not a Born Pirate?*, 2010 INTELL. PROP. Q. 341 [hereinafter Shao, *Global Debate*]; Shi Wei, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?*, 32 N.C.J. INT'L L. & COM. REG. 1 (2006).

33. HISTORICAL DOCUMENTS OF CHINA'S COPYRIGHT LAW (Zhou Lin & Li Mingshan eds., 1999) (in Chinese) [hereinafter HISTORICAL DOCUMENTS]; see also Feng Xiaoqing et al., *Awakening of a Sleeping Dragon: The Evolution of Copyright Conception in China*, 51 J. COPYRIGHT SOC'Y U.S.A. 615 (2004) (discussing the historical evolution of the copyright concept in China); Ken Shao, *The Promotion of Learning in Chinese History: Discovering the Lost Soul of Modern Copyright*, 24 COLUM. J. ASIAN L. 63 (2010) (examining the historical environment in which copyright was practiced in traditional China).

34. HISTORICAL DOCUMENTS, *supra* note 33.

35. *Da Qing Zhuzuoquan Lu* [Great Qing Copyright Law] (1910) (China), reprinted in HISTORICAL DOCUMENTS, *supra* note 33, at 89–94 (in Chinese). Reenacted by the Republican government in the form of a provisional act, the Great Qing Copyright Law is translated in NORWOOD F. ALLMAN, HANDBOOK ON THE PROTECTION OF TRADE-MARKS, PATENTS, COPYRIGHTS, AND TRADE-NAMES IN CHINA 112–21 (1924). See generally Li Yufeng & Catherine W. Ng, *Understanding the Great Qing Copyright Law of 1910*, 56 J. COPYRIGHT SOC'Y U.S.A. 767 (2008) (discussing the Law). The term “zhuzuoquan” is better translated as “author's right,” which brings with it the European tradition. Nevertheless, this Article translates the term as “copyright” due to its preferred usage in official English translations.

36. See ZHENG CHENGLI WITH MICHAEL D. PENDLETON, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 52 (1987) (noting that, in 1898, a late Qing emperor attempted to introduce the Regulations to Promote Industrial Technology during the famous “Hundred-Day” Reform). The “Hundred-Day” Reform of 1898, which lasted for only 103 days, was a short-lived reform movement that sought radical change in the political and social systems during the reign of Emperor Guangxu of the

(1850–1864).<sup>37</sup> Those researchers who were willing to go further in time even caught glimpses of intellectual property protection in those rights that Emperor Wu of the Han dynasty (*Han Wudi*) granted to individual merchants to “smelt iron, distill salt, and mint coin” more than two millennia ago.<sup>38</sup>

That researchers have located primitive forms of intellectual property rights in early Chinese history is unsurprising. After all, commentators have traced the Western intellectual property system to the Venetian Republic in the fifteenth century<sup>39</sup> or even earlier.<sup>40</sup> They have also considered the Statute of Monopolies of 1624 the origin of the Anglo-American patent system.<sup>41</sup> Moreover, many pioneering

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Qing dynasty. See generally IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 373–76 (6th ed. 2000) (discussing the reform movement).

37. As one commentator observed,

During the period of the Taiping Rebellion, the leader Hong Renxuan put forward his concept of a patent system, noting that “if someone can design a kind of train as we see in foreign countries which can run 8,000 kilometers in a day and a night, he should be granted a patent and be given the power to allow others to imitate.” He also maintained that “people [should be] encouraged to improve craftsmanship and sell their technical inventions or innovation . . . [and] . . . those who counterfeit will be punished.”

Flora Wang, *An Overview of the Development of the Chinese Patent System*, in *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE* 3, 3 (Mark A. Cohen et al. eds., 1999).

38. *Id.*

39. See STEPHEN P. LADAS, *PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION* 6 (1975) (stating that the Venetian Republic did not formalize such protection until the adoption of the first patent law on March 19, 1474).

40. As Ted Sichelman and Sean O’Connor observed,

[T]here is very strong evidence to rebut [the claim] that the first exclusionary patent rights for what we would today label “technological” inventions appeared in a directive limited to silk inventions passed in the late fourteenth or early fifteenth century. Rather, the first evidence of such exclusionary rights appears in 1416, when Ser Franciscus Petri, from Rhodes, was granted a patent by the Grand Council of Venice for his device for fulling wool (that is, turning it into felt).

Ted Sichelman & Sean O’Connor, *Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic*, 49 *SAN DIEGO L. REV.* 1267, 1276 (2012) (footnote omitted); see also Christopher May, *The Venetian Moment: New Technologies, Legal Innovation and the Institutional Origins of Intellectual Property*, 20 *PROMETHEUS* 159, 160 (2002) (stating that intellectual property protection “existed in some form in Venetian law as a customary practice” before the law’s codification in the late fifteenth century).

41. Statute of Monopolies of 1623, 21 Jac. 1, c. 3 (Eng.), <http://www.legislation.gov.uk/aep/Ja1/21/3>; see also STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 85TH CONG., *AN ECONOMIC REVIEW OF THE PATENT SYSTEM* 3 (Comm. Print 1958) (by Fritz Machlup) (“The Statute of Monopolies is the basis of the present British patent law, and became the model for the laws elsewhere.”); Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and*

inventions have emerged throughout the nearly five millennia of Chinese civilization,<sup>42</sup> such as the compass, gunpowder, papermaking, and woodblock printing.<sup>43</sup> Such inventions have inevitably raised questions about the incentive structure or arrangement that led to their creation in the first place. It is also worth noting that, even though the term “intellectual property” was not translated into Chinese until the 1970s,<sup>44</sup> the Chinese term “zhishi chanquan” can be traced back to “a very ancient historical record, ‘Guo-Yu,’ which was written some 3,000 years ago in the late Zhou Dynasty.”<sup>45</sup>

In short, a growing volume of literature has revealed a much longer and richer history of intellectual property developments in China than many Western scholars have suggested in the 1980s and 1990s. Notwithstanding this body of scholarship, this Part focuses on the research published in only the past fifty years—that is, a period starting only a decade before the establishment of the modern Chinese intellectual property system. Such a durational focus has three justifications. First, it will make the scholarship review conducted in this Article more manageable. Second, reaching back to a decade before the establishment of the modern Chinese intellectual property system will enable us to capture most, if not all, of the scholarship on the preparatory work that was undertaken to establish this system. Finally, having a more limited focus is highly practical because English-language scholarship on the Chinese intellectual property system was

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*Why We Should Care*, 38 LOY. L.A. L. REV. 177, 191 (2004) (“The origin of Anglo-American patent law is usually traced to the 1624 Statute of Monopolies and a handful of monumental common law decisions from the early seventeenth century.” (footnote omitted)); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1272–73 (2001) (“[T]he Statute of Monopolies represents the first definitive step toward the shift away from royal prerogative and privileges to common law and legal rights.”).

42. See ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA I (4th ed. 2011) (noting “nearly five thousand years of a continuous history of civilisation” in China).

43. For discussions of scientific developments in China, see generally BENJAMIN A. ELMAN, ON THEIR OWN TERMS: SCIENCE IN CHINA, 1550–1900 (2005); JOSEPH NEEDHAM, SCIENCE AND CIVILISATION IN CHINA (1956–2004); ROBERT TEMPLE, THE GENIUS OF CHINA: 3,000 YEARS OF SCIENCE, DISCOVERY & INVENTION (2007).

44. See ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 78 (2005) (quoting a September 1995 article in the *People’s Daily* that states that the China Council for the Promotion of International Trade “had rendered [the term ‘intellectual property’], for the first time, into the Chinese equivalent, *zhishi chanquan*” when China sent a delegation to WIPO in November 1973).

45. ZHENG & PENDLETON, *supra* note 36, at 51.

very rare before the mid-1970s.<sup>46</sup>

Within the first decade or so of the past half-century, very little English-language scholarship can be found. Hsia Tao-tai and Kathryn Haun provided a pioneering analysis of the attitudes within China toward industrial, literary, and artistic property.<sup>47</sup> It is notable that their study was published in 1973, the year when China sent its first delegation to WIPO.<sup>48</sup> Five years later, Barden Gale published an article examining the concept of “intellectual property” in China.<sup>49</sup> That article analyzed the historical policies that had provided incentives for inventive and innovative activities.<sup>50</sup>

On occasion, researchers focused on a specific branch of intellectual property rights, as opposed to the entire field. In the trademark area, Heinz Dawid examined the 1950 Provisional Regulations Concerning the Registration of Trademarks and the 1963 Regulations Concerning the Control of Trademarks.<sup>51</sup> Although the latter was abolished during the Cultural Revolution (1966–1976), it was subsequently restored and remained in force until the adoption of the 1982 Trademark Law.<sup>52</sup> John Butler also offered a treatise-like analysis of the 1963 Regulations.<sup>53</sup> Such article-by-article analysis, while rare in this phase, had become more popular in later phases. Indeed, books and treatises on Chinese intellectual property law began to appear after this phase.<sup>54</sup>

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46. Rare exceptions are the works of the former U.S. Consul Norwood Allman. See, e.g., ALLMAN, *supra* note 35; N.F. Allman, *China Trade-Mark Situation*, 40 TRADEMARK REP. 303 (1950); N.F. Allman, *Chinese Equivalents of Word-Marks*, 37 TRADEMARK REP. 36 (1947); N.F. Allman, *Chinese Regulations for Control of Patent Medicines*, 37 TRADEMARK REP. 131 (1947); N.F. Allman, *The Chinese Trademark Law and Extraterritoriality*, 3 CHINA L. REV. 78 (1926).

47. Hsia Tao-tai & Kathryn A. Haun, *Laws of the People's Republic of China on Industrial and Intellectual Property*, 38 LAW & CONTEMP. PROBS. 274 (1973).

48. MERTHA, *supra* note 44, at 78.

49. Barden N. Gale, *The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions*, 74 CHINA Q. 334 (1978).

50. *Id.*

51. Heinz Dawid, *Trademark Protection in the People's Republic of China*, 9 DENV. J. INT'L L. & POL'Y 217 (1980).

52. See Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L.J. 259, 273 (1986) (“After the Cultural Revolution, the 1963 Trademark Regulations remained the primary Chinese trademark legislation.”).

53. John I. Butler, *Trademarks in the People's Republic of China*, 65 TRADEMARK REP. 89 (1975).

54. For treatise-like discussions of Chinese intellectual property law, see generally LAURENCE J. BRAHM, *INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER IN CHINA* (2d ed. 1994); CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS (Rohan Kariyawasam ed., 2011); FENG, *supra* note 31; REBECCA ORDISH & ALAN ADCOCK, *CHINA INTELLECTUAL PROPERTY—CHALLENGES AND SOLUTIONS: AN ESSENTIAL BUSINESS GUIDE* (2008); *PATENT LAW IN GREATER CHINA* (Stefan Luginbühl & Peter Ganea eds., 2014);

In the copyright area, Dietrich Loeber explored how authors and their publications were protected in China in the 1970s, drawing on interviews and field research conducted shortly before the end of the Cultural Revolution.<sup>55</sup> His research was illuminating because China would not adopt a modern copyright law until more than a decade later.<sup>56</sup> In a memorial lecture sponsored by the Copyright Society of the U.S.A., Jon Baumgarten, a former general counsel of the U.S. Copyright Office, also shared observations on the changing U.S.-China copyright relations<sup>57</sup> following the signing of the Agreement on Trade Relations Between the United States of America and the People's Republic of China<sup>58</sup> ("1979 Agreement") in July 1979.

### B. *Imitation and Transplantation*

The second phase began with the establishment of the modern Chinese intellectual property system. Like its predecessor, this phase included several possible starting points. The phase could begin with the Third Plenary Session of the Eleventh Central Committee in December 1978,<sup>59</sup> in which Deng Xiaoping and his fellow leaders made a decisive push for the "Four Modernizations" to develop China's world-

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PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA (Mary L. Riley ed., 1997); CATHERINE SUN, CHINA INTELLECTUAL PROPERTY FOR FOREIGN BUSINESS (2004); TAN LOKE KHOON, PIRATES IN THE MIDDLE KINGDOM: THE NEW FRONTIER (3d ed. 2017); XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY (2002); XUE HONG & ZHENG CHENGSI, SOFTWARE PROTECTION IN CHINA: A COMPLETE GUIDE (1999) [hereinafter XUE & ZHENG, SOFTWARE PROTECTION]; ZHENG CHENGSI, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY (1997); ZHENG & PENDLETON, *supra* note 36.

55. Dietrich A. Loeber, *Copyright Law and Publishing in the People's Republic of China*, 24 UCLA L. REV. 907 (1977).

56. 1990 Copyright Law, *supra* note 4.

57. Jon A. Baumgarten, *Copyright Relations Between the United States and the People's Republic of China—The Seventeenth Annual Jean Geiringer Memorial Lecture*, 27 BULL. COPYRIGHT SOC'Y U.S.A. 419 (1980).

58. Agreement on Trade Relations Between the United States of America and the People's Republic of China, China-U.S., July 7, 1979, 31 U.S.T. 4652 [hereinafter 1979 Agreement].

59. See STAFF OF THE SPECIAL SUBCOMM. ON U.S. TRADE WITH CHINA OF THE H. COMM. ON ENERGY AND COMMERCE, 98TH CONGRESS, CHINA'S NEW PATENT LAW AND OTHER RECENT LEGAL DEVELOPMENTS 5–6 (Comm. Print 1984) [hereinafter 1984 H. COMM. PRINT] (by the Far Eastern Law Division of the Library of Congress) (discussing the restoration of the Chinese legal system at the Third Plenary Session); see also CHEN, *supra* note 42, at 42 ("[T]he return to the idea of a socialist legal system (and the related idea of socialist democracy) was the result of a conscious policy choice of the post-Mao leadership.").



class strengths in agriculture, industry, science and technology, and national defense by 2000.<sup>60</sup> The leaders also normalized the country's diplomatic and commercial relationships with the United States, Japan, and other Western developed countries.<sup>61</sup> Without these policy reversals, it is quite certain that China would not have developed the modern intellectual property system so quickly after the end of the Cultural Revolution.<sup>62</sup> Indeed, sufficient evidence existed to document the gradual expansion of domestic governmental support for the establishment of this new system. As Andrew Mertha recounted chronologically,

In 1978, . . . the State Council charged the State Science and Technology Commission (SSTC) with developing a patent system for China. In March 1979, the drafting group of the Chinese Patent Law was established. [In June 1979, the Chinese Patent Office, or State Patent Bureau, was established, assuming the responsibilities of the drafting group.] On October 17 of the same year, the formal request for the establishment of a patent system in China was submitted to the State Council by the SSTC. On January 14, 1980, the State Council approved the request, and on March 3, China became a member of [WIPO].<sup>63</sup>

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60. See Hsü, *supra* note 36, at 803–14 (providing a comprehensive overview of the Four Modernizations).

61. See *id.* at 858–69 (discussing the Open-Door Policy that China adopted in December 1978, which provided “a complete reversal of the Maoist policy of seclusion that had been in force . . . between 1958 and 1978”).

62. The development of the intellectual property system went hand in hand with the development of these new policies. As Ren Jianxin, the Director of the Legal Affairs Department of the China Council for the Promotion of International Trade, declared in September 1980, “[The Chinese] government is getting ready to institute a patent system in order to protect and encourage invention, to expand international exchange of technology, and to import advanced technology for acceleration of the four modernizations.” Ren Jianxin, *Some Legal Aspects of Our Import of Technology and Utilization of Foreign Investment*, 1 CHINA L. REP. 85, 89 (1980). Similarly, in an interview, William Alford observed,

The fledgling intellectual property law movement owes as much to internal considerations as external ones. The Chinese government has been endeavoring to develop intellectual property law in part to encourage internal economic development. It believes that technological development was hindered because scientists were reluctant to share data and lacked adequate incentives to make scientific advances. Proponents of the development of intellectual property law contend that it will both reward individual initiative and enhance collegiality among scientists. These two goals may seem slightly contradictory, but in the leadership's mind they are not.

*Chinese Living Law: An Interview with Professor William Alford*, 7 ARIZ. J. INT'L & COMP. L. 135, 137 (1989).

63. MERTHA, *supra* note 44, at 81–82.

The second possible starting point is the signing of the 1979 Agreement, which entered into force on February 1, 1980.<sup>64</sup> This agreement is significant in the intellectual property context because it called for the reciprocal protection of copyrights, patents, and trademarks owned by the nationals of the other party.<sup>65</sup> The agreement is equally noteworthy in the international context because it created in China “an international legal obligation for intellectual property rights protection before [the country] had established a domestic intellectual property protection system.”<sup>66</sup>

The third possible starting point is the beginning of China’s WIPO membership. China joined this U.N. specialized agency on March 3, 1980 and became a member three months later.<sup>67</sup> Although the country was unable to join the agency before reestablishing international ties, its involvement in the organization actually began much earlier. As Professor Mertha recounted,

As early as November 1973, after the Chinese delegation to [WIPO] returned to Beijing, delegation leader Ren Jiaxin, who would later become Chief Justice of China’s Supreme Court, proposed the establishment of a patent system in China. According to the *People’s Daily*,

This was the first time that New China has sent representatives to an international conference related to intellectual property rights. At that time, many people in China found the term “Intellectual Property” rather unfamiliar. The [China Council for the Promotion of International Trade (CCPIT)] had rendered it, for the first time, into the Chinese equivalent, *zhishi chanquan*.<sup>68</sup>

The last possible starting point is the adoption of the 1982

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64. 1979 Agreement, *supra* note 58.

65. *See id.* art. VI (3) (“Both Contracting Parties agree that each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.”); *id.* art. VI (5) (creating the same obligation in the copyright area).

66. XUE & ZHENG, SOFTWARE PROTECTION, *supra* note 54, at 5.

67. *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=1](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=1) (last visited May 9, 2018).

68. MERTHA, *supra* note 44, at 78; *see also* William O. Hennessey, *Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257, 1283 (2009) (discussing Ren’s 1973 visit to WIPO). Although the CCPIT is “nominally a nongovernmental organization, [it] is an essential arm of [China’s] foreign trade apparatus.” Stanley B. Lubman, *Trade Between the United States and the People’s Republic of China: Practice, Policy, and Law*, 8 LAW & POL’Y INT’L BUS. 1, 17 (1976).

Trademark Law.<sup>69</sup> Using this historic milestone as the beginning is quite popular among legal researchers. After all, the Trademark Law was the first statute in the modern Chinese intellectual property system. From a research standpoint, the early adoption of a new trademark law in China is noteworthy because such adoption showed that trademark law reform did not face as much domestic resistance as reform in the copyright or patent area. As Peter Feng explained, trademarks “were a state planning tool before they became a marketing device and private property.”<sup>70</sup> As such, they “survived China’s socialist transformation of the 1950s, and registration continued even during the Cultural Revolution.”<sup>71</sup>

In view of the existence of these four starting points, it has been rather difficult to determine the beginning of the second phase. It has also been quite challenging to determine what scholarship would fall within this particular phase. Typically, scholarship on new laws and policies emerge when they are proposed or considered, not after they have been adopted. Researchers therefore often have to reach back to scholarship published before the chosen starting point.

For analytical convenience and effectiveness, this Section focuses on scholarship that has been published since China’s reopening to the outside world in the late 1970s. The use of literature from that period can be easily justified by the researchers’ tendency to use the beginning of China’s WIPO membership or the 1982 Trademark Law as the starting point of this second phase. The choice of this earlier starting point also makes great sense considering that the country’s reopening marked the critical juncture at which foreign researchers became curious about the Chinese legal system, resulting in a growing volume of English-language scholarship on this system.<sup>72</sup>

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69. 1982 Trademark Law, *supra* note 1.

70. FENG, *supra* note 31, at 344.

71. *Id.* at 293; *see also* MERTHA, *supra* note 44, at 197 (noting that “trademarks existed throughout [China], even during the Cultural Revolution, although . . . the constriction in the universe of ‘politically correct’ brand names— . . . often obscured the identity of the actual manufacturer—and in the process made trademarks largely meaningless”); Sidel, *supra* note 52, at 272 (“Marks such as ‘Red Flag,’ ‘East Wind’ and ‘Worker-Peasant-Soldier’ appeared on thousands of similar and dissimilar goods during the 1966–1976 period and many lasted into the late 1970s and early 1980s.”).

72. *See, e.g.*, VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES (1977) (providing an accessible account of the Chinese legal system and dispelling the common American misconceptions of that system); Jerome Alan Cohen, *China’s Changing Constitution*, 1978 CHINA Q. 794 (1978) (discussing the 1978 Constitution and its ramifications for legal development in

Similar to publications in the previous phase, scholarship in this second phase tended to be rather straightforward; it focused mostly on newly emerging laws and policies. For instance, the adoption of the 1982 Trademark Law and the 1984 Patent Law sparked a significant volume of literature.<sup>73</sup> A notable example is a special issue collecting articles on the new Patent Law that Maria Lin guest-edited for the *AIPLA Quarterly Journal*.<sup>74</sup> In addition to scholarship in the trademark and patent areas, one could find scholarship exploring the upcoming Copyright Law,<sup>75</sup> even though that body of scholarship remained scant

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China); William C. Jones, *An Approach to Chinese Law*, 4 REV. SOCIALIST L. 3 (1978) (advancing an approach to understanding the Chinese legal system through trade laws); Lubman, *supra* note 68 (surveying the problems concerning laws and policies involved in U.S.-China trade).

73. For discussions of the 1982 Trademark Law, the 1984 Patent Law, or both, see generally Jesse T.H. Chang & Charles J. Conroy, *Trade-mark Law in the People's Republic of China*, in FOREIGN TRADE, INVESTMENT, AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 427 (Michael J. Moser ed., 2d ed. 1987) [hereinafter FOREIGN TRADE, INVESTMENT, AND THE LAW]; Michael J. Moser & David Y.W. Ho, *The Registration and Protection of Patents in China*, in FOREIGN TRADE, INVESTMENT, AND THE LAW, *supra*, at 453; William E. Beaumont, *The New Patent Law of the People's Republic of China (PRC): Evidence of a Second Chinese "Renaissance"?*, 27 IDEA 39 (1986); Charles L. Gholz, *China's New Trademark Law*, 2 CHINA L. REP. 103 (1982); Kim Seong-Ki, *Patent Law of China*, 18 KOREAN J. COMP. L. 90 (1990); Maria C.H. Lin, *The Patent Law of the People's Republic of China*, 13 AIPLA Q.J. 107 (1985); T. Traian Moga, *China's Patent Law Considered and Compared*, 64 U. DET. L. REV. 335 (1987); Jeanette L. Pinard & Lian Chun-cheng, *Patent Protection Under Chinese Law*, 1 J. CHINESE L. 69 (1987); P.D. Woods, *Trademark and Patent Law in the People's Republic of China*, 13 N.C. J. INT'L L. & COM. REG. 473 (1988); L. Mark Wu-Ohlson, *A Commentary on China's New Patent and Trademark Laws*, 6 NW. J. INT'L L. & BUS. 86 (1984); Zheng Chengsi, *China: The Alternatives: Patent, Utility Model or Design Registration*, 9 EUR. INTELL. PROP. REV. 103 (1987); David Ben Kay, Comment, *The Patent Law of the People's Republic of China in Perspective*, 33 UCLA L. REV. 331 (1985); Ross J. Oehler, Note, *Patent Law in the People's Republic of China: A Primer*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 451 (1987).

74. Symposium, 13 AIPLA Q.J. 98-164 (1985).

75. See generally Guo Shoukang, *Some Opinions on Copyright in the People's Republic of China*, 1 J. CHINESE L. 63 (1987) (offering personal observations on the forthcoming Chinese Copyright Law and its related questions and challenges); Shen Yuanyuan, *China's Protection of Foreign Books, Video Tapes and Sound Recordings*, 12 LOY. L.A. INT'L & COMP. L.J. 78 (1989) (discussing the protection of foreign books, videotapes, and sound recordings in China before the introduction of the 1990 Copyright Law); Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949-1984: Prelude to the Chinese Copyright Law*, 9 COLUM.-VLA J. ART & L. 477 (1985) (providing a historical survey on the regulation of authors' rights in China and observations on the possible content of the forthcoming Copyright Law); Joseph T. Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1 (1988) (discussing the draft Chinese Copyright Law); Zheng Chengsi, *The Future Chinese Copyright*

until the law's late adoption in the early 1990s.<sup>76</sup> Some commentators also explored the protection of computer software, which at that time could be offered through either copyright law or a sui generis regime.<sup>77</sup>

Apart from the three main branches of intellectual property law, some commentators broadened the research focus to cover law relating to foreign investment, technology licensing and transfer, and dispute settlement<sup>78</sup>—topics that were of great practical importance to attorneys who had clients doing business in China.<sup>79</sup> Because little English-language scholarship on the Chinese intellectual property system appeared before this phase, most scholarship in the second phase offered a historical overview of developments in the relevant areas.<sup>80</sup>

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*System and Its Context*, 15 INT'L REV. INDUS. PROP. & COPYRIGHT L. 141 (1984) (offering a pioneering discussion of the future of copyright protection in China).

76. 1990 Copyright Law, *supra* note 4.

77. For early discussions of efforts to protect computer software in China, see generally Elisa Cirillo, Note, *The Legal Protection of Computer Software in the People's Republic of China*, 7 CARDOZO ARTS & ENT. L.J. 387 (1989); William P. Fuller V, Note, *The Protection of Computer Software in the People's Republic of China*, 9 B.C. THIRD WORLD L.J. 57 (1989). China eventually chose to protect computer software by establishing a sui generis regime. See Regulations on the Protection of Computer Software of the People's Republic of China (promulgated by the State Council, June 4, 1991, effective Oct. 1, 1991) (China) (providing sui generis protection for computer software). For early discussions of protection of computer software in China, see generally XUE & ZHENG, SOFTWARE PROTECTION, *supra* note 54; Du Juan & K.H. Pun, *Practical Aspects of Software Copyright in China*, 22 EUR. INTELL. PROP. REV. 520 (2000); K.H. Pun, *A Critique of Copyright Protection for Computer Software in the People's Republic of China*, 16 EUR. INTELL. PROP. REV. 227 (1994); Zheng Chengsi, *The Protection of Computer Programs Under the Chinese Copyright Law*, 17 EUR. INTELL. PROP. REV. 344 (1995).

78. See FOREIGN TRADE, INVESTMENT, AND THE LAW, *supra* note 73 (providing a collection of articles covering trade, investment, and intellectual property law in China); Chwang Tek Ling & Richard L. Thurston, *Technology Takes Command: The Policy of the People's Republic of China with Respect to Technology Transfer and Protection of Intellectual Property*, 21 INT'L LAW. 129, 134–42, 164–67 (1987) (discussing laws relating to foreign investment, technology transfer, and dispute settlement); T. Traian Moga, *Making Foreign Things Serve China: A Western Licensor's Guide to the Chinese Market*, 28 ST. LOUIS U. L.J. 771 (1984) (providing a foreigner's guide to licensing in China); David E. Pierce, *The Legal Regime for Technology Imports in the People's Republic of China*, 10 EUR. INTELL. PROP. REV. 206 (1988); Mitchell A. Silk, *Recent Efforts in China's Drive to Promote Investment Through the Protection of Intellectual Property Rights: The 1988 Trademark Rules and the 1988 Technology Import Contract Rules*, 15 SYR. J. INT'L L. & COM. 215, 225–29 (1989) (covering the 1988 Technology Import Contract Rules).

79. Such a broadened focus continued into the next phase of standardization and customization. See generally DANIEL C.K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA (2002) (providing a primer on intellectual property laws and other laws regarding foreign investment enterprises).

80. See Beaumont, *supra* note 73, at 40–48 (1986) (providing a brief history of science

Complementing this body of scholarship was a helpful report the Far Eastern Law Division of the Library of Congress prepared for the Special House Subcommittee on U.S. Trade with China.<sup>81</sup> Written in 1984 by Hsia Tao-tai, who co-authored one of the pioneering articles mentioned in the previous Section,<sup>82</sup> this highly influential report provided in-depth analysis of the 1984 Patent Law and the much-needed contextual background surrounding its development.<sup>83</sup> Particularly commendable is the report's inclusion of Chinese-language sources<sup>84</sup> that helped bridge the rather significant language and access barriers encountered by virtually all early scholars of the Chinese intellectual property system.<sup>85</sup>

### C. *Standardization and Customization*

The third phase began in the early 1990s. Covering issues both inside and outside China, this phase featured scholarship on the United States' aggressive intellectual property policy toward China and China's active preparation for WTO accession. At the beginning of this phase, China made a dedicated effort to reintegrate with the outside world following the international crisis precipitated by its handling of the 1989 student protests in Tiananmen Square.<sup>86</sup> The protests and their aftermath not only resulted in sanctions from the international community,<sup>87</sup> but also led foreign policymakers and commentators to view China with a different lens—with greater emphasis on the rule of

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and technology developments in China and discussing the challenge of encouraging innovation under Communism); Chwang & Thurston, *supra* note 78, at 131–34 (discussing the evolution of Chinese trademark and copyright laws); Sidel, 52 52 (providing a historically informed discussion of the Chinese intellectual property regime); Kay, *supra* note 73 (providing a historical survey of the regulations concerning invention awards and discussing the challenges to developing the 1984 Patent Law).

81. 1984 H. COMM. PRINT, *supra* note 59.

82. See *supra* text accompanying note 47 (discussing the previous article).

83. 1984 H. COMM. PRINT, *supra* note 59, at iii, 18–35.

84. See *id.* at 18–35.

85. See *supra* text accompanying notes 340–42 (discussing the lack of research materials for early scholars studying the Chinese intellectual property system).

86. See Hsü, *supra* note 36, at 926–41 (discussing the protests and their aftermath).

87. See *id.* at 942 (noting the “universal condemnation[,] . . . severe international economic and military sanctions [and] diplomatic ostracism” after 1989).

law<sup>88</sup> and human rights protection, for instance.<sup>89</sup>

In the intellectual property area, the international sanctions and heightened global scrutiny greatly complicated policy and scholarly discussions.<sup>90</sup> For example, on May 19, 1989, China and the United

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88. See generally Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1 (1996) (highlighting the multiple impediments to protection and enforcement of intellectual property rights in China and arguing that the development of rule of law principles will be needed to remove these impediments); Li Yiqiang, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 412–22 (1996) (advancing a judicial approach to address local protectionism).

89. See HSÜ, *supra* note 36, at 960–67 (discussing policies made by the first Bush and Clinton administrations out of their concerns over human rights abuses in China). Although the human rights issues remained of great concern to U.S. policymakers and the American public, the Clinton administration delinked human rights protection from its trade policy in the early 1990s. See JAMES MANN, *ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON* 292–314 (2000) (discussing such delinkage).

Interestingly, the greater focus on human rights affects our views in both directions. It sheds light on not only the Chinese intellectual property system, but also on a country's foreign intellectual property policy toward China. In his critique of the American foreign intellectual property policy, Professor Alford noted that “[t]he real irony, and even tragedy, . . . is that it impairs the advancement of fundamental rights and the attainment of our stated goals regarding intellectual property as well as broader national interests of both the United States and China.” William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 143 (1996). As he elaborated,

What is tragic about the current U.S. intellectual property policy toward China is the way it sacrifices our—and China's—longer-term national interests for perceived short-term electoral and commercial gain. A democratic, law-abiding China surely will be a more stable, predictable, and dependable partner than the alternative—be it for the attainment of freer trade, national security, non-proliferation and arms control, human rights, a sound environment, or cooperation in dealing with any of the world's myriad other problems. Such a China will also advance its own people's interests more amply than the alternative. The United States impairs the realization of these vital interests when, in its emphasis on results over process, it uses law as little more than a blunt instrument to press Beijing to reconsolidate control. Such actions strengthen the position of those in Beijing most skeptical about legal processes and least interested in the devolution of power from central administrative authorities and the empowerment, through law, of the citizenry.

*Id.* at 145–46.

90. As Joseph Massey, former Assistant U.S. Trade Representative for Japan and China, recounted,

Tiananmen stilled the voices within the interagency process in Washington who

States signed the first intellectual property-related memorandum of understanding (“MOU”) after China reopened to the outside world.<sup>91</sup> Focusing mostly on copyright protection and addressing software protection in particular,<sup>92</sup> this MOU “paved the way for the eventual adoption of the Copyright Law in September 1990 and a separate set of computer software regulations the year after.”<sup>93</sup> Yet, scholarship from both Chinese and non-Chinese intellectual property scholars seldom mentions this MOU.<sup>94</sup>

Similar complications arose with respect to scholarship on the adoption of the 1990 Copyright Law. Although the U.S. government and copyright industries had been lobbying heavily for this law since the mid-1980s,<sup>95</sup> they remained reluctant to recognize its adoption as a

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had been calling, on “geopolitical” or other grounds, for the negotiators to moderate trade and IPR demands on China and accept lesser Chinese concessions. At the same time, however, the US decided not to press for criminal penalties for IPR piracy, a decision that (although appropriate at a time of severe political repression in China) would lead to problems in IPR enforcement later on.

Joseph A. Massey, *The Emperor Is Far Away: China’s Enforcement of Intellectual Property Rights Protection, 1986–2006*, 7 CHI. J. INT’L L. 231, 234 (2006); see also MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 147 (2009) (“Since the 1989 Tiananmen Square protests, it has not been desirable or politically viable for the United States to encourage police involvement in any type of policy implementation.”); Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 37, at 165, 172 (“While IPR would have been a source of friction in any case, the disputes cannot be separated from the U.S. internal struggle to define a credible post-Tiananmen policy toward China.”).

91. See *PRC Agrees to Push for Copyright Law that Will Protect Computer Software*, WORLD INTELL. PROP. REP. 151 (July 1989) (reprinting the 1989 MOU).

92. *Id.*

93. Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 25 (Nari Lee et al. eds., 2016) [hereafter CHINA AND EUROPE].

94. Part of the reason why scholars seldom mention this MOU is that it was unratified. See MERTHA, *supra* note 44, at 124 (noting its legal status). Nevertheless, a few works have mentioned this MOU. See, e.g., WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 112–13 (1995) (criticizing the U.S. government’s priorities and its negotiation for the 1989 MOU); Massey, *supra* note 90, at 234 (noting the negotiations of the 1989 MOU); Shen Jianming, *The P.R.C.’s First Copyright Law Analyzed*, 14 HASTINGS INT’L & COMP. L. REV. 529, 556 (1991) (mentioning the 1989 MOU); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 186 (Daniel J. Gervais ed., 1st ed. 2007) (noting the signing of the 1989 MOU).

95. As I noted in an earlier book chapter,

[In the mid-1980s], the United States’ main intellectual property concern was



success. Their reluctance was due largely to the strained diplomatic relationship between China and the United States and the suspension of bilateral talks “in 1989 and 1990 as part of the U.S. sanctions.”<sup>96</sup> This lack of governmental engagement, in turn, caused U.S. policymakers and scholars to pay little attention to the compromise facilitating the adoption of the 1990 Copyright Law<sup>97</sup>—namely, the denial of copyright protection to censored works. This compromise proved to be problematic for U.S. copyright industries down the road.<sup>98</sup> As the next Section will discuss, Article 4 of the 1990 Copyright Law, which stated that “works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law,”<sup>99</sup> would eventually become a key part of the WTO complaint the United States

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copyrights, not patents. Although China had already adopted new trademark and patent laws a few years before, it had yet to introduce a new copyright law. Part of the delay was caused by the need for censorship and control of information flows in China. The lack of copyright protection was particularly problematic, as a lack of both copyright protection and market access had made it difficult for the politically powerful [U.S.] movie, music and software industries to protect their content.

Yu, *supra* note 93, at 25; *see also* Maruyama, *supra* note 90, at 186 (“At a 1985 meeting to the U.S.-China Joint Committee on Commerce and Trade (JCCT), the U.S. for the first time expressed concerns about weak Chinese IPR standards. In 1987, the U.S. put IPR protection on the agenda for U.S.-China market access talks.”).

96. Massey, *supra* note 90, at 235; *accord* MERTHA, *supra* note 44, at 42 (“One outcome of the worldwide condemnation of [China following the Tiananmen incident] was that ‘it was impossible to get the USTR to even talk to China between June 1989 and autumn 1990.’” (quoting documented but undisclosed interview)).

97. As Andrew Mertha recounted,

In the post-June 4 period, many conservative elements in the government felt that the copyright debate involved issues of ideological “correctness” and that such issues should be explicitly included in the [Copyright Law]. By contrast, copyright proponents argued that ideological issues should not clutter up the Copyright Law—that the [Law] should not be used as a blunt instrument for meting out punishment for ideological crimes—and that such issues should be covered by the Criminal Law. This debate was particularly protracted, and it resulted in the compromise that was enshrined in Article 4 . . . .

MERTHA, *supra* note 44, at 125 (footnotes omitted); *see also id.* at 121–22 (noting the debate about the sequencing of the publishing and copyright laws).

98. Another policy that had harmed these industries in the early 1990s was the U.S. government’s reluctance to press for criminal penalties due to its concern over political repression. *See* Massey, *supra* note 90, at 234 (noting the decision “not to press for criminal penalties for IPR piracy” in the late 1980s and early 1990s); *accord* DIMITROV, *supra* note 90, at 147 (“Since the 1989 Tiananmen Square protests, it has not been desirable or politically viable for the United States to encourage police involvement in any type of policy implementation.”).

99. 1990 Copyright Law, *supra* note 4, art. 4.

was to file more than a decade and a half later.<sup>100</sup>

Notwithstanding the considerable complications in the early part of this phase, two specific developments radically changed the discourse on the Chinese intellectual property system. First, on April 26, 1991, the USTR designated China as a priority foreign country for the first time.<sup>101</sup> This designation indicated that China “ha[d] the most onerous or egregious acts, policies, or practices that . . . deny adequate and effective intellectual property rights or . . . fair and equitable market access to [intellectual property rights holders].”<sup>102</sup> Such designation paved the way for the first Bush administration’s announcement of \$1.5 billion of retaliatory tariffs on “Chinese textiles, shoes, electronic instruments, and pharmaceuticals” in January 1992.<sup>103</sup>

Second, and more crucial for Chinese legal research, the economic conditions in China changed rapidly following Deng Xiaoping’s visit to Guangzhou, Shenzhen, and Zhuhai in January 1992.<sup>104</sup> In the wake of this so-called “southern tour” (*nanxun*),<sup>105</sup> China not only accelerated the opening up of its economy, but also actively prepared for WTO accession.

To capture these two pathbreaking developments, this Section highlights two distinct strands of scholarship. The first strand concerned the American intellectual property policy toward China. Prescient, informative, and of great practical relevance, this strand of scholarship was largely sparked by the USTR’s designation of China as a priority foreign country in April 1991, a designation that would soon repeat on June 30, 1994, and April 30, 1996.<sup>106</sup> The scholarship also covered other actions that the USTR had imposed on China or threatened the country with, such as economic sanctions, trade wars,

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100. See *infra* text accompanying notes 134–50 (discussing this dispute and the related scholarship).

101. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 141 (2000). Ironically, April 26 would eventually become the World Intellectual Property Day, which WIPO launched in September 2000. Press Release, WIPO, First World Intellectual Property Day to Be Marked on April 26 Under Banner of “Creating the Future Today” (Apr. 23, 2001), [http://www.wipo.int/pressroom/en/prdocs/2001/wipo\\_pr\\_2001\\_264.html](http://www.wipo.int/pressroom/en/prdocs/2001/wipo_pr_2001_264.html). That date was chosen because it was “the date on which the Convention establishing WIPO entered into force in 1970.” *Id.*

102. 19 U.S.C. § 2242(b)(1)(A) (2012).

103. Yu, *supra* note 101, at 142.

104. See Hsü, *supra* note 36, at 945–47 (discussing Deng Xiaoping’s “southern tour”).

105. *Id.* at 945.

106. Yu, *supra* note 101, at 144, 148.

non-renewal of most-favored-nation status, and opposition to China's entry into the WTO.<sup>107</sup>

In addition, this strand of scholarship documented the back-and-forth engagement between China and the United States, including the multiple threats and counterthreats, the signing of the Memorandum of Understanding on the Protection of Intellectual Property in January 1992,<sup>108</sup> the adoption of the Agreement Regarding Intellectual Property Rights in February 1995,<sup>109</sup> and the exchange of a report on the 1995 Agreement in June 1996.<sup>110</sup> Although these bilateral instruments, in my view, have been largely ineffective—creating what I have referred to as a “cycle of futility”<sup>111</sup>—they have presented highly attractive topics for

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107. *See id.* at 140–51 (describing the United States' use of section 301 sanctions and various trade threats to induce China to strengthen protection of intellectual property rights).

108. Memorandum of Understanding on the Protection of Intellectual Property, China-U.S., Jan. 17, 1992, T.I.A.S. No. 12036 (1995); *see also* Massey, *supra* note 90, at 235 (describing the 1992 MOU as “the first full bilateral IPR agreement” between China and the United States).

109. Agreement Regarding Intellectual Property Rights, China-U.S., Feb. 26, 1995, 34 I.L.M. 881 (1995) [hereinafter 1995 Agreement]; *see also* *The U.S.-China Intellectual Property Rights Agreement: Implications for U.S.-Sino Commercial Relations: Joint Hearing Before the Subcomms. on International Economic Policy and Trade and Asia and the Pacific of the H. Comm. on International Relations*, 104th Cong. (1995) (providing a transcript of a congressional hearing on the 1995 Agreement).

110. TRADE COMPLIANCE CTR., PEOPLE'S REPUBLIC OF CHINA IMPLEMENTATION OF THE 1995 INTELLECTUAL PROPERTY RIGHTS AGREEMENT—1996 (1996) [hereinafter 1996 REPORT], [http://tcc.export.gov/trade\\_agreements/all\\_trade\\_agreements/exp\\_005361.asp](http://tcc.export.gov/trade_agreements/all_trade_agreements/exp_005361.asp); *see also* *The U.S.-China Intellectual Property Rights Agreement and Related Trade Issues: Joint Hearing Before the Subcomm. on International Economic Policy and Trade and Asia and the Pacific of the H. Comm. on International Relations*, 104th Cong. (1996) (providing the transcript of a congressional hearing on the effectiveness of intellectual property protection in China in the run-up to the 1996 Report). Some commentators have referred to this report as the 1996 accord or an “exchange of letters.” As Professor Mertha surmised, the use of the report format

was a nod to Chinese sensibilities: to call the 1995 agreement a Memorandum of Understanding . . . would imply that the Chinese had failed to implement the 1992 MOU. The Chinese insisted the second agreement not be in the form of an MOU; understanding the semantic significance, the U.S. side complied.

MERTHA, *supra* note 44, at 14.

111. Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT'L & COMP. L. 143, 143 (2005); *see also* Yu, *supra* note 101, at 140–48 (discussing this “cycle of futility”). As I described in an earlier article,

That cycle went as follows: The United States began by threatening China with trade sanctions (often with an ancillary threat of nonrenewal of China's most-favored-nation status). China responded with threats of retaliatory sanctions of a similar amount. After several months of negotiations, both countries

research on the Chinese intellectual property system.<sup>112</sup>

Before the early 1990s, scholarship on the Chinese intellectual property system did not focus much on American intellectual property policy toward China<sup>113</sup> or issues relating to intellectual property enforcement in the country.<sup>114</sup> This prior scholarship seemed to have

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agreed to an eleventh-hour compromise that usually led to a written document. While intellectual property protection improved during the first few months immediately following the agreements, piracy and counterfeiting problems worsened once international attention was diverted. Within a short period of time, American businesses again complained to the U.S. government, and the cycle repeated itself.

Yu, *supra*, at 149; see also MERTHA, *supra* note 44, at 15 (“External pressure may have succeeded in getting Beijing to promulgate satisfactory IPR-related laws and regulations, but the enforcement of intellectual property, as with most policy in China, falls within the domain of China’s complex bureaucracies and local government officials.”).

112. See generally Alford, *supra* note 89 (criticizing the wrong-headedness of the American intellectual property policy toward China); Li, *supra* note 88, at 402–11 (noting the shortcomings of the enforcement mechanisms created by the 1995 Agreement and the 1996 report and underscoring the need for the use of a judicial approach to address local protectionism and other underlying political, economic, and social problems); Michael Yeh, Note, *Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503, 515–21 (1996) (exploring why the U.S. government’s strategy of using economic influence has not led to the establishment of an effective intellectual property regime in China).

113. A rare exception is Baumgarten, *supra* note 57 (discussing the changing U.S.-China copyright relations following the signing of the 1979 Agreement).

114. A rare exception is Stuart C. McCormack, *Counterfeits in China*, 77 TRADEMARK REP. 133 (1987) (discussing the procedures and avenues for trademark holders to address counterfeit goods in China). For later scholarship in this area, see generally Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach Is Making Counterfeiting Worse*, 41 GEO. J. INT’L L. 749 (2010); Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L.Q. 1 (2000) [hereinafter Chow, *Counterfeiting*]; Daniel C.K. Chow, *Enforcement Against Counterfeiting in China*, 20 NW. J. INT’L L. & BUS. 447 (2000); Daniel C.K. Chow, *Organized Crime, Local Protectionism, and the Trade in Counterfeit Goods in China*, 14 CHINA ECON. REV. 473 (2003); Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203 (2006) [hereinafter Chow, *Commercial Piracy*]; Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795 (2006). For articles offering useful practical tips for enforcing intellectual property rights, see generally Jack Chang, *Practical Enforcement of IP in China: Suggestions and Comments from the Quality Brands Protection Committee (QBPC)*, in CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS, *supra* note 54, at 367; John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 37, at 409; Eric M. Griffin, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 187–96 (1998); Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, in

taken for granted (somewhat naïvely) that China would effectively enforce intellectual property laws once they had been put in place. The scholarship after the mid-1990s, however, no longer make this misguided assumption.<sup>115</sup> Instead, a growing volume of literature closely examined the piracy and counterfeiting problems in China and proposed solutions to address them.

Specifically, the scholarship covered the introduction of a special enforcement period through the 1995 Agreement,<sup>116</sup> the reinstatement of this period in June 1996,<sup>117</sup> and the various enforcement campaigns that China subsequently launched. This coverage shows that policymakers and commentators started to become aware that the intellectual property problems in China were less about the lack of intellectual property laws than about the failure to enforce those laws.<sup>118</sup> As the USTR noted in the *2001 National Trade Estimate Report*, shortly before China's admission to the WTO, rampant intellectual property violations in the country were largely attributed to "poor enforcement of existing laws and regulations, combined with

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PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 54, at 7.

115. See, e.g., ASSAFA ENDESHAW, *INTELLECTUAL PROPERTY IN CHINA: THE ROOTS OF THE PROBLEM OF ENFORCEMENT* viii (1996) ("There has been an expanding literature on the intellectual property situation in China but most of it is devoted to an exposition of what is found in the laws, that is in the black letter aspect of them, as opposed to the relevance of those laws to, and impact on, the social, economic and technological conditions . . . in China now or in the foreseeable future.").

116. See Action Plan for Effective Protection and Enforcement of Intellectual Property Rights, pmbL, § IC, in 1995 Agreement, *supra* note 109 (providing for a six-month special enforcement period, during which China would make intensive efforts to crack down on major infringers of intellectual property rights and to target regions in which infringing activity was particularly rampant at the time of the agreement).

117. See 1996 REPORT, *supra* note 110 ("The United States asked China for a second major step—reinstatement of the 'Special Enforcement Period' provided for in the Agreement.").

118. See Peter Ganea & Jin Haijun, *China*, in *INTELLECTUAL PROPERTY IN ASIA: LAW, ECONOMICS, HISTORY AND POLITICS* 17, 31–32 (Paul Goldstein & Joseph Straus eds., 2009) ("[M]odern laws transplanted from the West exist only on the books but are of little practical relevance. In China, the gap between law on the books and actual enforcement is the problem, not so much the remaining shortcomings of the present legislation."); Shi Wei & Robert Weatherley, *Harmony or Coercion—China-EU Trade Dispute Involving Intellectual Property Enforcement*, 25 *WIS. INT'L L.J.* 439, 443 (2007) ("The crucial issue for China lies not in the enactment of new laws, but in the application of existing laws."); Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 *AM. U. L. REV.* 901, 923–46 (2006) ("[T]he problem with China is not a lack of laws, but the existence of too many."); see also William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 *UCLA PAC. BASIN L.J.* 8, 21 (1994) (noting that he was "tempted to write an article entitled 'Why China Has Too Much Law—And Too Little Legality'").

weak punishments.”<sup>119</sup>

Another major strand of scholarship appearing in this phase focused on those changes China made to the intellectual property system in its run-up to WTO accession.<sup>120</sup> This strand of scholarship complemented and reinforced the previous strand of scholarship, because WTO accession and related reforms helped address the concerns the U.S. government and intellectual property industries had over inadequate intellectual property protection in China. Because WTO reforms are often examined together, this strand of scholarship inevitably touched on China’s “reform and open” (*gaige kaifang*) policies. These policies garnered even more policy, scholarly, and media attention following the Asian financial crisis in the late 1990s.<sup>121</sup> While this crisis deeply affected countries such as Japan, South Korea, and other leading Asian economies, China’s economy managed to grow on a steady pace.<sup>122</sup>

The discussion of WTO-related developments in this phase is complex and challenging. Not only did scholars need to capture fast-pace developments, which were often moving targets, they also had to

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119. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 55 (2001), [https://ustr.gov/archive/assets/Document\\_Library/Reports\\_Publications/2001/2001\\_NTE\\_Report/asset\\_upload\\_file535\\_6560.pdf](https://ustr.gov/archive/assets/Document_Library/Reports_Publications/2001/2001_NTE_Report/asset_upload_file535_6560.pdf).

120. See generally Li Yahong, *The Wolf Has Come: Are China’s Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77 (2002) (discussing the amendments China introduced in the run-up to the WTO membership and the impact such membership would have on the country and its intellectual property industries); Julia Cheng, Note, *China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT’L L.J. 1941, 2005–12 (1998) (discussing the potential improvements in the Chinese intellectual property system that WTO accession could spark).

121. See CHANG HA-JOON, *THE EAST ASIAN DEVELOPMENT EXPERIENCE: THE MIRACLE, THE CRISIS AND THE FUTURE* 179–225 (2006) (discussing the 1997 Asian financial crisis and its implications).

122. See C. FRED BERGSTEN ET AL., *CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER* 18 (2006) (“China has been the world’s fastest growing economy for almost three decades, expanding at any average pace of almost 10 percent.”); Yu, *supra* note 94, at 173 (“Since the late 1980s, the Chinese economy has been growing at an enviable average annual rate of about ten per cent.”); see also ROBERT G. SUTTER, *CHINA’S RISE IN ASIA: PROMISES AND PERILS* 178 (2005) (noting “Beijing’s careful responses to the crisis, including its pledges to maintain economic growth, eschew devaluation of the Chinese currency, support IMF rescue efforts, and provide supplementary support of \$1 billion to Thailand and a reported several billion dollars to Indonesia”); Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 996 (2011) (noting China’s ability to provide financial assistance to Thailand, Indonesia, and other Asian countries during the Asian financial crisis and its decision not to exacerbate the crisis by devaluing the renminbi).

address the substantial changes that were simultaneously occurring in the international intellectual property regime in the early to mid-1990s. These changes included, most notably, those caused by the arrival of the TRIPS Agreement<sup>123</sup> and the mainstreaming of the internet.<sup>124</sup> Taking note of these changes, some scholarship in this phase not only focused on domestic intellectual property reforms in China, but also featured discussion of the dramatic changes within the international intellectual property regime.<sup>125</sup>

When considered together, these two major strands of scholarship reveal a clean break from scholarship in the previous phase. While there were occasional articles covering the transition of the Chinese intellectual property system from the mid-1980s,<sup>126</sup> scholarship in this phase seems to have broken the timeline and jumpstarted with a new direction. This new direction was generated externally by the United States' aggressive intellectual property policy toward China, internally by reforms that China eagerly undertook in its effort to join the WTO, or both.

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123. See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 3–27 (3d ed. 2008) (describing the origins and development of the TRIPS Agreement); DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* (2002) (examining the role of intellectual property industries in the TRIPS negotiations); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW* 96-120 (2003) (recounting the trilateral discussions among the United States, the European Union, and Japan); JAYASHREE WATAL, *INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES* 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Peter K. Yu, *TRIPS and Its Discontents*, 10 *MARQ. INTELL. PROP. L. REV.* 369, 371–79 (2006) (examining four different accounts of the origins of the TRIPS Agreement).

124. See generally COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000) (discussing the challenges the internet has posed to the copyright system).

125. For discussions of the Chinese intellectual property system in relation to the TRIPS Agreement, see generally Reiko R. Feaver, Comment, *China's Copyright Law and the TRIPS Agreement*, 5 *J. TRANSNAT'L L. & POL'Y* 431 (1996); Michael N. Schlesinger, Note, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 *J. CHINESE L.* 93 (1995); Amy E. Simpson, Comment, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade*, 20 *N.C.J. INT'L L. & COM. REG.* 575 (1994).

126. Notable examples are the discussions of the 1990 Copyright Law and the 1992 Patent Law. For these discussions, see generally Shen, *supra* note 75; Yang Yiping, *The 1990 Copyright Law of the People's Republic of China*, 11 *UCLA PAC. BASIN L.J.* 260 (1993); Laurence P. Harrington, Note, *Recent Amendments to China's Patent Law: The Emperor's New Clothes*, 17 *B.C. INT'L & COMP. L. REV.* 337 (1994).

*D. Integration and Assimilation*

The fourth phase began with China's accession to the WTO. Unlike the first three phases, this phase is the most clearly identifiable. At the Doha Ministerial Conference in November 2001, WTO members approved the proposal to admit China to the international trading body.<sup>127</sup> After fifteen years of exhaustive negotiations,<sup>128</sup> China formally became the organization's 143rd member on December 11, 2001.<sup>129</sup>

In this phase, the scholarship built heavily on scholarship in the previous phase. Indeed, the overlap between these two phases has led researchers to lump together the two phases in their analyses. Combining these two phases is also an approach I have taken in past scholarship.<sup>130</sup> While the previous phase covered the customization and standardization efforts before China's WTO accession, the present phase focused on post-accession developments.<sup>131</sup>

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127. See Paul Blustein & Clay Chandler, *WTO Approves China's Entry*, WASH. POST, Nov. 11, 2001, at A47 (reporting China's admission to the WTO); Joseph Kahn, *World Trade Organization Admits China, amid Doubts*, N.Y. TIMES, Nov. 11, 2001, at 1A (same).

128. As Michael Schlesinger observed,

China was a founding member of the General Agreement on Tariffs and Trade [GATT] in 1947, but in the aftermath of the retreat of Chiang Kaishek's Nationalist forces to the island of Taiwan in October 1949 and the rise to power of the Communists on the mainland, the Nationalist government gave notification to the GATT Secretariat in March 1950 that China was withdrawing from the GATT. On July 14, 1986, the government of the People's Republic of China formally notified the GATT Secretariat of its intention to seek "resumption" of its status as a contracting party[.] From late 1986 until the founding of the WTO on January 1, 1995, China has been permitted to participate in the GATT Uruguay Round of negotiations as an observer. However, China ultimately failed in its primary objective: persuading the GATT contracting parties to allow it into the GATT before the founding of the WTO.

Schlesinger, *supra* note 125, at 135–36 (footnotes omitted).

129. For discussions of China's entry into the WTO, see generally CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT (Frederick M. Abbott ed., 1998) [hereinafter CHINA IN THE WORLD TRADING SYSTEM]; GORDON G. CHANG, THE COMING COLLAPSE OF CHINA 187–212 (2001); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 1–28 (2002); PETER NOLAN, CHINA AND THE GLOBAL ECONOMY: NATIONAL CHAMPIONS, INDUSTRIAL POLICY AND THE BIG BUSINESS REVOLUTION 195–209 (2001); SUPACHAI PANITCHPAKDI & MARK CLIFFORD, CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE (2002); Peter K. Yu et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003).

130. See Yu, *Building the Ladder*, *supra* note 22, at 9–10 (combining the two phases under the stage of standardization and customization); Yu, *supra* note 23, at 4–6 (dividing the development of the modern Chinese intellectual property system into three distinct phases).

131. See generally INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA: CHINESE



Notwithstanding the continuity from the pre-accession phase to the post-accession phase, this Part separates scholarship in the customization and standardization phase from scholarship in the integration and assimilation phase. Such separation makes salient the latter's focus on China's integration efforts and legal and policy responses following WTO accession. For instance, a significant volume of scholarship in the integration and assimilation phase analyzed the amendments China adopted shortly before WTO accession.<sup>132</sup> These amendments included the Second Amendment to the Patent Law, the First Amendment to the Copyright Law, and the Second Amendment to the Trademark Law, which China adopted in August 2000, October 2001, and October 2001, respectively.<sup>133</sup>

One major incident that attracted considerable policy and scholarly attention in this phase was the U.S.-China WTO dispute over the lack of protection and enforcement of intellectual property rights under the TRIPS Agreement.<sup>134</sup> This dispute marked the first time the United States used the mandatory WTO dispute settlement process to address the massive piracy and counterfeiting problems in China.<sup>135</sup> Filed on April 16, 2007, the United States' complaint included four issues: (1) the

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AND EUROPEAN PERSPECTIVES (Paul Torremans et al. eds., 2007) (collecting articles that discuss China's effort to comply with the TRIPS Agreement following WTO accession).

132. For this body of scholarship, see generally Chen Jiwen, *Better Patent Law for International Commitment—The Amendment of Chinese Patent Law*, 2 RICH. J. GLOBAL L. & BUS. 61 (2001); Feng Xiaoqing & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC'Y U.S.A. 917 (2002); Ran Ruixue, *Well-Known Trademark Protection in China: Before and After the TRIPS Amendments to China's Trademark Law*, 19 UCLA PAC. BASIN L.J. 231 (2002); Louis S. Sorell, *A Comparative Analysis of Selected Aspects of Patent Law in China and the United States*, 11 PAC. RIM L. & POL'Y 319 (2002).

133. Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001) (China); Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Aug. 25, 2000, effective July 1, 2001) (China); Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amended Oct. 27, 2001, effective Dec. 1, 2001) (China).

134. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009) [hereinafter WTO Panel Report]. For the Author's discussions of this dispute, see generally Yu, *supra* note 6; Peter K. Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727 (2011).

135. See *Disputes by Agreement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm) (last visited May 9, 2018) (listing the disputes involving the TRIPS Agreement).

high thresholds for criminal procedures and penalties in the intellectual property area; (2) the failure of the Chinese customs authorities to properly dispose of infringing goods seized at the border; (3) the denial of copyright protection to works that have not been authorized for publication or dissemination within China; and (4) the unavailability of criminal procedures and penalties for infringing activities that involved either reproduction or distribution, but not both.<sup>136</sup>

By the time the WTO Dispute Settlement Body established a panel to address the complaint, the two parties had already resolved the fourth claim.<sup>137</sup> As a result, the panel considered only the three remaining claims. In January 2009, after some initial delay, the WTO panel finally released its long-awaited report.<sup>138</sup> While China prevailed on the claim concerning criminal thresholds,<sup>139</sup> the United States won the censorship claim.<sup>140</sup> The remaining customs claim was somewhat divided between the two parties,<sup>141</sup> with each side declaring victory.<sup>142</sup> With a 2–1 outcome, neither China nor the United States appealed the panel decision to the WTO Appellate Body.<sup>143</sup>

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136. See Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc. WT/DS362/1 (Apr. 16, 2007) (providing the complaint).

137. Yu, *supra* note 6, at 1055.

138. WTO Panel Report, *supra* note 134.

139. See *id.* ¶ 8.1(a) (stating that the first sentence of Article 4 of the Chinese Copyright Law is inconsistent with China’s obligations under Article 5(1) of the Berne Convention as incorporated by Article 9.1 of the TRIPS Agreement and under Article 41.1 of the TRIPS Agreement); *id.* ¶¶ 7.396–682 (analyzing the claim on criminal thresholds); *id.* ¶ 8.1(c) (stating that “the United States has not established that the criminal thresholds are inconsistent with China’s obligations under the first sentence of Article 61 of the TRIPS Agreement”); Yu, *supra* note 6, at 1056–69, 1083–90 (discussing this claim and analyzing its limitations).

140. See WTO Panel Report, *supra* note 134, ¶¶ 7.1–192 (analyzing the censorship claim); Yu, *supra* note 6, at 1074–81, 1096–1101 (discussing this claim and analyzing its limitations).

141. See WTO Panel Report, *supra* note 134, ¶ 8.1(b)(ii)–(iii) (stating that “the United States has not established that the Customs measures are inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principles set out in the *first* sentence of Article 46 of the TRIPS Agreement . . . [but that those] measures are inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principle set out in the *fourth* sentence of Article 46 of the TRIPS Agreement”); ¶¶ 7.193–395 (analyzing the customs claim); Yu, *supra* note 6, at 1056–74, 1091–96 (discussing this claim and analyzing its limitations).

142. See Yu, *supra* note 6, at 1081–82 (discussing the reactions and assessments of the Chinese and U.S. governments and other commentators).

143. *Id.* at 1082.

Although scholarship on this dispute existed long before the release of the WTO panel report,<sup>144</sup> most commentaries emerged after the report and well into the next phase of indigenization and transformation.<sup>145</sup> A notable collection of articles on this report was published as a special issue on “The WTO China—IPR Case in Perspective” in the *Journal of World Intellectual Property*.<sup>146</sup> These “post-mortems” not only assessed the dispute’s outcome and its ramifications for the WTO and its TRIPS Agreement, but also covered many different aspects of the WTO panel report, including interpretive methodology,<sup>147</sup> TRIPS flexibilities,<sup>148</sup>

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144. See, e.g., Donald P. Harris, *The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 *FORDHAM INT’L L.J.* 96, 113–86 (2008) (analyzing the complaint’s merits); Yu, *supra* note 118, at 923–46 (articulating five reasons why the United States should not file a formal complaint with the WTO Dispute Settlement Body over the inadequate enforcement of intellectual property rights in China); Yu, *supra* note 111, at 144–51 (arguing that the United States’ WTO complaint could create a new “cycle of futility” and suggesting ways to avoid such a cycle); Zhu Lanye & Liu Jiarui, *Sino-US Intellectual Property Dispute: A New Chapter in WTO History*, 3 *J. INTELL. PROP. L. & PRAC.* 194, 199–200 (2008) (analyzing the four claims in the United States’ WTO complaint).

145. For discussions of the WTO panel report, see generally Rogier Creemers, *The Effects of World Trade Organisation Case DS362 on Audiovisual Media Piracy in China*, 31 *EUR. INTELL. PROP. REV.* 568 (2009); Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 *AM. J. INT’L L.* 549 (2009); Xue Hong, *An Anatomical Study of the United States Versus China at the World Trade Organisation on Intellectual Property Enforcement*, 31 *EUR. INTELL. PROP. REV.* 292 (2009); Peter K. Yu, *Shaping Chinese Criminal Enforcement Norms Through the TRIPS Agreement*, in *CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* 286 (Christophe Geiger ed., 2012); Yu, *supra* note 6; Yu, *supra* note 134; see also *infra* note 146 (listing additional sources collected in a special issue of the *Journal of World Intellectual Property*).

146. This special issue includes the following articles: Tomer Broude, *It’s Easily Done: The China—Intellectual Property Rights Enforcement Dispute and the Freedom of Expression*, 13 *J. WORLD INTELL. PROP.* 660 (2010); Li Xuan, *The Agreement on Trade-Related Aspects of Intellectual Property Rights Flexibilities on Intellectual Property Enforcement: The World Trade Organization Panel Interpretation of China—Intellectual Property Enforcement of Criminal Measures and Its Implications*, 13 *J. WORLD INTELL. PROP.* 639 (2010); Henning Grosse Ruse-Khan, *China—Intellectual Property Rights: Implications for TRIPS-plus Border Measures*, 13 *J. WORLD INTELL. PROP.* 620 (2010); Jayashree Watal, *US-China Intellectual Property Dispute—A Comment on the Interpretation of the TRIPS Enforcement Provisions*, 13 *J. WORLD INTELL. PROP.* 605 (2010).

147. See generally Watal, *supra* note 146 (discussing the panel report’s significance for the interpretation of TRIPS enforcement provisions).

148. See generally Li, *supra* note 146 (examining the panel report’s findings on the claim on criminal thresholds and their implications for TRIPS flexibilities).

border measures,<sup>149</sup> and freedom of expression.<sup>150</sup>

Another major incident that received considerable policy, scholarly, and media attention worldwide was the Beijing Olympics in August 2008.<sup>151</sup> The hosting of this world sporting event was a great source of national pride among the Chinese populace.<sup>152</sup> In the view of one commentator, such hosting “not only would help position the country in the global economy, but might also trickle ripple effects to accelerate reforms in the country,” including intellectual property reforms.<sup>153</sup> Scholarship covering the Beijing Olympics therefore discussed issues ranging from international integration to trademark protection to intellectual property enforcement.<sup>154</sup>

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149. See generally Ruse-Khan, *supra* note 146 (examining the panel report’s findings on the customs claim and their potential application to TRIPS-plus enforcement measures).

150. See generally Broude, *supra* note 146 (exploring the human rights implications of the panel report’s findings on the censorship claim and the potential negative effects on the legal framework of the freedom of expression in China).

151. See Jim Yardley, *Games Open in a New China, Dazzling an Age of New Media*, N.Y. TIMES, Aug. 9, 2008, at A1 (reporting the opening of the Beijing Olympics).

152. See Peter K. Yu, *The Curious Case of Fake Beijing Olympics Merchandise*, in TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY 259, 272 (Irene Calboli & Edward Lee eds., 2014) (“The pride Chinese nationals derived from Beijing’s successful bid to host the Olympics was understandable, especially against a background of China’s painful struggle with the ‘century of humiliation’ and the ongoing and repeated criticisms the country has received from the United States and other foreign powers. As with citizens of any host country of major international sporting events, these proud individuals wanted to showcase the country’s ability to meet international standards in the face of heavy media scrutiny.”).

153. *Id.* at 262; see also Steve Friess, *The Trouble with Olympic Trinkets*, USA TODAY, Dec. 12, 2001, at 6B (quoting Michael Payne, marketing director of the International Olympic Committee, in his assertion that “there are high expectations and hopes that the Olympics will be an important catalyst for China’s trademark protection, just as it was in Korea”).

154. See generally Yu, *supra* note 152 (closely scrutinizing the intellectual property developments during and in the run-up to the Beijing Olympics to determine whether this important world event has provided the much-needed example to show that China could effectively address the counterfeiting problem when national interests are at stake); Brenda Pamela Mey (Ongech), *China, the “Intellectual Property Black Hole” Hosts the XXIX Olympiad: Measures the People’s Republic of China Undertook to Secure the Protection of Olympic-Related Intellectual Property Rights*, 12 J. WORLD INTEL. PROP. 153 (2009) (discussing the efforts China undertook to protect Olympics-related intellectual property rights and the continuing problems in the country); Yu, *supra* note 118, at 991–99 (discussing the Chinese authorities’ heightened efforts to protect trademarks used in relation to the 2008 Beijing Olympics); Jennifer L. Donatuti, Note, *Can China Protect the Olympics, or Should the Olympics Be Protected from China?*, 15 J. INTEL. PROP. L. 203 (2007) (discussing the challenges that would prevent China from offering sufficient protection to intellectual property rights related to the Beijing Olympics); Stacey H. Wang, Note, *Great Olympics, New China: Intellectual Property Enforcement Steps*

Notwithstanding the significance of both the WTO panel report and the Beijing Olympics, the timing of these events has presented some taxonomical challenges for scholarship in this phase. Although both events were held just when China was changing its intellectual property system from a transplant-based model to one focusing on independent innovation, scholarship regarding these events fit much better here than in the next phase of indigenization and transformation.

From a chronological standpoint, the United States filed the WTO complaint in this phase even though the WTO panel did not release its report until two years later. Likewise, China had been planning the Beijing Olympics since its winning bid in July 2001.<sup>155</sup> Those years of planning took place long before the development of the National Intellectual Property Strategy.

From a research standpoint, the scholarship on both events also tie well to scholarship in this phase. Both the WTO panel report and the Beijing Olympics reflected China's effort to assimilate international standards and to integrate with the outside world. Scholarship on the latter, in particular, foregrounded issues about global integration. Because the International Olympic Committee had dictated many new intellectual property standards the same way the WTO did,<sup>156</sup> the scholarship on the Beijing Olympics and post-WTO accession adjustments bore remarkable similarities.

#### *E. Indigenization and Transformation*

The last phase began with the State Council's release of the National Intellectual Property Strategy in June 2008,<sup>157</sup> a couple of months before the Beijing Olympics. This nationwide strategy provided a comprehensive plan to improve the creation, utilization, protection, and administration of intellectual property rights.<sup>158</sup> Specifically,

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*up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291 (2005) (discussing the unique opportunity provided by the Beijing Olympics to set the framework needed to strengthen foreign intellectual property rights).

155. See Jere Longman, *Beijing Wins Bid for 2008 Olympic Games*, N.Y. TIMES, July 14, 2001, at A1 (reporting China's winning bid).

156. See Yu, *supra* note 152, at 264 ("Since the 1996 Atlanta Olympics, the [International Olympic Committee] has focused an increased amount of attention on the intellectual property aspects of the Games."); see also *id.* at 262–64 (discussing Beijing Organizing Committee for the Games of the XXIX Olympiad and a wide variety of legal measures that China introduced in the run-up to the Olympics); Donatuti, *supra* note 154, at 206–09 (discussing the Committee's role in the Olympic Games).

157. NATIONAL INTELLECTUAL PROPERTY STRATEGY, *supra* note 24.

158. See *id.* pmbl. ("This Outline is formulated for the purpose of improving China's

paragraph 7 emphasized the need for active development of independent or self-controlled intellectual property (*zizhu zhishi chanquan*).<sup>159</sup> As this Section will discuss further, this emphasis would eventually cause policymakers and commentators from the United States, Europe, and other parts of the world to link its discussion to protectionist indigenous innovation policies.<sup>160</sup>

The origin of China's National Intellectual Property Strategy traced back to the mid-2000s when government leaders began to consider major changes to move the economy forward. These laws were well aware of the need to develop a new overall economic strategy to "avoid what policymakers and commentators have described as the 'middle-income trap'—the proverbial state of development at which a country is stuck after it has attained a certain level of wealth, but has yet to catch up with its more developed counterparts."<sup>161</sup>

In February 2006, the State Council released the National Long-term Scientific and Technological Development Program, formally declaring its commitment to turn China into an innovation-based economy within fifteen years.<sup>162</sup> Since then, top Chinese leaders increasingly recognized the economic and strategic significance of a well-functioning intellectual property system. As the State Intellectual Property Office recounted in its 2008 report,

During the Ninth Collective Study of the 17th [Chinese Communist Party] Politburo, General Secretary Hu Jintao stressed specifically the importance of sticking to innovation with Chinese characteristics, energetically implementing the strategy of making the country prosperous with science and technology, the strategy of capitalizing on talent to make the country strong, IP [intellectual property] strategy, and accelerating the construction of innovative country.

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capacity to create, utilize, protect and administer intellectual property, making China an innovative country and attaining the goal of building a moderately prosperous society in all respects.”).

159. *Id.* ¶ 7.

160. *See infra* text accompanying notes 168–77 (discussing the linkage between the two).

161. Yu, *supra* note 93, at 27.

162. State Council, *The Outline of the National Medium- and Long-Term Plan for Science and Technology Development* (2006–2020) § II(1) (2006), [http://www.gov.cn/jrzq/2006-02/09/content\\_183787.htm](http://www.gov.cn/jrzq/2006-02/09/content_183787.htm) and *translated in* <http://www.etiea.cn/data/attachment/123%286%29.pdf>. For discussions of this fifteen-year plan, see generally Cao Cong et al., *China's 15-Year Science and Technology Plan*, PHYSICS TODAY, Dec. 2006, at 38; Feng Xiaoqing, *The Interaction Between Enhancing the Capacity for Independent Innovation and Patent Protection: A Perspective on the Third Amendment to the Patent Law of the P.R. China*, 9 PITT. J. TECH. L. & POL'Y 1, 7 (2009); Liang, *supra* note 17, at 483–84.

When addressing the Party's meeting mobilizing the study and practice of scientific outlook on development, Premier Wen Jiabao said, "One thing necessary to stress is to concretely strengthen IPR [intellectual property right] protection. In the new era, competition of world science and technology as well as economy is mainly competition of IPRs. Underscoring IP protection is underscoring and inspiring innovation." . . . Vice Premier Wang Qishan published an article in his own name entitled China no longer tolerates piracy, infringement on the Chinese version of the Wall Street Journal . . .<sup>163</sup>

Although there had been lengthy policy discussion, scholarship on the National Intellectual Property Strategy did not emerge in intellectual property literature until after the launch of the new strategy.<sup>164</sup> Until then, that strategy was occasionally mentioned. Moreover, because China released its National Intellectual Property Strategy only a few months before the adoption of the Third Amendment to the Patent Law in December 2008,<sup>165</sup> scholarship in this

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163. State Intellectual Property Office of the People's Republic of China, *China's Intellectual Property Protection in 2008*, [http://english.sipo.gov.cn/laws/whitepapers/200904/t20090427\\_457167.html](http://english.sipo.gov.cn/laws/whitepapers/200904/t20090427_457167.html) (last visited May 9, 2018); see also PANG LAIKWAN, CREATIVITY AND ITS DISCONTENTS: CHINA'S CREATIVE INDUSTRIES AND INTELLECTUAL PROPERTY RIGHTS OFFENSES 8 (2012) ("If *gaige kaifang* (reform and open) was the dominant policy principle of the [Chinese] government in the 1980s and 1990s, the recent Hu Jintao government has shifted its attention to *gaige chuangxin* (reform and innovation), emphasizing the importance of innovation and production of the new." (Chinese characters omitted)); Wu Handong, *One Hundred Years of Progress: The Development of the Intellectual Property System in China*, 1 WIPO J. 117, 120 (2009) ("Strengthening the building of China's system of intellectual property right and vigorously upgrading the capacity of creation, management, protection and application regarding intellectual property are our urgent need for the purpose of enhancing independent and self-driven innovation capabilities and building an innovation-oriented country." (quoting President Hu Jintao's remarks in the Group Study of the Political Bureau of the Central Committee of the Chinese Communist Party in May 2006)).

164. See generally PRUD'HOMME, *supra* note 17 (discussing the impact of China's new patent policies and practices on innovation); Liang, *supra* note 17, at 483–91 (discussing China's plans to become an innovative society); Ken Shao, *Neoliberal Capitalism and China's Strategic Patent Framework for the Global Intellectual Property Regime*, 8 QUEEN MARY J. INTELL. PROP. 15 (2018) (discussing how the neoliberal capitalist view of the global intellectual property regime fails to explain the design and implementation of China's strategic patent framework); Peter K. Yu, *Five Oft-Repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 88–101 (discussing China's national intellectual property strategy and the push for the active development of independent intellectual property); Yu, *supra* note 6, at 1122–24 (discussing the concerns raised by China's domestic innovation policies).

165. Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1,

phase often discussed the two topics together.<sup>166</sup>

From a research standpoint, the development of this amendment was particularly noteworthy, as it reflected China's eagerness to make adjustment to its intellectual property system based mostly on internal needs, as opposed to external demands.<sup>167</sup> Up to that point, intellectual property reforms in China focused primarily on compliance with external norms. The development of the strategy and the new patent law amendment also redirected scholarship on the Chinese intellectual property system. Instead of continuing to address issues that are of great concern to foreign governments and rights holders—such as the massive piracy and counterfeiting problems in China—scholarship emerging after this point has turned to other issues that are equally interesting and significant to Chinese policymakers and the local populace.

In this phase of indigenization and transformation—which is still ongoing—the scholarship has focused mostly on law and policy changes that China has introduced to implement and “perfect” its National Intellectual Property Strategy. In addition to the latest round of amendments to the copyright, patent, trademark, and unfair competition laws, scholarship in this phase has covered new topics such as indigenous innovation<sup>168</sup>—a topic that has greatly troubled foreign

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2009), arts. 39–40 (China).

166. See, e.g., LI YAHONG, IMITATION TO INNOVATION IN CHINA: THE ROLE OF PATENTS IN BIOTECHNOLOGY AND PHARMACEUTICAL INDUSTRIES 2–3 (2010) (linking the strategy's discussion with that of the new patent law amendment); Stefan Luginbühl, *China's Patent Policy*, in PATENT LAW IN GREATER CHINA, *supra* note 54, at 3, 4–11 (same); Stefan Luginbuehl & Thomas Pattloch, *China's New Patent Policy*, 33 EUR. INTELL. PROP. REV. 274 (2011) (same).

167. See Guo He, *Patents*, in CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS, *supra* note 54, at 25, 28 (“The impetus for the early amendments came from outside, whilst the need for the third amendment [to the Patent Law] originated from within China, that is to say, the majority of the third amendment was to meet the needs of the development of the domestic economy and technology originating in China.”); Yu, *supra* note 93, at 27–28 (noting that “China, for the first time, adjusted its patent standards based on its own needs”).

168. For discussions of China's independent innovation policies, see PRUD'HOMME, *supra* note 17, at 75–115; Feng Xiaoqing, *Challenges to China's Self-Driven Innovation and Intellectual Property Practice*, in INNOVATION AND INTELLECTUAL PROPERTY IN CHINA: STRATEGIES, CONTEXTS AND CHALLENGES 80 (Ken Shao & Feng Xiaoqing eds., 2014) [hereinafter INNOVATION AND INTELLECTUAL PROPERTY IN CHINA]; An Siyuan & Brian Peck, *China's Indigenous Innovation Policy in the Context of Its WTO Obligations and Commitments*, 42 GEO. J. INT'L L. 375 (2011); Daniel C.K. Chow, *China's Indigenous Innovation Policies and the World Trade Organization*, 34 NW. J. INT'L L. & BUS. 81 (2013); Ken Shao, *Zizhu Chuangxin and China's Self-Driven Innovation: Calling for a Holistic*



governments and intellectual property industries.<sup>169</sup> Indeed, China's new indigenous innovation policies were so problematic that the Trump administration launched a section 301 investigation of China in August 2017.<sup>170</sup> The WTO complaint that the USTR recently filed also underscored the concerns raised by these policies.<sup>171</sup> Focusing on Articles 3 and 28 of the TRIPS Agreement,<sup>172</sup> the complaint alleged that "China deprive[d] foreign intellectual property rights holders of the ability to protect their intellectual property rights in China as well as freely negotiate market-based terms in licensing and other technology-related contracts."<sup>173</sup>

As I noted in prior scholarship, indigenous innovation is actually not

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*Perspective*, 2013 CARDOZO L. REV. DE NOVO 168, 169; Yu, *supra* note 6, at 1122–24.

169. As the U.S. International Trade Commission stated in its 2011 report,

China's indigenous innovation policies, which promote the development, commercialization, and procurement of Chinese products and technologies, are of recent origin. In some industries, they appear to have eroded the competitive positions of U.S. and other foreign firms in China while creating new barriers to foreign direct investment . . . and exports. More generally, U.S. firms are concerned about the future implications of China's evolving policies in such areas as preferential support to Chinese firms and the implementation of China-specific technical standards.

ITC Report, *supra* note 18, at xiii; *see also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 69 (2010) ("A troubling trend that has emerged . . . is China's willingness to encourage domestic or 'indigenous' innovation at the cost of foreign innovation and technologies."); Yu, *supra* note 93, at 35–36 ("Since the release of [the National Intellectual Property Strategy], US policymakers have translated the term as 'indigenous intellectual property', suggesting China's intention 'to encourage domestic or "indigenous" innovation at the cost of foreign innovation and technologies.""); Travis Tanner, *Foreword* to Richard P. Suttmeier & Yao Xiangkui, *China's IP Transition: Rethinking Intellectual Property Rights in a Rising China* 6–7 (Nat'l Bureau of Asian Research, NBR Special Report No. 29, 2011) ("The release of government procurement catalogues and other government actions based on the nation's policy of indigenous innovation have . . . heightened foreign anxiety that China plans to develop domestic industries by unfairly protecting the development of homegrown champions and forcing technology transfers that undermine the rights of IP developers.").

170. *See* Section 301 Investigation Press Release, *supra* note 19 (launching a section 301 investigation on Chinese laws, policies, and practices in the areas of intellectual property, innovation, and technology development).

171. *See* Request for Consultations by the United States, *China—Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542/1 (Mar. 23, 2018) [hereinafter WTO Complaint] (providing the complaint).

172. *See* TRIPS Agreement, *supra* note 9, art. 3 (providing for national treatment); *id.* art. 28 (conferring patent rights).

173. WTO Complaint, *supra* note 171, at 1.

the best term to describe the focus of China's new policies.<sup>174</sup> A better term is independent, self-driven, or self-controlled innovation. After all, as far as those policies are concerned, the innovation involved does not have to be homegrown or indigenous. As I noted in an earlier article,

As with many other Chinese terms, the term “*zizhu zhishi chanquan*” does not translate well from Chinese to English. While [“zi”] can be easily translated to “self,” “zhu” is much more complicated. As a noun, the word refers to “master,” “owner,” or “host.” As a verb, the word refers to “direct” or “manage.” As an adjective, the word refers to “chief” or “main.” Thus, policymakers, commentators, and the media have translated “*zizhu*” to “self-relied,” “self-driven,” “self-controlled,” “self-owned,” “indigenous,” “homegrown,” or “independent.” Out of all the terms, the word “independent” seems to best capture the term’s original meaning while preserving its useful Western connotations.<sup>175</sup>

Thus, when the term is put in the right cultural, linguistic, and historic contexts, its emphasis is on independence, self-reliance, and control.<sup>176</sup> To some extent, the term *zizhu zhishi chanquan* and the

174. As I noted in an earlier article,

[T]he term “*zizhu*” intellectual property certainly covers more than “indigenous” or “homegrown” intellectual property. Although the term “independent intellectual property” does not provide a direct translation, it accurately reflects that “*zizhu*” intellectual property can be developed or acquired from abroad or involve China-based entities with minority foreign ownership. The key to identifying certain intellectual property as “*zizhu*” is whether such an asset is independently controlled by Chinese individuals, firms, or the government.

Yu, *supra* note 164, at 94–95; *see also* Shao, *supra* note 168, at 170 (offering a definition of *zizhu chuangxin*, or self-driven innovation). Dan Prud’homme traced the origin of the term “*zizhu zhishi chanquan*” to the automotive policies in the mid-1990s:

Consultations suggest that the term originated in the mid-1990s [when] it was used in policy advice to build domestic IPR in the Chinese automobile industry. At the turn of the new millennium, the term was used in important policy guidance, which is still in effect, from state leader Jiang Zemin at an April 2nd 2000 conference on the Exhibition on China’s Fifteen-Year Achievements in Patent Work.

There is solid evidence . . . that the term typically means IP ownership, including acquired ownership, by a Chinese entity, which in some cases expressly is said to exclude entities with a majority foreign ownership.

PRUD’HOMME, *supra* note 17, at 79 (footnotes omitted).

175. Yu, *supra* note 164, at 94 (footnote omitted).

176. As Feng Xiaoqing observed,

The goal of China’s *zizhu chuangxin* (self-driven innovation) is to improve China’s ability in innovation. The key is to realize the combination of the breakthrough of core technologies within institutional innovation; its basic meaning is to emphasize the autonomy of innovation, or to consider that self-

introduction of the National Intellectual Property Strategy reflected the Chinese leaders' frustration with the massive foreign control of intellectual property rights, the licensing of which had drained a considerable amount of the country's foreign exchange reserves.<sup>177</sup> Regardless of one's terminology, however, scholarship in this phase has focused on two related issues: (1) how China's new strategy has affected, or will affect, foreign businesses; and (2) whether that strategy complies with WTO and other international standards.

One major strand of scholarship that the ongoing discussion of independent innovation has sparked concerns the innovation models

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driven innovation is the advanced stage of technological innovation or scientific and technical innovation.

Feng, *supra* note 168, at 80; *see also* Ken Shao, *The Cores and Contexts of China's 21st-Century National Innovation System*, in *INNOVATION AND INTELLECTUAL PROPERTY IN CHINA*, *supra* note 168, at 1, 6 ("Self-driven innovation means that Chinese enterprises perform with their own power source, depend less on external or third-party intellectual fruits, and thus increase their share in the global value chain. Self-driven innovation can and should be achieved through different means, such as home-developed patents and original cultural goods, foreign technology acquisition, share control, takeover, exclusive licenses, collaborations, and marketing and branding strategies.").

177. As Chen Jianfu noted,

Chinese firms are now paying hefty prices for foreign technology. According to the Vice Minister for Science and Technology, Shang Yong, royalties now paid to foreign firms amount to 20% of the mobile phone sales price and 30% of the computer sales price, and for each DVD machine sold, the Chinese firm only makes US\$1 in profit, and 10 *yuan* for each TV sold.

CHEN, *supra* note 22, at 617–18; *see also* Chow, *supra* note 168, at 89 ("[T]he U.S. licensor will typically charge licensing fees or royalties, which may be onerous. [In addition], the U.S. licensor may be unwilling to license its most advanced, cutting-edge technologies, but will only license secondary or outdated technologies to the Chinese licensee."); Xue Hong, *Between the Hammer and the Block: China's Intellectual Property Rights in the Network Age*, 2 *U. OTTAWA L. & TECH. J.* 291, 300 (2005) ("The high licence fees of IPRs are taking a toll on China's economic development . . . . Foreign IPRs are believed to suffocate market competition and to reinforce the dominant status of foreign enterprises in the Chinese market."); Yu, *supra* note 101, at 189–90 (noting that "Chinese leaders consider[ed] intellectual property rights as weapons that were designed specifically to protect the West's dominant position and the United States's hegemony, to drain the Chinese purse, and to slow down China's economic progress and its rise in world affairs" (footnotes omitted)); *cf.* Edgardo Buscaglia, *Can Intellectual Property in Latin America Be Protected?*, in *INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS* 96, 111 (Clarisa Long ed., 2000) (noting that Latin American countries "have traditionally used intellectual property rights as an instrument for regulating technology transfer and avoiding royalty payments on innovations from the developed world"); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 *GEO. WASH. J. INT'L L. & ECON.* 327, 331 (1993) ("Paying for imports or royalties is thus seen as an economic burden fostering a negative balance of trade.").

and innovative capabilities of Chinese companies, especially those of the national champions in the high-technology area.<sup>178</sup> Although this body of scholarship, which Section II.B will discuss in greater detail,<sup>179</sup> originates from mostly business and management scholars, it has been well received by legal scholars and has attracted considerable attention from those conducting empirical research or policy analyses.<sup>180</sup>

An additional, but somewhat limited, strand of scholarship in this phase pertains to China's changing position in the international trading and intellectual property systems.<sup>181</sup> As China is slowly moving from its oft-discussed roles of a norm-breaker and a norm-taker to the new roles of a norm-shaker and a norm-maker, this body of literature

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178. As Daniel Chow explained,

One key goal of [China's indigenous innovation policies] is to develop "national champions": Chinese companies that aspire to compete effectively with the largest and most powerful multinational companies . . . in the world today. Since innovation and advanced technology are crucial requirements of competitiveness in the modern global economy, a key component of these strategies is to spur Chinese entities to develop the capacity to create innovative and advanced technologies . . . . In China's view, it can never ascend to the leading ranks of industrialized nations if it continues to be a recipient or importer of advanced technologies or IP created by innovator countries, such as the United States. Innovator countries are often reluctant to provide access to their "core" technologies but often only provide access to their secondary technologies in order to preserve a competitive advantage. China wants to become a leading innovator country in its own right and does not want to depend on access to technology from the United States, Japan, and western European nations, which now dominate the area of technology innovation.

Chow, *supra* note 168, at 82–83; *see also* ITC Report, *supra* note 18, at 5–27 (discussing how China's indigenous innovation policies have contributed to the success of "national champions" in the country).

179. *See infra* text accompanying notes 248–59 (discussing this body of scholarship).

180. *See* Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 571–73 (2012) (discussing this body of scholarship).

181. *See generally* Bryan Mercurio, *China, Intellectual Property Rights and the WTO: Challenging but Not a Challenge to the Existing Legal Order*, in CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS 293, 316 (Lisa Toohey et al. eds., 2015) [hereinafter CHINA IN THE INTERNATIONAL ECONOMIC ORDER] (discussing how China has "narrowly interpret[ed] its commitments and engage[d] in excessive legalism as a shield against unwelcome scrutiny"); Peter K. Yu, *The First Decade of TRIPS in China* [hereinafter Yu, *First Decade*], in CHINA AND GLOBAL TRADE GOVERNANCE: CHINA'S FIRST DECADE IN THE WORLD TRADE ORGANIZATION 126 (Zeng Ka & Liang Wei eds., 2013) [hereinafter CHINA AND GLOBAL TRADE GOVERNANCE] (reviewing the intellectual property developments in China in its first decade of the WTO membership); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209 (2011) [hereinafter Yu, *Middle Kingdom*] (discussing China's participation in the international intellectual property regime and its role in both the WTO and WIPO).

has become quite significant.<sup>182</sup> Because the literature involves not only legal scholars but also those interested in geopolitics and international relations, Section II.C will provide further discussion.<sup>183</sup>

#### F. Closing Observations

The previous Sections have discussed the five phases in which fairly distinctive bodies of scholarship on the Chinese intellectual property system have emerged. To enrich our understanding of the evolution of this system, and to bring the five disparate phases closer to each other, this Section offers four closing observations.

First, as the previous Sections have shown, the separation between the different phases is not always clear-cut. For example, scholarship in the third phase of customization and standardization and the fourth phase of integration and assimilation overlapped considerably, with WTO accession being the main divide. Similarly, scholarship on the WTO panel report and the Beijing Olympics fit better with the fourth phase, even though both events occurred after the beginning of the fifth phase of indigenization and transformation. For researchers studying the Chinese intellectual property system, understanding the continuity from phase to phase and the historical contexts behind each phase will likely be essential. After all, this system has been developing in an incremental fashion. As many commentators have noted, such incremental developments can be vividly captured by the phrase “groping for stones to cross the river” (*mozhe shitou guohe*),<sup>184</sup> a concept

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182. In an earlier article, I noted the path of norm engagement China has undertaken in the international intellectual property arena:

Although piracy and counterfeiting remain major problems within the country, China is not the traditional norm breaker one typically infers from its disappointing record of intellectual property protection. Instead, the country has been a norm taker for most of its participation in the international intellectual property regime. As its strength, experience, and self-confidence grow, it slowly assumes the additional roles of a norm shaker and a norm maker.

Yu, *Middle Kingdom*, *supra* note 181, at 258–59; see also Henry Gao, *China’s Ascent in Global Trade Governance: From Rule Taker to Rule Shaker and, Maybe Rule Maker?*, in *MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES* 153 (Carolyn Deere Birkbeck ed., 2011) (noting China’s move from rule-taker to rule-shaker to rule-maker in the international trade regime).

183. See *infra* text accompanying notes 283–308 (discussing this body of scholarship).

184. See JOSHUA COOPER RAMO, *THE BEIJING CONSENSUS* 4 (2004) (“[T]he Beijing Consensus still holds tightly to [Deng Xiaoping’s] pragmatic idea that the best path for modernisation is one of ‘groping for stones to cross the river,’ instead of trying to make one-big, shock-therapy leap.”); Yu, *supra* note 93, at 27 (“[A] stronger focus on intellectual property developments fits within the incremental approach that Chinese

endorsed by Deng Xiaoping.<sup>185</sup>

Second, even though the phases discussed in this Part are arranged by chronological order, they have been episodic and punctuated by isolated major incidents. Similar to what Bruce Ackerman has coined “constitutional moments,”<sup>186</sup> these incidents have attracted so much scholarly attention that they have inevitably colored scholarship in the relevant phase. Indeed, China scholars are accustomed to discussing incidents.<sup>187</sup> Key incidents explored in the previous Sections included the signing of the 1979 Agreement; the adoption of the trademark, patent, and copyright laws in the 1980s and early 1990s; the U.S.-China trade wars in the early to mid-1990s; China’s WTO accession; the U.S.-China TRIPS dispute; the Beijing Olympics; the adoption of the National Intellectual Property Strategy; and China’s active involvement in or exclusion from bilateral, regional, and plurilateral trade negotiations.

Third, it remains unclear what phase, or phases, will follow the fifth phase of indigenization and transformation, which is still ongoing. Indeed, it will be quite difficult to predict how the Chinese or international intellectual property system will evolve in the future. Adrian Johns showed provocatively how “profound shift[s] in the relation between creativity and commerce”<sup>188</sup> had occurred “about once every

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leaders have carefully implemented over the years, which some commentators have referred to as ‘groping for stones to cross the river’ . . . .”); Yu, *supra* note 164, at 99 (“[I]t is the Chinese leaders’ pragmatic approach in ‘groping for stones to cross the river’ (*mozhe shitou guohe*) and their willingness to consider a wide variety of options.” (footnotes omitted)).

185. See CHEN, *supra* note 22, at 623 (“Deng Xiaoping was not only pragmatic, he was also realistic. Thus he neither pushed for ‘Big Bang’ therapy, nor did he try to change the politico-economic system as defined in the Constitution overnight. He undertook a gradual process of transformation, politically, economically and administratively.”).

186. See 1 BRUCE ACKERMAN, *WE THE PEOPLE* 266–94 (1991) (discussing “constitutional moment[s]” and the higher lawmaking process).

187. See generally Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China*, 45 COLUM. J. TRANSNAT’L L. 114 (2006) (discussing citizen action surrounding the Sun Zhigang Incident); Jiang Min, *Internet Events*, in *THE INTERNET IN CHINA: CULTURAL, POLITICAL, AND SOCIAL DIMENSIONS (1980–2000s)* 211 (Ashley Esarey & Randolph Kluver eds., 2014) (outlining the major actors, issues, causes, places, and mobilization of Chinese internet events or incidents in China); Liu Chenglin, *Profits Above the Law: China’s Melamine Tainted Milk Incident*, 79 MISS. L.J. 371 (2009) (discussing the food safety regulatory issues surrounding the tainted milk incident in China).

188. ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* 498 (2009).

century, in fact, since the end of the Middle Ages.”<sup>189</sup> As he reminded us,

The last major [turning point] occurred at the height of the industrial age, and catalyzed the invention of intellectual property. Before that, another took place in the Enlightenment, when it led to the emergence of the first modern copyright system and the first modern patents regime. And before that, there was the creation of piracy in the 1660s–1680s. By extrapolation, we are already overdue to experience another revolution of the same magnitude. If it does happen in the near future, it may well bring down the curtain on what will then, in retrospect, come to be seen as a coherent epoch of about 150 years: the era of intellectual property.<sup>190</sup>

Professor Johns’s prognostication, while provocative, seems to be well supported by all the ongoing and pathbreaking developments surrounding digital communication, Big Data, Internet of Things, 3D printing, blockchains, artificial intelligence, robotics, autonomous vehicles, nanotechnology, and synthetic biology.<sup>191</sup>

Finally, scholarship on the Chinese intellectual property system has been cyclical. As a result, the scholarship in one phase can easily engage with the scholarship in another. For instance, the discussion of China’s responses to U.S. trade policy in the third phase of customization and standardization easily brings to mind similar responses regarding the various commercial treaties that China signed in the wake of its defeat following the Boxer Uprising in 1900.<sup>192</sup> A notable example is the 1903

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189. *Id.* at 508.

190. *Id.*

191. Mark Lemley captured some of these developments:

3D printers can manufacture physical goods based on any digital design. While home 3D printers are so far quite limited in size and materials, there are tens of thousands of printing designs available on the Internet already, and larger commercial-scale printers can print anything from circuit boards to rocket engines to human organs on site for the cost of the raw materials and some electricity. Synthetic biology has automated the manufacture of copies of not just existing genetic sequences, but also any custom-made gene sequence, allowing anyone who wants to create a gene sequence of their own to upload the sequence to a company that will “print” it using the basic building blocks of genetics. And advances in robotics generalize the principle beyond goods, offering the prospect that many of the services humans now supply will be provided free of charge by general-purpose machines that can be programmed to perform a variety of complex functions.

Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461–62 (2015) (footnote omitted).

192. During the Boxer Uprising, members of a *fin-de-siècle* secret society, backed by Empress Dowager, brutally murdered missionary families, foreign ministers and diplomats, and Chinese converts. They also besieged embassies and burned churches

Treaty Between the United States and China for the Extension of the Commercial Relations Between Them,<sup>193</sup> which has been frequently mentioned in scholarship on the early history of the Chinese intellectual property system. Referred to by some commentators as the Shanghai Treaty based on the place of signing, this treaty built upon the newly adopted Paris Convention for the Protection of Industrial Property,<sup>194</sup> to which the United States acceded in 1887.<sup>195</sup> It granted copyright, patent, and trademark protection to Americans in return for reciprocal protection to the Chinese.<sup>196</sup> As William Alford observed, this treaty had the distinction of being “one of the first efforts by the United States anywhere to use its strength bilaterally to bring about greater intellectual property protection.”<sup>197</sup>

Taken together, these four closing observations have shown that scholarship on the Chinese intellectual property system has been interrelated, episodic, and cyclical. Although these observations are by no means exhaustive, they provide useful insights into the five distinct phases of developments that the Chinese intellectual property system has seen thus far.

## II. AN INTERDISCIPLINARY TURN

The previous Part has provided a chronology-based taxonomy of scholarship on the Chinese intellectual property system. Although most scholarship in this area has focused on law and policy, the scholarship in the past two decades have brought with them scholars from many other disciplines. To some extent, the increasingly interdisciplinary nature of scholarship on the Chinese intellectual

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and shops that sold foreign merchandise and books. See HSÜ, *supra* note 36, at 387–418 (discussing the Boxer Uprising).

193. Treaty Between the United States and China for the Extension of the Commercial Relations Between Them, China-U.S., Oct. 8, 1903, *reprinted in* 1 TREATIES AND CONVENTIONS WITH OR CONCERNING CHINA AND KOREA, 1894–1904, TOGETHER WITH VARIOUS STATE PAPERS AND DOCUMENTS AFFECTING FOREIGN INTERESTS 135 (William Woodville Rockhill ed., 1904) [hereinafter 1903 Treaty].

194. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 305 (revised at Stockholm July 14, 1967).

195. *WIPO-Administered Treaties*, WORLD INTELLECTUAL PROP. ORG., [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=2](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2) (last visited May 9, 2018).

196. 1903 Treaty, *supra* note 193, arts. 9–11. Interestingly, out of the three commercial treaties China signed with Great Britain, Japan, and the United States in the early 1900s, only this treaty included patent protection. See ALFORD, *supra* note 94, at 37–38 (discussing the 1903 Treaty).

197. Alford, *supra* note 89, at 138.



property system has paralleled a similarly interdisciplinary turn in intellectual property scholarship in other areas.<sup>198</sup> As the profile of intellectual property law and policy rises, scholars in other disciplines have become attracted to this fast-growing field.<sup>199</sup> With the arrival of these scholars, scholarship on the Chinese intellectual property system has become more inter- and multi-disciplinary as a result.

Thus far, intellectual property scholarship has featured many

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198. See Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 940 (2008) [hereinafter Yu, *Teaching International Intellectual Property Law*] (noting that “the ‘law and . . .’ movement has finally spread to international intellectual property law, and the subject has become increasingly multidisciplinary”). As I suggested in a previous article,

[B]ecause of the ever-expanding scope of intellectual property rights and the ability for these rights to spill over into other areas of international regulation, intellectual property training and educational programs should feature inter- and multi-disciplinary perspectives. Many of the existing programs focus primarily on the legal aspects of intellectual property. However, it is increasingly important to consider other aspects of intellectual property, such as political, economic, social, and cultural.

Peter K. Yu, *Intellectual Property Training and Education for Development*, 28 AM. U. INT’L L. REV. 311, 328 (2012) (footnotes omitted).

199. As Professor Alford recounted,

It is scant exaggeration to suggest that until the 1970s, American legal academe generally regarded intellectual property law as a subject of modest intellectual merit, at least compared to such mainstays as constitutional law or contract. As a consequence, with a few notable exceptions such as Professors Melville Nimmer of UCLA and Edmund Kitch of the University of Virginia, courses in this area were typically taught on a part-time basis by adjuncts and addressed, if at all, in important scholarly journals in a highly doctrinal or technical manner. Relatively little of the economic, philosophical, or other extra-legal disciplinary frameworks that had already begun to inform other areas of the law was brought to bear in this area.

William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 9 (1994); see also MERTHA, *supra* note 44, at 23 (“[U]ntil recently IPR remained a third-tier, ‘technical’ issue in the lexicon of U.S. trade policy because it is often articulated in a seemingly arcane discourse that presupposes a considerable degree of specialization and expertise. As a result, much discussion on intellectual property remains somewhat esoteric and inaccessible.”); William P. Alford, *Intellectual Property, Trade and Taiwan: A GATT-Fly’s View*, 1992 COLUM. BUS. L. REV. 97, 98 (“I can remember when intellectual property was seen as a backwater issue—particularly as concerns East Asia. That, of course, changed enormously in the 1980s.”); Yu, *Teaching International Intellectual Property Law*, *supra* note 198, at 924 (“Intellectual property law was in the backwater only a few decades ago. The Section on Intellectual Property Law of the Association of American Law Schools . . . was not even founded until the early 1980s, and the creation of intellectual property specialty programs has been a recent phenomenon.” (footnotes omitted)).

disciplines. To highlight the growing inter- and multi-disciplinary interests, the *WIPO Journal* has devoted the first issue of each volume to a different area of disciplinary focus. The areas that the journal has covered in its past eight volumes are law and policy, economics, political science and international relations, culture, history, geography, philosophy, and development studies.<sup>200</sup> Although the limited length and scope of this Part do not allow for a comprehensive analysis of the different disciplinary engagement with the Chinese intellectual property system, this Part illustrates the interdisciplinary turn in scholarship by focusing on three broadly defined multi-disciplinary clusters within which scholarship on the Chinese intellectual property system has emerged outside the area of law and policy: (1) philosophy and culture; (2) economics, innovation, and creative industries; and (3) politics and international relations.

#### A. *Philosophy and Culture*

Chinese philosophy and culture has been an important entry point to understanding not only intellectual property law and policy in China, but also the Chinese legal system in general.<sup>201</sup> It is not uncommon for scholars in both areas to discuss the historic distinction between *li* (rituals or rites) and *fa* (law and punishment) in Chinese culture.<sup>202</sup> Such distinctions trace back to the age-old tension between

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200. See Peter K. Yu, *Five Decades of Intellectual Property and Global Development*, 8 *WIPO J.* 1, 7 (2016) (“[E]very year since its inception, [the *WIPO Journal*] has devoted a special issue to highlighting intellectual property research in a different discipline. Thus far, the journal has published special issues on law and policy (Vol.1), economics (Vol.2), politics and international relations (Vol.3), culture (Vol.4), history (Vol.5), geography (Vol.6) and philosophy (Vol.7).”); *id.* at 10 (stating that the special issue in Volume 8 “has been devoted to the development aspects of intellectual property rights”).

201. See Koen Lemmens, *Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship*, in *PRACTICE AND THEORY IN COMPARATIVE LAW* 302, 306 (Maurice Adams & Jacco Bomhoff eds., 2014) (“Law is first and foremost a cultural phenomenon, and a deep understanding of a legal order presupposes sound knowledge of the culture in which it is embedded.”); Gary Watt, *Comparison as Deep Appreciation*, in *METHODS OF COMPARATIVE LAW* 82, 84–85 (Pier Giuseppe Monateri ed., 2012) (“Comparison between the laws of national jurisdictions will remain superficial unless we seek to appreciate those laws in the contexts of their local cultures, and comparison between laws in their cultures will remain superficial unless we appreciate that law is not alien to other cultural arts, but is closely akin to them.”).

202. As I elaborated in an earlier article,

Broadly defined, *li* extended beyond one’s proper conduct or etiquette and covered the whole range of political, social, and familial relationships that encompass a harmonious Confucian society. People who were guided by this

Confucianism and Legalism.<sup>203</sup> While the former focuses on normative roles, responsibilities, obligations, and a wide range of political, social, and familial relationships, the latter sought to use penal law, physical

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concept always understood their normative roles, responsibilities, and obligations to others. They were also ready to adjust their views and demands in order to accommodate other people's needs and desires, to avoid confrontation and conflict, and to preserve harmony. As a result, litigation and promotion of individual rights became unnecessary in a Confucian society.

In contrast to *li*, "*fa* is a penal concept; it is associated with punishment, serving to maintain public order through the threat of force and physical violence." Unlike the Confucianists, the Legalists believed that it was impossible to teach people to be good. Thus, *fa* is needed to tell people what to do and to induce them to do what they should do. Except in the Qin dynasty in the third century B.C., *fa jia* (legalism) has never been the dominant Chinese ideology. In fact, the Chinese always viewed *fa* unfavorably and associated it with the harsh and despotic Qin rule, which unified China and centralized its bureaucracy. They assumed that "when government leans heavily on *fa* to reinforce its authority, it does so because it has no effective ability to rule by *li*." To the Chinese, *fa* should always be employed as the last resort.

Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 33-34 (2001) (footnotes omitted); see also THE ANALECTS OF CONFUCIUS 88 (Arthur Waley trans., Vintage 1989) [hereinafter ANALECTS] ("Govern the people by regulations, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord." (quoting Book II, ¶ 3)).

Notwithstanding the distinction between the two, *li* and *fa* have coexisted in Chinese society. As the introductory comment in book I of the Tang Code declared, Virtue and morals are the foundation of government and education, while laws and punishments are the operative agencies of government and education. The former and the latter are necessary complements to each other, just as it takes morning and evening to form a whole day, or spring and autumn to form a whole year.

CHEN, *supra* note 42, at 17 (quoting the translation in John C.H. Wu, *The Status of the Individual in the Political and Legal Traditions of Old and New China*, in THE CHINESE MIND: ESSENTIALS OF CHINESE PHILOSOPHY AND CULTURE 340, 361 (Charles A. Moore ed., 1967)); JOHN W. HEAD, CHINA'S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT 48 (2009) ("Legalism and Confucianism were inextricably bound together, in a new compound material, a legal alloy, that was strong enough to last for the next two thousand years as a central core of China's government and culture."); see also CHEN, *supra* note 22, at 18 ("The theory of *Yin-Yang* . . . justified the supplementary function of punishment in governing a state, with *li*, being *Yang*, as the first instrument, and punishment, being *Yin*, as a supplementary tool for governing a state. In this way [*Yin-Yang*] laid down the theoretical foundation for the harmonisation between Confucianism and Legalism.").

203. For discussions of the debate between the Confucianists and the Legalists, see generally Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43, 48-51 (2005); Yu, *supra* note 202, at 32-38.

punishment, threats, and coercion to maintain public order.<sup>204</sup>

As far as intellectual property scholarship is concerned, one of the seminal works on the Chinese intellectual property system is William Alford's *To Steal a Book Is an Elegant Offense*.<sup>205</sup> Although this work covered not only Chinese philosophy but also political culture, it has been most widely cited for its discussion of the interplay between Confucian culture and intellectual property reforms in China.<sup>206</sup> As I noted in earlier writings,<sup>207</sup> there is both a strong form and a weak form of Professor Alford's culture-based argument:

The strong form states that Confucianism militates against intellectual property reforms in China. It accounts for the failure of the many reforms pushed by foreign countries and intellectual property rights holders to induce improvements in intellectual property protection and enforcement. . . . [By contrast, t]he weak form . . . states that Confucianism has prevented the Western notion of intellectual property rights from taking root in China. . . . [It] does not suggest any incompatibility between Confucianism and the Western notion of intellectual property rights. Nor does it contend that Confucianism will militate against intellectual property reforms. Thus, if such reforms are to be introduced—either internally through the borrowing of foreign ideas or externally in response to foreign pressure—these reforms may help China establish an exogenously developed intellectual property system.<sup>208</sup>

While the reality on Chinese soil is unlikely to support the strong form of Professor Alford's culture-based argument,<sup>209</sup> many Chinese

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204. See *supra* notes 202–03 (listing sources that discuss the distinctions between *li* and *fa* and between Confucianism and Legalism).

205. ALFORD, *supra* note 94.

206. See *id.* at 19–29 (discussing how the Confucian culture prevented intellectual property protection from taking root in imperial China). An earlier version of the chapter cited here was published as William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3 (1993).

207. See Peter K. Yu, *Intellectual Property and Confucianism*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 247, 253–57 (Irene Calboli & Srividhya Ragavan eds., 2015) (underscoring the distinction between the strong form of Professor Alford's culture-based claim and its weak form).

208. *Id.* at 253, 256–57.

209. As I noted in an earlier article,

While copying may be an important living process for a Confucian Chinese to understand life, culture, and society, Chinese poets and literary theorists widely disagreed on the appropriate extent of copying. It is therefore problematic to put all of these poets and theorists together. After all, traditional Chinese culture does not always call for verbatim copying, the

scholars have equally questioned the weak form of that argument.<sup>210</sup> After all, if intellectual property standards are related to legal or norm-based incentives that the country has provided to promote creativity and innovation throughout its millennia-long existence, it likely will be an overstatement to suggest the lack of indigenous notions of intellectual property rights in China.

Regardless of one's reaction to culture-based arguments, however, there is no denying that Chinese culture has contributed to the success and failure of the country's intellectual property reforms. As far as such culture is concerned, Confucianism provides the immediate jumping off point for intellectual property scholars. Indeed, a considerable volume of English-language scholarship on the Chinese intellectual property system has been devoted to the Confucian impact on intellectual property reforms.<sup>211</sup> While this type of scholarship has provided culture-based analyses that are both insightful and appealing to Western readers, it is ill-advised to equate Confucianism with Chinese culture. Indeed, an exclusive focus on Confucianism would create a rather incomplete picture of the impact of Chinese culture on intellectual property developments.

To begin with, three dominant schools of philosophy existed in traditional Chinese culture: Buddhism, Confucianism, and Daoism (which derived from the teachings of Laozi and Zhuangzi). Commentators have described these three schools collectively as *sanjiao* (three schools of teachings or three religions).<sup>212</sup> Although few commentators have

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means by which massive piracy and counterfeiting are often conducted. Rather, Confucianism has called for the transformative use of preexisting works that is tailored to the user's needs and conditions.

*Id.* at 253–54 (footnote omitted).

210. See *supra* note 32 (listing sources that criticize culture-based claims relating to the Chinese intellectual property system); see also Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1110–23 (1996) (drawing on economic analysis to provide alternative explanations for China's intellectual property problems).

211. For discussions of Confucianism and intellectual property reforms, see generally ALFORD, *supra* note 94, at 19–29; Shao, *Chinese Culture*, *supra* note 32; Shao, *Global Debate*, *supra* note 32; Yu, *supra* note 207.

212. See CHEN, *supra* note 42, at 11 (noting that, along with Confucianism, “Taoism and Buddhism were . . . influential in some periods and in some aspects of life”); ARTHUR F. WRIGHT, *BUDDHISM IN CHINESE HISTORY* 70–85 (1979) (discussing the importance of Buddhism and Daoism in Chinese history); Christoph Antons, *Legal Culture and History of Law in Asia*, in *INTELLECTUAL PROPERTY LAW IN ASIA* 13, 22–23 (Christopher Heath ed., 2003) (noting the importance of Confucianism, Taoism, Buddhism, and Legalism in China); Rollie Lal, *China's Relations with South Asia*, in

discussed the linkage between Buddhism and intellectual property developments in China,<sup>213</sup> I am not yet aware of any scholar providing a Daoist analysis of intellectual property law and policy in China.<sup>214</sup>

Even if one is to focus narrowly on only Confucianism, there remains the oft-raised question concerning which Confucius best represents Chinese culture. Are we focusing on the Confucius from the *Analects*,<sup>215</sup> which provided a record of “selected sayings” collected by his students? Or are we discussing the Confucius from Neo-Confucianism as propounded by Zhu Xi (1130–1200), a highly prominent Confucian scholar in the Song dynasty?<sup>216</sup> As Theodore de Bary wrote,

“Whose Confucianism are we talking about?” If it is the original teachings of Confucius in the *Analects*, then almost nothing said about Confucianism today speaks to that. Indeed even the anti-Confucian diatribes earlier in [the twentieth] century spoke rarely to Confucius’ own views but only to later adaptations or distortions of them.<sup>217</sup>

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CHINA AND THE DEVELOPING WORLD: BEIJING’S STRATEGY FOR THE TWENTY-FIRST CENTURY 133, 133 (Joshua Eisenman et al. eds., 2007) (“China has a long history of relations with India, beginning with cultural and religious contact between the two by 100 CE. Buddhism traveled from India through the Silk Route in Central Asia to China, mixing with the existing Daoist and Confucian philosophies there.”); Charles R. Stone, Comment, *What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property*, 92 MARQ. L. REV. 199, 226 (2008) (noting that “Buddhism and Daoism became quite influential in their own right”).

213. See Stone, *supra* note 212, at 202 (“The bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right.” (footnote omitted)); *id.* at 227 (“Confucianism in its various incarnations played a central role in the development of printing and the dissemination of classical texts that . . . contributed to the eventual development of Chinese intellectual property, [but] it is probably a mistake to focus all of our attention upon Confucianism in the first place.”).

214. The closest is my analysis of the application of the Yin-Yang school and correlative thinking to the intellectual property field. See generally Peter K. Yu, *Intellectual Property, Asian Philosophy and the Yin-Yang School*, 7 WIPOJ. 1 (2015).

215. ANALECTS, *supra* note 202.

216. See generally CHAN WING-TSIT, CHU HSI: LIFE AND THOUGHT (1987) (discussing the life and philosophy of Zhu Xi).

217. WM. THEODORE DE BARY, THE TROUBLE WITH CONFUCIANISM xi (1991); see also WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 11 (1998) (“Problems of continuity and change in the evolution of major traditions must be considered. Confucianism should not be thought either static or monolithic—that is, taking the sayings of Confucius and Mencius just by themselves, to represent an historically developing, often conflicted, and yet gradually maturing Confucian tradition.”); Liu Shu-hsien, *Confucian Ideals and*

Likewise, in his introduction to the *Analects*, Arthur Waley clarified that “[t]he Confucius of whom I shall speak here is the Confucius of the *Analects*.”<sup>218</sup> He further reminded us of Chinese historian Gu Jiegang’s helpful admonition that scholars should study “one Confucius at a time.”<sup>219</sup> In short, any discussion of Confucian influence on the Chinese intellectual property system requires researchers to determine in advance which Confucius they want to focus on.

As if these issues were not complicated enough, Chinese history has been filled with many different schools of thought beyond Confucianism, Buddhism, and Daoism. In the last chapter of *Historical Records (Shiji)*, Sima Qian, the grand historian in the Han dynasty (206 B.C.–220 A.D.), recalled an essay of his late father classifying Chinese philosophies into six dominant schools: Yin-Yang, Confucianism (or, more properly, *Rujia*), Mohism (*Mojia*), School of Names, Dialecticians, or Logicians (*Mingjia*), Legalism (*Fajia*), and Daoism.<sup>220</sup> Also present in the Chinese territory are many minority cultures and beliefs, including those of the Zhuang, Hui, Uyгур, Yi, Tibetan, Miao, Manchu, Mongol, and Buyei.<sup>221</sup>

A few years ago, when I put together a special issue on intellectual property and culture for the *WIPO Journal*, I went outside Confucianism to explore whether other Asian philosophy would provide useful insight into intellectual property developments in

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*the Real World: A Critical Review of Contemporary Neo-Confucian Thought*, in CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY: MORAL EDUCATION AND ECONOMIC CULTURE IN JAPAN AND THE FOUR MINI-DRAGONS 92, 92 (Tu Wei-Ming ed., 1996) (noting that the term “Confucianism” “may refer to the philosophical tradition represented by Confucius and Mencius, or it may refer to the institutions and customs that emerged in the long course of Chinese history through the influence of Confucian thought”); Benjamin Schwartz, *Some Polarities in Confucian Thought*, in CONFUCIANISM AND CHINESE CIVILIZATION 3, 3 (Arthur F. Wright ed., 1964) (considering “universal and perennial” questions concerning whether “the original teachings of the founders [of Confucianism] can be extricated from the interpretations of the followers”).

218. ANALECTS, *supra* note 202, at 13.

219. *Id.* at 14.

220. FUNG YU-LAN, A SHORT HISTORY OF CHINESE PHILOSOPHY: A SYSTEMATIC ACCOUNT OF CHINESE THOUGHT FROM ITS ORIGINS TO THE PRESENT DAY 30–31 (Derk Bodde ed., 1976).

221. See JAMES C.F. WANG, CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION 176 (6th ed. 1999) (“The largest of the fifty-six minority groups are the Zhuangs (15.4 million), Hui or Chinese Muslims (8.6 million), Uyгур (7.2 million), Yi (6.5 million), Tibetans (4.5 million), Miao (7.3 million), Manchus (9.8 million), Mongols (4.8 million), Bouyei (2.1 million), and Koreans (1.9 million).”).

China.<sup>222</sup> Specifically, my article focused on the Yin-Yang School, the first school of thought mentioned in *Historical Records*.<sup>223</sup> Highlighting the duality that often appears in both Chinese and international intellectual property laws and policies, that article argued that the Yin-Yang School's "focus on contexts, relationships and adaptiveness and its high tolerance for contradictions have made it particularly well-equipped to address the ongoing intellectual property challenges concerning both emerging economies and the digital environment."<sup>224</sup>

While the analysis of the philosophical basis of Chinese intellectual property law and policy has thus far remained limited to only scholars with deep knowledge of Chinese philosophy or culture, a better linkage between the notions of intellectual property rights and such philosophy or culture can be quite beneficial. After all, cultural barriers have provided a prevailing explanation for the failure of externally induced intellectual property reforms in China.<sup>225</sup> Commentators have also noted repeatedly the need to increase public consciousness of intellectual property rights.<sup>226</sup> Thus, if cultural barriers and the lack of public consciousness indeed accounted for China's massive piracy and counterfeiting problems, scholars studying the Chinese intellectual property system would have to acquire a deeper understanding of Chinese philosophy or culture before they could further evaluate the strengths and weaknesses of the proposed intellectual property reforms.

#### B. *Economics, Innovation, and Cultural Industries*

The second area worth highlighting concerns economic issues relating to intellectual property protection and enforcement in China and the country's growing intellectual property industries. These issues include

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222. See generally Yu, *supra* note 214 (discussing the application of the Yin-Yang school and correlative thinking to the intellectual property field).

223. FUNG, *supra* note 220, at 30; see also CHEN, *supra* note 22, at 10 (noting the influence of Yin-Yang Jia on traditional Chinese conceptions of law).

224. Yu, *supra* note 214, at 2.

225. See Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127, 131–34 (2003) (discussing the common misconception that copyright piracy is merely a cultural problem).

226. See NIE JIANQIANG, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 24 (2006) (noting "the conflictory and complementary relationships between the law-on-the-books, law-in-operation and law-in-the-mind within Chinese intellectual property laws"); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 428–31 (2003) (discussing education and public awareness programs); Yu, *supra* note 101, at 221–25 (noting the need to educate the Chinese populace about intellectual property rights).



economic growth, industrial development, technological innovation, and foreign investment. They are of great interest to economists, researchers in business or management schools, and those in schools or departments focusing on innovation and creative industries. Although there was very limited, if any, early scholarship on the economics of intellectual property rights in China, scholarship in this area has greatly expanded as scholars with economic training or interests in industrial development entered the intellectual property field.

One of the most widely cited early economic analyses of the Chinese intellectual property system is a book chapter written by Keith Maskus, Sean Dougherty, and Andrew Mertha.<sup>227</sup> This chapter examined the relationship between intellectual property protection and economic development in China.<sup>228</sup> While the chapter is insightful on its own, it is particularly illuminating when read together with the other chapters in the edited volume, all of which featured the latest empirical research on intellectual property and development conducted by World Bank economists.<sup>229</sup>

Thus far, economists have shown how stronger intellectual property protection could lead to an increase in foreign direct investment. Their research demonstrates that such a positive link requires the presence of two key preconditions: a strong imitative capacity and a large market.<sup>230</sup> While China undoubtedly possesses both preconditions, it has presented a “puzzle” to economists. As Professor Maskus rightly observed in the World Bank volume, if stronger intellectual property protection always led to more foreign direct investment, “recent [investment] flows to developing economies would have gone largely to sub-Saharan Africa and Eastern Europe . . . [rather than] Brazil, China, and other high-growth, large-market developing economies with weak protection.”<sup>231</sup>

To be sure, weak intellectual property protection could undermine, and has undermined, China’s appeal to foreign investors.<sup>232</sup>

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227. See generally Keith E. Maskus et al., *Intellectual Property Rights and Economic Development in China*, in *INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH* 295 (Carsten Fink & Keith E. Maskus eds., 2005) [hereinafter *INTELLECTUAL PROPERTY AND DEVELOPMENT*].

228. *Id.*

229. See generally *id.*

230. See Yu, *supra* note 94, at 176–80 (discussing the preconditions needed for stronger intellectual property protection to attract foreign direct investment).

231. Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, in *INTELLECTUAL PROPERTY AND DEVELOPMENT*, *supra* note 227, at 41, 54.

232. See Yu, *supra* note 101, at 192 n.331 (listing sources that discuss the role of

Nevertheless, other attractive location advantages, such as low labor costs and a large market, have more than compensated for the country's shortcomings in the intellectual property field.<sup>233</sup> To a large extent, the China case has shown the limits of using intellectual property reforms to attract foreign direct investment.

Another book that has similar contextual significance for scholarship on the Chinese intellectual property system is an excellent collection of articles Hiroyuki Odagiri, Akira Goto, Atsushi Sunami, and Richard Nelson put together to examine the role of the intellectual property regime in the development and catch-up process.<sup>234</sup> Titled *Intellectual Property Rights, Development, and Catch-up: An International Comparative Study*, this edited volume provided comparative studies on the catch-up processes that developed, emerging, and large developing countries had experienced.<sup>235</sup> While the book included only one chapter on China<sup>236</sup>—which featured the catch-up story of Huawei Technologies<sup>237</sup>—its concluding chapter and the other country and industrial studies in the volume provided useful insights into the challenges and opportunities confronting the Chinese intellectual property system.<sup>238</sup> Together, these chapters underscored the need to consider the impact of the intellectual property regime on the catch-up process “in conjunction with

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intellectual property rights in attracting foreign investment).

233. See Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249, 259 (2003) (stating that decisions to relocate research and development facilities are likely to be affected by “the level of education and training of the local workforce, the condition of its financial sector, the health of its legal system, and the transparency of governmental procedures”); Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT’L L. 109, 123 (1998) (identifying “market size and growth, local demand patterns, transport costs and distance from markets, low wage costs in relation to labor productivity, abundant natural resources, and trade protection that could encourage ‘tariff-jumping’ investments” as examples of location advantages).

234. INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP: AN INTERNATIONAL COMPARATIVE STUDY (Hiroyuki Odagiri et al. eds., 2010) [hereinafter INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP].

235. *Id.*

236. See Xue Lan & Liang Zheng, *Relationships Between IPR and Technology Catch-up: Some Evidence from China*, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP, *supra* note 234, at 317 (discussing China’s catch-up process following its reopening to the outside world in the late 1970s and documenting the adaptation of domestic firms, such as Huawei Technologies, to the intellectual property right system through gradual innovation).

237. See *id.* at 350–55 (discussing Huawei Technologies as a success story).

238. INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP, *supra* note 234.

[industrial] and other government policies.”<sup>239</sup>

Apart from these two edited volumes, there are other noteworthy economic analyses of the Chinese intellectual property system. Albert Hu and Gary Jefferson explored the cause of China’s rising patenting activities that eventually generated what they referred to as “a great wall of patents.”<sup>240</sup> More recently, Professor Hu, Zhang Peng, and Zhao Lijing provided a critical follow-up examination of China’s patent surge of the early 2010s, when China surpassed the United States as the country filing the largest volume of patent applications.<sup>241</sup> In addition, Deli Yang undertook comparative study of the Chinese and U.S. patent systems to examine pendency, grant ratios, and issues relating to national treatment.<sup>242</sup> Qian Yi also utilized sales data in the Chinese footwear industry to explore ways to optimize enforcement against counterfeit trademarked goods.<sup>243</sup>

Taken together, all of these economic analyses highlighted the tremendous benefits provided by research on the economic dimension of the Chinese intellectual property system. Research in this area is badly needed, considering how little economic research has been conducted on the Chinese intellectual property system both inside and outside the country until the past decade or so. As Maskus, Dougherty,

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239. Hiroyuki Odagiri et al., *Conclusion*, in INTELLECTUAL PROPERTY RIGHTS, DEVELOPMENT, AND CATCH-UP, *supra* note 234, at 412, 421.

240. Albert Guangzhou Hu & Gary H. Jefferson, *A Great Wall of Patents: What Is Behind China’s Recent Patent Explosion?*, 90 J. DEV. ECON. 57 (2009). They attributed the patent explosion to “[t]he continuing surge of [foreign direct investment] in China, pro-patent amendments to China’s patent law, China’s entry to the WTO, the deepening of enterprise reform that realigns incentive structures, along with the intensification of [research and development] in Chinese industry.” *Id.* at 67.

241. Albert G.Z. Hu et al., *China as Number One? Evidence from China’s Most Recent Patenting Surge*, 124 J. DEV. ECON. 107 (2017). In their view,

Chinese firms have been aggressively applying for patents as a result of their newly acquired capability to invent new technologies and their response to the government incentives and other strategic considerations. While the former is most likely to be a result of conscious [research and development] effort, the latter would have increased the propensity to patent independent of technology innovation.

*Id.* at 117.

242. Deli Yang & Mahmut (Maho) Sonmez, *Global Norm of National Treatment for Patent Uncertainties: A Longitudinal Comparison Between the US and China*, 53 J. WORLD BUS. 164 (2018); Deli Yang, *Intellectual Property System in China: A Study of the Grant Lags and Ratios*, 10 J. WORLD INTELL. PROP. 22 (2007); Deli Yang, *Pendency and Grant Ratios of Invention Patents: A Comparative Study of the US and China*, 37 RES. POL’Y 1035 (2008).

243. Qian Yi, *Counterfeiters: Foes or Friends? How Counterfeits Affect Sales by Product Quality Tier*, 60 MGMT. SCI. 2381 (2014).

and Mertha lamented in the mid-2000s,

University scholarship in China (and in other countries) in IPRs is overwhelmingly addressed to legal issues. Many scholars are actively involved in assessing shortcomings in the law and in drafting revisions, and they also participate in training new intellectual property lawyers. Few economists study the processes of technical change in China and how they are affected by market structure, competition, and exposure to foreign technologies and investment. Fewer still examine the relationship between IPRs, technical development, and growth. Accordingly, economists in China either remain unaware of IPR issues or are skeptical about the potential for IPRs to increase technological advance and business development.<sup>244</sup>

While economic research has been essential to the intellectual property field,<sup>245</sup> comparative research can provide especially valuable insight into the appropriate international minimum standards for both protection and enforcement of intellectual property rights. Because most developing countries have limited resources to enforce these rights<sup>246</sup>—and considerable tradeoffs existed between intellectual

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244. Maskus et al., *supra* note 227, at 311.

245. For literature in this area, see generally ROGER D. BLAIR & THOMAS F. COTTER, *INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES* (2005); THOMAS F. COTTER, *COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS* (2013); CHRISTINE GREENHALGH & MARK ROGERS, *INNOVATION, INTELLECTUAL PROPERTY, AND ECONOMIC GROWTH* (2010); *INTELLECTUAL PROPERTY AND DEVELOPMENT*, *supra* note 227; *INTELLECTUAL PROPERTY, GROWTH AND TRADE* (Keith E. Maskus ed., 2008); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003); KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000); KEITH E. MASKUS, *PRIVATE RIGHTS AND PUBLIC PROBLEMS: THE GLOBAL ECONOMICS OF INTELLECTUAL PROPERTY IN THE 21ST CENTURY* (2012); SUZANNE SCOTCHMER, *INNOVATION AND INCENTIVES* (2004); WORLD INTELLECTUAL PROP. ORG., *THE ECONOMICS OF INTELLECTUAL PROPERTY: SUGGESTIONS FOR FURTHER RESEARCH IN DEVELOPING COUNTRIES AND COUNTRIES WITH ECONOMIES IN TRANSITION* (2009).

246. The lack of enforcement resources is indeed why the TRIPS Agreement includes Article 41.5, which states explicitly that a WTO member state is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement. See TRIPS Agreement, *supra* note 9, art. 41.5 (“Nothing in [Part III of the TRIPS Agreement] creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.”); see also WTO Panel Report, *supra* note 134, annex B-4, ¶ 33 (“Articles 1.1 and 41.5 were key concessions to the developing world, which the United States and other developed third parties seek now to dismiss and disregard.”); CARLOS M. CORREA, *TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT* 417 (2007) (“[Article 41.5] was introduced upon a proposal by the Indian delegation, and essentially reflects developing countries’ concerns about the implications of Part III of the [TRIPS] Agreement.”);

property protection and other competing public needs—the costs to sectors unrelated to intellectual property could easily make the introduction of higher standards of intellectual property protection and enforcement highly undesirable.<sup>247</sup> It is therefore inevitable that developing countries, China included, will have to conduct holistic cost-benefit analyses before they explore whether to strengthen intellectual property protection and enforcement.

Finally, as Section I.E has noted, a fascinating body of scholarship emerged in the mid-2000s and the early 2010s to examine the fast-growing innovative capabilities of Chinese firms. In *Run of the Red Queen*, Dan Breznitz and Michael Murphree located in China “a remarkably profitable and sustainable model of innovation . . . [that] makes China into a critical part of the world innovation system, but . . . does not rely on China excelling in cutting-edge novel-product [research and development].”<sup>248</sup> As they observed, “like the Red

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UNCTAD-ICTSD PROJECT ON IPRs & SUSTAINABLE DEV., RESOURCE BOOK ON TRIPS AND DEVELOPMENT 585 (2005) (noting that Article 41.5 “was in fact one of the few provisions in Part III where developing countries’ views made a difference”).

247. See Carsten Fink, *Enforcing Intellectual Property Rights: An Economic Perspective*, in INT’L CTR. FOR TRADE & SUSTAINABLE DEV., ISSUE PAPER NO. 22, THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES xiii, 2 (2009) (“Governments need to make choices about how many resources to spend on combating piracy, as opposed to enforcing other areas of law, building roads and bridges, protecting national security, and providing other public goods. Such choices are usually not stated in explicit terms, but they underlie every budgetary decision by federal and local governments.”); Li Xuan & Carlos M. Correa, *Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 207, 210 (Li Xuan & Carlos M. Correa eds., 2009) [hereinafter INTELLECTUAL PROPERTY ENFORCEMENT] (noting that the demands for strengthened intellectual property enforcement “seem to overlook the cost of the required actions, the different priorities that exist in developing countries regarding the use of public funds (health and education would normally be regarded as more urgent than IP enforcement) and the crucial fact that IPRs are *private rights* and, hence, the burden and cost of their enforcement is to be borne by the right-holder, not the public at large”); Xue Hong, *Enforcement for Development: Why Not an Agenda for the Developing World?*, in INTELLECTUAL PROPERTY ENFORCEMENT, *supra*, at 133, 143 (“Increment and strength of public enforcement measures will inevitably impose an economic burden on the developing countries and divert the priorities of these countries, such as prosecution of violent crimes or relief of poverty.”); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 2–6 (2010) (discussing the costs of strong intellectual property enforcement norms and the resulting trade-offs).

248. DAN BREZNITZ & MICHAEL MURPHREE, *RUN OF THE RED QUEEN: GOVERNMENT, INNOVATION, GLOBALIZATION, AND ECONOMIC GROWTH IN CHINA* 4, 19 (2011). According to the authors,

As China has become the global center for many different stages of

Queen [in Lewis Carroll's *Through the Looking-Glass*], [China] runs as fast as possible in order to remain at the cusp of the global technology frontier without actually advancing the frontier itself."<sup>249</sup> While the emergence of this alternative form of innovation has raised intriguing questions concerning economic development, industrial strategy, and global competitiveness, the book explained why the Chinese model could complement the breakthrough innovation model embraced by the United States and other developed countries.<sup>250</sup> As Breznitz and Murphree observed,

China needed Apple to develop the concept and definition of the iPod and the iPhone, but Apple cannot produce and sell these products without China. In the world of flexible mass production, the Red Queen country [referring to China or other countries with a similar innovation model] needs the novel-product innovators to keep churning out new ideas, and the novel-product-innovating countries need the Red Queen country to keep innovating on almost every aspect of production and delivery.<sup>251</sup>

Similarly, other scholars have articulated new theories of innovation to capture the innovative activities in China. In *Dragons at Your Door*,<sup>252</sup> Zeng Ming and Peter Williamson advanced the concept of “cost

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production, it has also developed a formidable competitive capacity to innovate in different segments of the research, development, and production chain that are as critical for economic growth as many novel-product innovations, and perhaps even more so. In addition, taken together, China's regional and national systems have developed varied capabilities that amount to a specific and highly successful, though inadvertently, created national model. China's accomplishment has been to master the art of thriving in second-generation innovation—including the mixing of established technologies and products in order to come up with new solutions—and the science of organizational, incremental, and process innovation. Thus, China's innovation capabilities are not solely in process (or incremental) innovation but also in the organization of production, manufacturing techniques and technologies, delivery, design, and second-generation innovation. Those capabilities enable China to move quickly into new niches once they have been proved profitable by the original innovator.

*Id.* at 4; *see also id.* at 195 (noting the need to dispel the myth concerning “the Western techno-fetishism of novelty, which equate innovation only with the creation of new technologies and products”).

249. *Id.* at 3.

250. *See id.* at 206 (“Thanks to the fragmentation of production, the rise of China need not be seen as a zero-sum game by policy makers inside and outside the country.”).

251. *Id.* at 18.

252. ZENG MING & PETER J. WILLIAMSON, *DRAGONS AT YOUR DOOR: HOW CHINESE COST INNOVATION IS DISRUPTING GLOBAL COMPETITION* (2007).

innovation” and discussed its global implications.<sup>253</sup> As they pointed out,

[t]he new competition from China is . . . disruptive because it threatens to obsolete much of the established firms’ assets, capabilities, and experience base by changing the accepted rules of the game, undermining traditional profit models, and growing parts of the market that incumbents are poorly equipped to serve.<sup>254</sup>

In the authors’ view, “[f]ar from being a zero-sum game . . . , the emergence of Chinese companies as significant players in the global market promises new benefits to the world’s consumers and new opportunities to those established companies that choose the right responses and execute them well.”<sup>255</sup>

In *Chinnovation*,<sup>256</sup> Tan Yinglan explored how Chinese innovators are changing the world by focusing on “process innovation”<sup>257</sup> and other forms of innovation and entrepreneurship.<sup>258</sup> As he explained,

Most of China’s companies are in the stage of process innovation. Start-ups typically learn and adopt business models from other geographies and adapt them locally. Companies are trying to move into technological innovation via research and development by building on their existing knowledge, the way semiconductor firms are moving into thin film in 2010. Most Chinese firms are still using existing technology to create products, rather than creating the technology itself (as is done in the United States). This makes China tech markets symbiotic and complementary with the U.S. market and those in some other countries.<sup>259</sup>

Although all of these discussions suggest that the alternative forms of innovation found in Chinese firms complement the breakthrough innovation embraced by the United States and other intellectual property powers in the developed world, a better understanding of

253. *Id.* at 1 (describing “cost innovation” as the “tool of choice” for Chinese competitors and defining such innovation as “the strategy of using Chinese cost advantage in radically new ways to offer customers around the world dramatically more for less”).

254. *Id.* at 55–56.

255. *Id.* at vii.

256. TAN YINGLAN, *CHINNOVATION: HOW CHINESE INNOVATORS ARE CHANGING THE WORLD* (2011).

257. *Id.* at xii.

258. *Cf.* BREZNITZ & MURPHREE, *supra* note 248, at 4 (“China’s innovation capabilities are not solely in process (or incremental) innovation but also in the organization of production, manufacturing techniques and technologies, delivery, design, and second-generation innovation. Those capabilities enable China to move quickly into new niches once they have been proved profitable by the original innovator.”).

259. TAN, *supra* note 256, at 268.

these alternatives will enable us to improve the design and calibration of the international intellectual property regime. To some extent, the analyses surrounding alternative forms of Chinese innovation make researchers question whether the existing TRIPS-based intellectual property standards provide the most suitable arrangements for China. After all, those problems that are indicative of China's lack of progress in developing a robust intellectual property system could easily have reflected the mismatch between the existing international intellectual property standards and the many alternative forms of innovation that can now be found in the country. There is indeed no easy way to tell whether the former or the latter is the case. Fortunately, this emerging body of scholarship will help shed light on this difficult question.

Finally, alongside these three notable books, a growing volume of scholarship has emerged to discuss China's changing innovative capabilities, thereby calling into question the hitherto somewhat one-sided discourse on China's status as a pirate nation.<sup>260</sup> Shaun Rein boldly declared "the end of copycat China,"<sup>261</sup> building on his earlier work on "the end of cheap China."<sup>262</sup> As he observed, "Chinese companies no longer just copycat business models from America and Europe. They still grab low-hanging fruit but focus more on innovation."<sup>263</sup> Drawing on statistical materials, Denis Fred Simon and Cao Cong critically examined the rapid expansion of China's science and technology capabilities, focusing in particular on the contributions provided by an increasingly large and well-educated talent pool.<sup>264</sup> In addition, a number of books examined the rising middle class and the expanded interest in luxury goods in China.<sup>265</sup> A

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260. See Yu, *supra* note 23, at 6–7 ("While piracy and counterfeiting problems continue to exist, and are unlikely to go away any time soon, many policymakers and commentators now see China as an innovative power, or at least an emerging one." (footnote omitted)).

261. SHAUN REIN, *THE END OF COPYCAT CHINA: THE RISE OF CREATIVITY, INNOVATION, AND INDIVIDUALISM IN ASIA* (2014) (discussing changes in the Chinese economy and emphasizing that local companies are shifting away from copying American and European business models).

262. *Id.* at xv; SHAUN REIN, *THE END OF CHEAP CHINA: ECONOMIC AND CULTURAL TRENDS THAT WILL DISRUPT THE WORLD* (2012).

263. REIN, *supra* note 261, at xv.

264. DENIS FRED SIMON & CAO CONG, *CHINA'S EMERGING TECHNOLOGICAL EDGE: ASSESSING THE ROLE OF HIGH-END TALENT* (2009).

265. See generally SAVIO CHAN & MICHAEL ZAKKOUR, *CHINA'S SUPER CONSUMERS: WHAT 1 BILLION CUSTOMERS WANT AND HOW TO SELL IT 1–10* (2014) (discussing the rapid growth of the group of wealthy and super wealthy customers in China); PIERRE XIAO LU, *ELITE CHINA: LUXURY CONSUMER BEHAVIOR IN CHINA* (2008) (discussing luxury



growing volume of scholarship also covered the active development of China's cultural industries.<sup>266</sup> Such development provided an intriguing contrast with the “shanzhai” phenomenon that began appearing in the late 2000s.<sup>267</sup>

### C. *Politics and International Relations*

In the past decades, scholars have heavily utilized political science literature to develop a better understanding of the Chinese legal system. This literature has been particularly insightful because there is no clear-cut distinction between law and policy from a Marxist standpoint.<sup>268</sup> Not only is law a “concrete formulation of the Party’s

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consumer behavior in China); ERWAN RAMBOURG, *THE BLING DYNASTY: WHY THE REIGN OF CHINESE LUXURY SHOPPERS HAS ONLY JUST BEGUN* (2014) (discussing the rapid growth of luxury shoppers in China).

266. For this body of scholarship, see generally HANDBOOK OF CULTURAL AND CREATIVE INDUSTRIES IN CHINA (Michael Keane ed., 2016); MICHAEL KEANE, *CREATED IN CHINA: THE GREAT NEW LEAP FORWARD* (2007); MICHAEL KEANE, *CREATIVE INDUSTRIES IN CHINA: ART, DESIGN AND MEDIA* (2013); LI WUWEI, *HOW CREATIVITY IS CHANGING CHINA* (Michael Keane ed., 2011); LUCY MONTGOMERY, *CHINA'S CREATIVE INDUSTRIES: COPYRIGHT, SOCIAL NETWORK MARKETS AND THE BUSINESS OF CULTURE IN A DIGITAL AGE* (2011); PANG, *supra* note 163.

267. “Originally, *shan zhai* was used to refer to a bandit stronghold outside government control [in imperial China]; today it is shorthand for a multitude of knockoffs, fakes, and pirated products. These include everything from mobile phones to medicine and movies to makeup, and they permeate China’s consumer markets.” EDWARD TSE, *THE CHINA STRATEGY: HARNESSING THE POWER OF THE WORLD’S FASTEST-GROWING ECONOMY* 79 (2010); *see also* Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 390 (2012) [hereinafter Yu, *Intellectual Property and Asian Values*] (“In recent years, a shanzhai culture emerged in China, raising challenging questions about the acceptable boundaries of sequential and cumulative innovation.”). For discussions of the “shanzhai” phenomenon in China, see generally YU HUA, *CHINA IN TEN WORDS* 181–202 (Allan H. Barr trans., 2012); Cheung Ming, *Shanzhai Phenomenon in China—The Disparity Between IPR Legislation and Enforcement*, 43 INT’L REV. INTELL. PROP. & COMPETITION L. 3 (2012); Hennessey, *supra* note 30; Sun Haochen, *Can Louis Vuitton Dance with HiPhone? Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 387 (2012); Yu, *Intellectual Property and Asian Values*, *supra*, at 390.

268. *See* CHEN, *supra* note 42, at 123 (noting that the “Chinese circumstances seem to blur the distinction between law and policy”); FENG, *supra* note 31, at 10 (noting that socialist laws “operate within the boundaries of policy directives, under the guidance of policy principles and supplemented by various policy tools (such as a Party or government circular or notice)”; Berkman, *supra* note 88, at 35 (“Throughout the Cultural Revolution and until Mao’s death in 1976, law was simply a mechanism for implementing Party policy, interpreted and reinterpreted to reflect the direction of the prevailing political winds.”).

policy,”<sup>269</sup> but “law will wither away together with the state” in future Communist society.<sup>270</sup> Throughout Chinese history, law has been consistently used as a political or administrative tool.<sup>271</sup> Although law was abolished during the Cultural Revolution, its subsequent restoration<sup>272</sup> has precipitated many difficult questions concerning what law is and whether researchers should understand legal development through Chinese politics.<sup>273</sup>

Interestingly, despite the importance of politics to the development of Chinese laws and legal institutions, few scholars have devoted attention to studying the political dimension of the Chinese intellectual property system.<sup>274</sup> There are a few notable exceptions,

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269. FENG, *supra* note 31, at 10.

270. CHEN, *supra* note 42, at 8; *see also id.* at 2 (“Marx seemed to believe that law in the bourgeois state was largely a means by which the bourgeoisie maintained their class rule over the proletariat, and that in the classless communist society which represented the final stage of social evolution, there would be no need for law to exist.”).

271. *See* CHEN, *supra* note 22, at 20–21 (discussing law as both a political tool and an administrative tool).

272. *See* CHEN, *supra* note 42, at 42 (discussing the impact of the Cultural Revolution on the Chinese legal system). *See generally* JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 273–443 (Touchstone 2003) (providing an insightful personal account of the Cultural Revolution).

273. *See* CHEN, *supra* note 42, at 123 (“A preliminary question which might be considered in examining the sources of law in mainland China is whether the model or conception of law used in describing Western legal systems is appropriate in the Chinese context.”). Determining what law was in the early Chinese legal system after its restoration has indeed been quite challenging. As the late Victor Li noted in regard to the challenge of assessing the legal significance of Chinese newspaper articles,

The mass media, such as the *People's Daily*, play a major role in [communicating legal norms]. A Chinese newspaper, unlike an American newspaper, is not a chronicle of daily events but rather a means by which messages are sent from the center to the intermediate levels and then to the bottommost levels. These messages urge particular types of conduct—criticize revisionism, carry out the principle of self-reliance, etc.—and also lay down some general guidelines on how this work should be carried out. Good consequences ensue for those who carry out these urgings, and less pleasant consequences follow for those who do not. Is this law? No, not in the sense that we are accustomed to; among other things, it lacks the precision and the use of legal institutions and mechanisms that we regard as part of law. And yet it does lay down norms of conduct, norms backed by [an] enforcement mechanism . . . .

LI, *supra* note 72, at 15; *see also* KEVIN J. O'BRIEN & LI LIANJIANG, *RIGHTFUL RESISTANCE IN RURAL CHINA* 6 (2006) (“The scope of central policy in China . . . encompasses what constitutes law in most other nations but also reaches into far murkier realms, such as pledges made by officials on inspection tours, Party propaganda and the ‘spirit of the Center’ (*zhongyang jingshen*).”).

274. *See generally* DIMITROV, *supra* note 90 (advancing a theory of state capacity

however. In *The Politics of Piracy*, Andrew Mertha offered a pioneering book showing how the organizational structures and complexities within Chinese government agencies could affect the implementation and enforcement of intellectual property laws.<sup>275</sup> More attractively, this book—through its separate chapters on the domestic patent, copyright, and trademark systems—showed how the differences in organizational structures and complexities have affected the respective system to a different degree.<sup>276</sup> The book explained not only the behavior of these agencies, but also the success or failure of select campaigns or reforms. Particularly noteworthy is the book’s discussion of the “interbureaucratic competition”<sup>277</sup> between two trademark enforcement agencies—namely the State Administration for Industry and Commerce and the Quality Technical Supervision Bureau.<sup>278</sup>

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through the study of intellectual property enforcement in China); Mark A. Groombridge, *The Political Economy of Intellectual Property Rights Protection in the People’s Republic of China*, in INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS, *supra* note 177, at 11 (examining the political economy of intellectual property protection in China and the contradictions inherent in Chinese society); MERTHA, *supra* note 44 (discussing the limited impact external pressure has on intellectual property enforcement in China even though such pressure has helped shape the laws involved); MICHEL OKSENBERG ET AL., ADVANCING INTELLECTUAL PROPERTY RIGHTS: INFORMATION TECHNOLOGIES AND THE COURSE OF ECONOMIC DEVELOPMENT IN CHINA 6 (1996) (providing recommendations on “ways that the public and private sectors in the United States and elsewhere outside of China might better cooperate with the Chinese government and private sector to help overcome the obstacles they confront in improving their IPR regime”); Rebecca G. Hulse & James K. Sebenius, *Sequencing, Acoustic Separation, and 3-D Negotiation of Complex Barriers: Charlene Barshefsky and IP Rights in China*, 8 INT’L NEG. 311 (2003) (discussing the challenges confronting the U.S.-China intellectual property negotiations from the viewpoint of former Deputy USTR Charlene Barshefsky); Andrew Mertha & Robert Pahre, *Patently Misleading: Partial Implementation and Bargaining Leverage in Sino-American Negotiations on Intellectual Property Rights*, 59 INT’L ORG. 695 (2005) (using the U.S.-China intellectual property negotiations to develop a model of international negotiation in which states anticipate the partial implementation of signed agreements).

275. MERTHA, *supra* note 44.

276. *See id.* at 77–209 (discussing the intellectual property enforcement problems in the patent, copyright, and trademark areas).

277. *Id.* at 32; *see also* Chow, *Counterfeiting*, *supra* note 114, at 22 (“[E]nforcement actions can be brought with the Administration of Industry and Commerce . . . under the Trademark Law or the Anti-Unfair Competition Law, or with the Technical Supervision Bureau . . . under the Consumer Protection Law or the Product Quality Law.” (footnotes omitted)).

278. *See* MERTHA, *supra* note 44, at 164–209 (discussing such competition in the context of trademark enforcement); *see also* DIMITROV, *supra* note 90, at 34 (“[M]ultiple agencies share an enforcement mandate, sometimes even when they are not interested in participating in enforcement.”); Groombridge, *supra* note 274, at 27 (noting that

A few years later, Martin Dimitrov published an equally informative book, covering the capacity of government agencies to enforce intellectual property rights.<sup>279</sup> Drawing on personal interviews, newspaper articles, and comparative statistics, this book showed that intellectual property enforcement through police raids and campaigns in China had been high in volume, yet low in quality (as measured by constituency, transparency, and procedural fairness).<sup>280</sup> By contrast, enforcement through local intellectual property litigation had been high in quality, but low in volume.<sup>281</sup> This book is illuminating because it covered a wide variety of government agencies within the elaborate intellectual property enforcement apparatus in China, including the General Administration of Customs; the General Administration of Quality Supervision, Inspection, and Quarantine; the National Copyright Administration; the Public Security Bureau; the State Administration for Industry and Commerce; the State Food and Drug Administration; the State Intellectual Property Office; and the State Tobacco Monopoly Administration.<sup>282</sup>

One topic that has thus far received only limited—but slowly growing—coverage is China’s role in the international intellectual property regime. This topic is what brought international relations scholars to this area. The limited coverage can be largely explained by China’s hitherto low profile in the international trading and intellectual property systems.<sup>283</sup> Until recently, few scholars—domestic and foreign alike—have actively studied the interface between the Chinese and international intellectual property systems. For those scholars who managed to study this interface, the focus tends to be on

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the problem of “too many mothers-in-law (*popo tai duo*, or *yi ge shifu san ge popo*)”; Andrew C. Mertha, *Policy Enforcement Markets: How Bureaucratic Redundancy Contributes to Effective Intellectual Property Implementation in China*, 38 COMP. POL. 295 (2006) (discussing how bureaucratic redundancy has helped accelerate the evolution of enforcement markets in China).

279. DIMITROV, *supra* note 90.

280. *See id.* at 185–220 (using trademark enforcement as an illustration of high-volume, but capricious and corrupt enforcement).

281. *See id.* at 249–67 (using patent enforcement as an illustration of low-volume, but high-quality, rationalized enforcement).

282. *Id.* at 50.

283. *See* Henry S. Gao, *China’s Participation in the WTO: A Lawyer’s Perspective*, 11 SING. Y.B. INT’L L. 41, 69 (2007) (“Be it in the informal green room meetings, the formal meetings of the various committees and councils or the grand sessions of the Ministerial Conferences, China has generally been reticent.”); Yu, *Middle Kingdom*, *supra* note 181, at 229–37 (discussing China’s low profile in the international intellectual property arena).

the impact of foreign pressure on domestic intellectual property reforms—that is, Western impact and Chinese response.<sup>284</sup> The focus rarely goes the other way around.

Nevertheless, there has been a growing volume of scholarship on China's increasing role in the international trading system.<sup>285</sup> Thanks to the marriage of intellectual property with trade via the TRIPS Agreement<sup>286</sup> and China's growing emphasis on independent innovation, this role has an increasingly important intellectual property component. A case in point is scholarship on China's role in the WTO, which has included a growing volume of scholarship covering intellectual property issues.<sup>287</sup>

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284. See *supra* text accompanying notes 107–19 (discussing scholarship on the American intellectual property policy toward China).

285. For discussions of China's role in the WTO-based international economic system, see generally CHINA AND GLOBAL TRADE GOVERNANCE, *supra* note 181; CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM (Deborah Z. Cass et al. eds., 2003) [hereinafter CHINA AND THE WORLD TRADING SYSTEM]; CHINA IN THE INTERNATIONAL ECONOMIC ORDER, *supra* note 181; CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER (Muthucumaraswamy Sornarajah & Wang Jianguo eds., 2010); CHINA'S PARTICIPATION IN THE WTO (Henry Gao & Donald Lewis eds., 2005).

286. See *supra* note 123 (listing sources that discuss the TRIPS negotiations).

287. See generally Gao Lulin, *China's Intellectual Property Protection System in Progress*, in CHINA IN THE WORLD TRADING SYSTEM, *supra* note 129, at 127 (discussing the progress China has made in the intellectual property area and its effort to comply with the TRIPS Agreement); Angela Gregory, *Chinese Trademark Law and the TRIPS Agreement—Confucius Meets the WTO*, in CHINA AND THE WORLD TRADING SYSTEM, *supra* note 285, at 321 (exploring whether the 2001 Trademark Law satisfied the minimum standards for protection and enforcement of trademark rights under the TRIPS Agreement); Daniel Stewart & Brett G. Williams, *The Impact of China's WTO Membership on the Review of the TRIPS Agreement*, in CHINA AND THE WORLD TRADING SYSTEM, *supra* note 285, at 363 (discussing the impact of China's accession on the ongoing negotiations relating to the WTO and its TRIPS Agreement); Antony S. Taubman, *TRIPS Goes East: China's Interests and International Trade in Intellectual Property*, in CHINA AND THE WORLD TRADING SYSTEM, *supra* note 285, at 345 (discussing how China's implementation of the TRIPS Agreement was consistent with its internal economic and industrial development even though the policy changes might have been driven from outside); Yu, *First Decade*, *supra* note 181 (reviewing intellectual property developments in China in the first decade of its WTO membership); Zheng Chengsi, *Looking into the Revision of the Trade Mark and Copyright Laws from the Perspective of China's Accession to WTO*, 24 EUR. INTELL. PROP. REV. 313 (2002) (examining the amendment of the Chinese copyright and trademark laws in preparation for WTO accession); Zheng Chengsi, *The TRIPS Agreement and Intellectual Property Protection in China*, 9 DUKE J. COMP. & INT'L L. 219 (1998) (discussing the preparation China was making to join the WTO and its TRIPS Agreement); Zheng Chengsi, *TRIPS and the Amendment of Unfair-Competition Laws in China*, in CHINA'S PARTICIPATION IN THE WTO, *supra* note 285, at 231 (discussing the inadequacy of the Chinese unfair competition laws and the need for reforms to enable the laws to comply with the TRIPS Agreement).

In the past decade, commentators have also paid greater attention to the development of bilateral and regional trade agreements China has established with its trading partners.<sup>288</sup> These agreements include China's bilateral agreements with Chile, Pakistan, New Zealand, Singapore, Peru, Costa Rica, Iceland, Switzerland, South Korea, Australia, Georgia, and the Maldives.<sup>289</sup> The analyses of these agreements have provided useful contrasts to the existing discussions of free trade agreements or economic partnership agreements established by the European Union and the United States.<sup>290</sup>

Apart from bilateral free trade agreements, China has also actively negotiated regional trade agreements. In November 2000, China established the ASEAN-China Free Trade Area with the ten members of the Association of Southeast Asian Nations (ASEAN).<sup>291</sup> China has also actively participated in the RCEP negotiations, a mega-regional

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288. See Peter K. Yu, *Sinic Trade Agreements and China's Global Intellectual Property Strategy*, in INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION 247 (Christoph Antons & Reto M. Hilty eds., 2015) (discussing China's growing engagement with the developing world, the underlying goals of the bilateral and regional trade agreements established by China, and the negotiation strategies behind these agreements); Zhang Guangliang, *China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan-Korea FTA Negotiations*, 24 ASIA PAC. L. REV. 36 (2016) (discussing China's position on the intellectual property negotiations relating to the China-Japan-Korea Free Trade Agreement).

289. For discussions of China's free trade agreements, see generally THE CHINA-AUSTRALIA FREE TRADE AGREEMENT: A 21ST-CENTURY MODEL (Colin Picker et al. eds., 2018); Henry Gao, *The RTA Strategy of China: A Critical Visit*, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 53 (Ross Buckley et al. eds., 2008); Marc Lanteigne, *Northern Exposure: Cross-Regionalism and the China-Iceland Preferential Trade Negotiations*, 202 CHINA Q. 362 (2010); Yu, *Sinic Trade Agreements*, *supra* note 122.

290. See generally INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (collecting articles that discuss free trade agreements in the intellectual property context); Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259 (criticizing the U.S.-Australia Free Trade Agreement); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 392-400 (2004) (discussing the growing use of bilateral and regional trade agreements to push for higher intellectual property standards).

291. The ten current ASEAN members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *ASEAN Member States*, ASEAN SECRETARIAT, <http://asean.org/asean/asean-member-states> (last visited May 9, 2018); see Peter K. Yu, *The Incremental Development of the ASEAN-China Strategic Intellectual Property Partnership*, in HANDBOOK ON INTELLECTUAL PROPERTY LAW IN SOUTHEAST ASIA (Christoph Antons ed., forthcoming 2019) (discussing the ASEAN-China Free Trade Area and other cooperative efforts between ASEAN and China in the intellectual property area).

trade agreement that is now being developed between ASEAN, Australia, China, India, Japan, New Zealand, and South Korea under the ASEAN+6 framework.<sup>292</sup>

A related topic that has garnered considerable scholarly interest and attention concerns China's exclusion from the negotiations for the Anti-Counterfeiting Trade Agreement<sup>293</sup> (ACTA) and the Trans-Pacific Partnership (TPP).<sup>294</sup> While the scholarship in this area,<sup>295</sup> like scholarship on China and the WTO, is not always limited to intellectual property, this body of scholarship has provided important insight into China's emerging role in international intellectual property normsetting.

From a geopolitical standpoint, having a good grasp of China's normsetting activities can be quite beneficial. After all, there has been growing discussion of the "Beijing Consensus"<sup>296</sup>—or what noted

292. See *supra* note 11 (listing sources that discuss the RCEP negotiations).

293. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011).

294. Trans-Pacific Partnership Agreement, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

295. See Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHI. J. INT'L L. 370 (2017) (explaining why and how the United States sought to use the TPP to rein in or constrain China in international trade); Peter K. Yu, *TPP and Trans-Pacific Perplexities*, 37 FORDHAM INT'L L.J. 1129, 1132–51 (2014) (discussing China's experience as a "TPP outsider"). As Shintaro Hamanaka noted,

[T]he formation of regional integration and cooperation frameworks can be best understood as a dominant state's attempt to create its own regional framework where it can exercise some exclusive influence . . . . For an economy that wants to increase its influence, establishing a regional group where it can be the most powerful state—dominating other members in terms of material capacity—is convenient. The most powerful state is likely to be influential in the group because it can easily assume so-called "structural leadership," which is based on material resources. While other factors such as knowledge can also be a source of power, the exercise of power based on non-material resources is uncertain. Thus, having the largest resources in a regional grouping is important to increase the likelihood of attaining leadership. By assuming leadership, an economy can set a favorable agenda and establish convenient rules. In addition, the most powerful state can increase influence through prestige and asymmetric economic interdependence with others.

Shintaro Hamanaka, *Trans-Pacific Partnership Versus Regional Comprehensive Economic Partnership: Control of Membership and Agenda Setting* 1–2 (Asian Dev. Bank, Working Paper on Regional Economic Integration No. 146, 2014), [https://aric.adb.org/pdf/workingpaper/WP146\\_Hamanaka\\_Trans-Pacific\\_Partnership.pdf](https://aric.adb.org/pdf/workingpaper/WP146_Hamanaka_Trans-Pacific_Partnership.pdf) (footnote and citations omitted).

296. For discussions of the Beijing Consensus, see generally STEFAN A. HALPER, THE

Chinese economist Hu Angang modestly called the “Beijing Proposal.”<sup>297</sup> Thus far, those frustrated with the existing international economic system have touted the Beijing Consensus as a viable alternative to the Washington Consensus.<sup>298</sup> While the Washington Consensus emphasizes free market reforms as a path to economic prosperity,<sup>299</sup> the Beijing Consensus suggests that economic growth “comes from the state directing development to some degree, avoiding the kind of chaos that comes from rapid economic opening, and thus allowing a nation to build its economic strength.”<sup>300</sup> In the intellectual property area, the tension and rivalry between the Beijing and Washington Consensuses deserve policy and scholarly attention because

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BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY (2010); THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (Chen Weitseng ed., 2017); RAMO, *supra* note 184.

297. HU ANGAN, CHINA IN 2020: A NEW TYPE OF SUPERPOWER 17 (2011).

298. See Chris Alden, *Africa Without Europeans*, in CHINA RETURNS TO AFRICA: A RISING POWER AND A CONTINENT EMBRACE 349, 355 (Chris Alden et al. eds., 2008) (“The ‘Beijing Consensus’ challenges [the formula dictated by the Washington Consensus] and may embolden states, even those not recognized as pariahs, to opt out of the complexities that these norms and values introduce to their economic and political programmes.”); Dot Keet, *South-South Strategic Bases for Africa to Engage China*, in THE RISE OF CHINA AND INDIA IN AFRICA: CHALLENGES, OPPORTUNITIES AND CRITICAL INTERVENTIONS 21, 28 (Fantu Cheru & Cyril Obi eds. 2010) (“[T]he means and methods employed in Chinese operations in Africa are more likely to provide appropriate models and more instructive experiences in the conditions of underdevelopment, lack of basic infrastructures and other current technical incapacities in Africa.”); Stephen Marks, *Introduction to AFRICAN PERSPECTIVES ON CHINA IN AFRICA* 1, 11 (Firoze Manji & Stephen Marks eds., 2007) (citing Nigerians’ appreciation of the Chinese model for providing stability and visionary leadership); RAMO, *supra* note 184, at 3 (“China is marking a path for other nations around the world who are trying to figure out not simply how to develop their countries, but also how to fit into the international order in a way that allows them to be truly independent, to protect their way of life and political choices in a world with a single massively powerful centre of gravity.”). See generally Yu, *Sinic Trade Agreements*, *supra* note 122, at 1018–22 (discussing the battle between the Beijing Consensus and the Washington Consensus).

299. John Williamson, an economist and a senior fellow of the Institute for International Economics, coined the term “Washington Consensus.” See generally John Williamson, *What Washington Means by Policy Reform*, in LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7, 7–20 (John Williamson ed., 1990) (identifying the economic policies Washington encouraged other states to adopt in Latin America). The Washington Consensus was derived from policy recommendations in ten different areas: (1) fiscal deficits; (2) public expenditure priorities; (3) tax reform; (4) interest rates; (5) the exchange rate; (6) trade policy; (7) foreign direct investment; (8) privatization; (9) deregulation; and (10) property rights.

300. JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA’S SOFT POWER IS TRANSFORMING THE WORLD 56 (2007).



the TRIPS-based international intellectual property regime was built upon the latter set of policy recommendations.<sup>301</sup>

The discussion of China's growing role in the international trading and intellectual property systems is also timely and important when it is tied to the ongoing exploration of developments in the G-2 (Group of 2)<sup>302</sup> or the BRICS countries.<sup>303</sup> Since its creation, the term "BRICS"

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301. See Neil Weinstock Netanel, *Introduction: The WIPO Development Agenda and Its Development Policy Context*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 1, 2–3 (Neil Weinstock Netanel ed., 2008) ("The Development Agenda . . . reflects developing countries' growing resistance to the upward harmonization of [intellectual property] protection required by the TRIPS and subsequent 'TRIPS-plus' bilateral free trade agreements . . . . [It] should be understood as part of a broad, multipronged rejection of the 'Washington Consensus' that shunted aside the [New International Economic Order] and came to dominate development policy in the 1980s and early 1990s.").

302. As Fred Bergsten argued,

The United States should . . . implement a subtle but sharp change in its basic economic strategy toward China. Instead of focusing on bilateral problems and complaints, and seeking to coopt China into a global economic system that it would try to continue leading by itself, the United States should seek to develop a true partnership with China to provide joint leadership of that system, even if the system requires substantial modifications to persuade China to play that role. The two economic superpowers should begin to pursue together the development of coordinated, or at least cooperative, approaches to global issues that can be resolved effectively only through their active co-management. Such a "G-2" approach would accurately recognize, and be perceived by the Chinese as accurately recognizing, the new role of China as a legitimate architect and steward of the international economic order.

C. FRED BERGSTEN ET AL., *CHINA'S RISE: CHALLENGES AND OPPORTUNITIES* 22–23 (2008); see also Walden Bello, *Chain-Gang Economics: China, the US, and the Global Economy*, in *CHINA'S NEW ROLE IN AFRICA AND THE SOUTH: A SEARCH FOR A NEW PERSPECTIVE* 7, 11 (Dorothy-Grace Guerrero & Firoze Manji eds., 2008) (describing "a chain-gang relationship" between China and the United States in light of their growing economic interdependence); Niall Ferguson & Moritz Schularick, "*Chimerica*" and the Global Asset Market Boom, 10 *INT'L FIN.* 215 (2007) (coining the term "Chimerica"). But see HALPER, *supra* note 296, at 216–18 (arguing against elevating the U.S.-China relationship to a special G-2 bilateral partnership). See generally ZACHARY KARABELL, *SUPERFUSION: HOW CHINA AND AMERICA BECAME ONE ECONOMY AND WHY THE WORLD'S PROSPERITY DEPENDS ON IT* (2009) (discussing the intertwined economic relationship between China and the United States).

303. See Jim O'Neill, *Building Better Global Economic BRICs* (Goldman Sachs, Global Economics Paper No. 66, 2001) (coining the term "BRIC"); see also JIM O'NEILL, *THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND* (2011) [hereinafter O'NEILL, *THE GROWTH MAP*] (providing a later and much broader analysis). For discussions of the BRICS countries, see generally *BRICS AND DEVELOPMENT ALTERNATIVES: INNOVATION SYSTEMS AND POLICIES* (José Eduardo Cassiolato & Virgínia Vitorino eds., 2011); *THE BRICS-LAWYERS' GUIDE TO GLOBAL COOPERATION* (Rostam Neuwirth et al. eds., 2017) [hereinafter *THE BRICS-LAWYERS' GUIDE*]; ANDREW F.

has been used to refer to Brazil, Russia, India, China, and South Africa—and, for some, also other large developed countries.<sup>304</sup> In April 2011, China invited South Africa to join Brazil, India, and Russia for the first time in Sanya to discuss issues that could benefit from greater cooperation.<sup>305</sup> Since then, an annual BRICS summit has taken place in New Delhi (India), Durban (South Africa), Fortaleza (Brazil), Ufa (Russia), Goa (India), and Xiamen (China).<sup>306</sup> Although the popularity and collective influence of the BRICS countries have slightly declined in the past few years, the BRICS concept has continued to garner considerable academic and policy attention.<sup>307</sup> In the area of international intellectual property normsetting, some BRICS countries—such as Brazil, China, and India—have also played rather influential roles, even though they have not yet utilized their collective clout as a single bloc.<sup>308</sup>

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COOPER, *THE BRICS: A VERY SHORT INTRODUCTION* (2016); AMRITA NARLIKAR, *NEW POWERS: HOW TO BECOME ONE AND HOW TO MANAGE THEM* (2010); O'NEILL, *THE GROWTH MAP*, *supra*. For discussions specifically relating to intellectual property, see generally Peter K. Yu, *Intellectual Property Negotiations, the BRICS Factor and the Changing North-South Debate*, in *THE BRICS-LAWYERS' GUIDE*, *supra*, at 148 [hereinafter Yu, *The BRICS Factor*]; Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 *AM. BUS. L.J.* 317 (2006); Robert C. Bird & Daniel R. Cahoy, *The Emerging BRIC Economies: Lessons from Intellectual Property Negotiation and Enforcement*, 5 *NW. J. TECH. & INTELL. PROP.* 400 (2007); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 *AM. J.L. & MED.* 345 (2008) [hereinafter Yu, *Access to Medicines*]; Rochelle C. Dreyfuss, *The Role of India, China, Brazil and Other Emerging Economies in Establishing Access Norms for Intellectual Property and Intellectual Property Lawmaking* (Int'l Law & Justice, N.Y. Univ. Sch. of Law, Working Paper No. 2009/5, 2009), <http://ssrn.com/abstract=1442785>.

304. See CHIDI OGUAMANAM, *INTELLECTUAL PROPERTY IN GLOBAL GOVERNANCE: A DEVELOPMENT QUESTION 221–22* (2012) (expanding BRICS to cover other emerging middle-income economies).

305. See Sébastien Hervieu, *South Africa Gains Entry to Bric Club*, *GUARDIAN* (Apr. 19, 2011, 9:04 AM), <https://www.theguardian.com/world/2011/apr/19/south-africa-joins-bric-club> (reporting that South Africa joined the four BRIC countries in the third BRIC summit in Sanya).

306. See *Themes and Results of BRICS Summits over the Decade*, *CHINA DAILY* (Aug. 31, 2017, 2:59 PM), [http://www.chinadaily.com.cn/world/2017brics/2017-08/31/content\\_31369213.htm](http://www.chinadaily.com.cn/world/2017brics/2017-08/31/content_31369213.htm) (recapitulating the main themes and results of BRICS summits over the past decade).

307. See *supra* note 303 (listing sources that discuss the BRICS countries).

308. See Yu, *The BRICS Factor*, *supra* note 303, at 148 (discussing the BRICS countries' roles in international trade and intellectual property negotiations); Yu, *Access to Medicines*, *supra* note 303, at 370–87 (discussing the important roles that the BRICS countries can play in the international intellectual property regime); see also Amélie Robine, *Technology Transfer Agreements and Access to HIV/AIDS Drugs: The Brazilian Case*, in *THE POLITICAL ECONOMY OF HIV/AIDS IN DEVELOPING COUNTRIES: TRIPS, PUBLIC HEALTH SYSTEMS AND FREE ACCESS* 120, 126 (Benjamin Coriat ed., 2008) (discussing the growing importance of the BRICS countries in the global HIV/AIDS debate).

#### D. Summary

This Part has identified three broadly defined multi-disciplinary clusters within which scholarship on the Chinese intellectual property system has been developed outside the area of law and policy. Although the discussion in this Part is by no means exhaustive, it provides a good indication of the different types of research that have slowly emerged to cover the Chinese intellectual property system. Such emergence is welcome, because inter- and multi-disciplinary research brings with it different interests, assumptions, preoccupations, concepts, methodologies, vocabularies, and research questions.

From a research standpoint, the interdisciplinary turn in scholarship on the Chinese intellectual property system is noteworthy because it bears strong resemblance to a similar interdisciplinary turn in intellectual property scholarship in other areas. With the adoption of the TRIPS Agreement, the increased salience of internet-based activities, and the raising profile of intellectual property research, scholars have paid growing attention to developments in the intellectual property area. As scholars become more interested in this area, some of them have also chosen to conduct research on the Chinese intellectual property system.

### III. LESSONS

#### A. China Scholars

In view of the growing volume of scholarship on the Chinese intellectual property system, an instructive question to ponder is what this body of scholarship can teach China scholars. While it is hard to explain who constitute China scholars, this Article broadly defines the term to cover not only Sinologists or China hands,<sup>309</sup> but also those studying China and its developments. This broadly defined group could draw at least three sets of lessons from scholarship on the Chinese intellectual property system.

First, this body of scholarship has covered developments in an area

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309. See Berthold Laufer, *Mission of Chinese Students*, 13 CHINESE SOC. & POL. SCI. REV. 285, 286 (1929) (noting that Sinology “is of paramount educational and cultural value not only to our country, but to mankind at large” and “has a tendency to broaden our minds, to widen our horizon, to deepen our ideals, to contribute to the progress of a higher learning and to the discovery of a new and beautiful world that is still unknown to us”); see also J. Stapleton Roy, *A China Hand: Young, Witty and Untiring*, N.Y. TIMES, Mar. 19, 1979, at 7 (noting the emergence of “a new generation of China hands . . . in the American government”).

in which China has faced considerable pressure from the outside world, most notably the United States.<sup>310</sup> For instance, those studying Chinese law will find scholarship on the Chinese intellectual property system filled with rich discussions of the transplant of foreign laws and policies.<sup>311</sup> Similarly, those studying U.S.-China trade or diplomatic relations will find intellectual property an important area through which one can better understand the dynamics concerning the engagement between the two countries.<sup>312</sup>

Second, intellectual property is a highly specialized area of economic regulation that has progressed very rapidly in China. Indeed, intellectual property developments have provided an excellent window into the rapid development of economic laws and policies since China accelerated its reintegration with the global economy in the early 1990s. Given the

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310. See Yu, *supra* note 101, at 140–51 (describing the United States' use of section 301 sanctions and various trade threats to induce China to strengthen intellectual property protection); see also MERTHA, *supra* note 44, at 41–52 (discussing the U.S.-China intellectual property negotiations from 1989 to 1996).

311. See generally ALFORD, *supra* note 94, at 30–55 (discussing foreign transplants in the intellectual property area and how the Chinese “learn[ed] the law at gunpoint”); Niklas Bruun & Zhang Ligu, *Legal Transplant of Intellectual Property Rights in China: Norm Taker or Norm Maker?*, in CHINA AND EUROPE, *supra* note 93, at 43 (discussing the interaction between the transplant of intellectual property laws and the building of intellectual property norms as a dynamic process); Li Mingde, *Intellectual Property Law Revision in China: Transplantation and Transformation*, in CHINA AND EUROPE, *supra* note 93, at 65 (discussing the transplant of international intellectual property norms to China and the effort the country has made to assimilate those norms into its special political, economic, and social structures); Yu, *supra* note 93 (providing a history of the transplant of intellectual property laws in China and discussing the strengths, weaknesses, and future of such efforts).

312. See generally Alford, *supra* note 89 (critically examining the U.S. policy toward the development of protection for American intellectual property in China and calling for the policy's reformulation); Baumgarten, *supra* note 57 (providing observations on the changing U.S.-China copyright relations following the signing of the 1979 Agreement); Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295 (1996) (providing a critical assessment of the various U.S.-China intellectual property conflicts in the late 1980s and early to mid-1990s); Robert S. Rogoyski & Kenneth Basin, *The Bloody Case that Started from a Parody: American Intellectual Property Policy and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237 (2009) (discussing the conflict the existing U.S. foreign intellectual property policy has posed to American democratic ideals and democratic foreign policy objectives); Yu, *supra* note 101 (criticizing the ineffectiveness and shortsightedness of the American intellectual property policy toward China in the early to mid-1990s and offering the constructive strategic partnership as a new conceptual framework to reformulate the policy); Yu, *supra* note 111 (arguing that the United States' WTO complaint could create a new “cycle of futility” and suggesting ways to avoid such a cycle).

tremendous difficulty in studying the varying aspects of economic laws and policies, a focus on intellectual property developments will make research projects more manageable. Indeed, intellectual property developments provide “an excellent window into the policymaking and policy enforcement processes of contemporary China.”<sup>313</sup>

Third, the intellectual property area provides international benchmarks against which Chinese developments can be easily measured against those in the rest of the world—for both good and bad.<sup>314</sup> To be sure, scholars studying China can debate whether the existing TRIPS-based international intellectual property standards suit the country’s specific local conditions or cultural background. Nevertheless, the existence of two sets of initially drastically different standards inside and outside China enables researchers to make the much-needed comparison.<sup>315</sup> Indeed, a vast divide existed between early socialist regulations relating to intellectual property in the 1960s and 1970s<sup>316</sup> and the TRIPS-based intellectual property system that China has today.<sup>317</sup> Even after China reopened its economy to the outside world, the development of the early modern intellectual property laws in the 1980s, most notably 1982 Trademark Law and the 1984 Patent Law, was filled with back-and-forth debates about the different ways to introduce intellectual property rights.<sup>318</sup> Those debates not only

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313. MERTHA, *supra* note 44, at 26.

314. See Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 13–17 (2010) (discussing the challenge of figuring out how to compare a multitude of countries with different sizes, economies, market conditions, technological proficiencies, institutional infrastructures, and cultural backgrounds).

315. Commentators may question the difference between the current intellectual property laws in China and those in other parts of the world, given the harmonization brought about by the TRIPS Agreement and other international and regional intellectual property agreements. Nevertheless, as Chen Jianfu rightly reminded us, law always operates in local conditions:

Chinese law has become less Chinese than ever before, both in its form and substance. Law, however, always operates in “local conditions”; that is, in the unique political, social, economic and cultural context of the country concerned. However much Chinese law has become “western,” the adoption of western law is not necessarily the same as the introduction of the western values that underpin the western law.

CHEN, *supra* note 22, at 699–700 (footnote omitted).

316. See *supra* Section I.A (providing examples of scholarship in the first phase of prehistoric development).

317. See text accompanying *supra* note 120 (discussing China’s effort to comply with the TRIPS Agreement).

318. For discussions of the debates surrounding the drafting of the 1984 Patent Law, see generally ALFORD, *supra* note 94, at 66, 70; MERTHA, *supra* note 44, at 84–86;

explained the design of those laws, but also reflected the strengths and weaknesses of the current international intellectual property regime.

### B. *Intellectual Property Scholars*

The previous Section has explored what China scholars can learn from developments in the intellectual property area. This Section asks the reverse question about what developments in China can teach intellectual property scholars. There are at least five specific lessons.

First, scholarship on the Chinese intellectual property system provides updates on the latest developments in a country that has a growing influence on the international intellectual property community. Whether the focus is on the massive piracy and counterfeiting problem, the millions of patents that Chinese applicants file annually,<sup>319</sup> or the new international intellectual property norms that China has helped establish through the RCEP negotiations,<sup>320</sup> intellectual property developments involving China are likely to have considerable impacts at the domestic, regional, and international levels. For those studying the competition between China and the United States—or, for that matter, between China and other countries—scholarship on the Chinese intellectual property system will provide useful information about the state of bilateral competition, opportunities for increased cooperation, and possibilities for greater rivalry or confrontation. Although scholarship on the Chinese intellectual property system has thus far focused on the impact of the international intellectual property regime on China—the primary focus of the first four phases<sup>321</sup>—it is high time that researchers undertook more in-depth study of China’s impact on the international intellectual property regime.<sup>322</sup>

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Yu, *Building the Ladder*, *supra* note 22, at 6.

319. See *Table 1 Statistics on Applications for Inventions from Home and Abroad*, STATE INTELLECTUAL PROP. OFFICE, <http://english.sipo.gov.cn/statistics/2017s/201712/1111449.htm> (last visited May 9, 2018) (stating that in 2017 SIPO received a total of 1,381,594 applications for invention patents); *Table 2 Statistics on Applications for Utility Model and Design from Home and Abroad*, STATE INTELLECTUAL PROP. OFFICE, <http://english.sipo.gov.cn/statistics/2017s/201712/1111448.htm> (last visited May 9, 2018) (stating that in 2017 SIPO received a total of 1,687,593 applications for utility model patents and 628,658 applications for design patents).

320. See *supra* note 11 (listing sources that discuss international intellectual property normsetting through the RCEP negotiations).

321. See *supra* Sections I.B–D (discussing scholarship in the three phases of imitation and transplantation, standardization and customization, and integration and assimilation).

322. In various forums, I have made a similar claim with respect to internet

Second, scholarship on the Chinese intellectual property system encourages researchers to think more deeply about the different justifications for and treatment of intellectual property rights in non-market economies. Although intellectual property laws in China have been repeatedly revamped to ensure compliance with the TRIPS-based international minimum standards,<sup>323</sup> a historical analysis of the early developments of the Chinese intellectual property system provides especially helpful insights into the different ways to promote creativity and innovation.<sup>324</sup> The limited scholarship in the first two phases also raises important questions about the compatibility and mismatch between intellectual property rights and what commentators have referred to as “socialist legality with Chinese characteristics.”<sup>325</sup> While China—or, for that matter, other socialist economies—may not protect intellectual property rights to the same extent as Western developed countries, it will be hard to justify the claim that socialist countries do not offer any protection to these rights. As scholarship in the first phase has shown, even during the Mao Zedong era, China

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developments in China. See Yu, *Middle Kingdom*, *supra* note 181, at 253–54 (“[T]he important question about the Internet in China is not only how the Internet will change China but also how China will change the Internet.”); see also JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 104, 104 n.60 (2006) (citing Peter K. Yu, The Path of Sinicyberlaw, Presentation at Michigan State University College of Law Symposium: Digital Silk Road: A Look at the First Decade of China’s Internet Development and Beyond (May 23, 2005)).

323. As I noted in an earlier article,

The primary driver of convergence of intellectual property laws in Asia is the World Trade Organization (WTO), which was established in April 1994. Except for Afghanistan, Bhutan, Iran and Timor-Leste, all countries in Eastern, Southern and South-eastern Asia (under UN classification) are members of this organization. As a result, they abide by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Indeed, countries such as China and Vietnam had to strengthen their intellectual property regimes and go through a strenuous accession process before they could finally join the WTO—in December 2001 and January 2007, respectively.

Peter K. Yu, *Clusters and Links in Asian Intellectual Property Law and Policy*, in ROUTLEDGE HANDBOOK OF ASIAN LAW 147, 150 (Christoph Antons ed., 2017).

324. See PETER DRAHOS, THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS 223 (2010) (“Despite the fact that there was virtually no patenting activity [in the late nineteenth and early twentieth centuries], there was innovative activity. Quite remarkably, China was able to build between 1860 and 1949 a modern chemical industry.”).

325. E.g., ALFORD, *supra* note 94, at 70; Jonathan K. Ocko, *Using the Past to Make a Case for the Rule of Law*, in THE LIMITS OF THE RULE OF LAW IN CHINA 65, 66 (Karen G. Turner et al. eds., 2000).

offered protection through inventors' certificates (*faming zhengshu*),<sup>326</sup> payments to authors or inventors,<sup>327</sup> and non-property-based protection of these creators (similar to moral rights in Western jurisdictions).<sup>328</sup>

Third, scholarship on the Chinese intellectual property system provides an attractive forum for scholars to undertake comparative intellectual property research.<sup>329</sup> In this increasingly globalized world, such scholarship is urgently needed.<sup>330</sup> In a recent article, Irene

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326. See Gale, *supra* note 49, at 349 (noting the monetary awards to inventors provided through the 1963 Regulations Concerning Awards for Inventions and the 1963 Regulations Concerning Awards for Technical Improvement Proposals); Hsia & Haun, *supra* note 47, at 282, 289 (discussing the financial awards or compensation provided to authors and inventors through the regulations in the 1950s and 1960s).

327. See 1984 H. COMM. PRINT, *supra* note 59, at 19 (“[The Regulations Concerning Awards for Inventions and the Regulations Concerning Awards for Technical Improvement Proposals] changed the system of awards to inventors that had been tied to the certificates of authorship. In place of the annual payments, lump-sum bonuses in much smaller amounts were prescribed.”); ALFORD, *supra* note 94, at 57 (“[The certificates of inventions under the 1950 Provisional Regulations on the Protection of Invention Rights and Patent Rights] entitled persons or entities responsible for worthy advances to recognition and monetary rewards tied to the savings realized from their inventions.”); *id.* at 59–60 (discussing the Soviet-style of contracts with authors in the 1950s, which provide for *gaofei*, or basic payments for the writings).

328. See Gale, *supra* note 49, at 349 (stating that “all monetary awards in China [under the regulations for invention awards in the 1950s and 1960s] were to be accompanied by honorary awards as well, in the form of medals, certificates and titles”); Loeber, *supra* note 55, at 913 (“The author possesses the right to the inviolability of his work. This means that changes of the text may only be inserted with the permission of the author. The Chinese author also possesses the right to be acknowledged as the author of his works.”).

329. See Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT’L L.J. 1, 6–13 (2005) (explaining “why foreign law is becoming more relevant in deciding IP claims arising under domestic statutes”).

330. As Hiram Chodosh declared,

[Comparison of laws in different jurisdictions] serve many overlapping purposes. First, they potentially facilitate a greater appreciation of similarities and differences among competing laws. Second, they are integral to law reform initiatives intended to reduce the differences. Finally, comparisons inform the creation of private and public international law designed to eliminate conflicts of domestic law.

Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1027–28 (1999). Similarly, Albert Chen wrote,

By studying the history, structure, content and operation of legal systems and legal cultures in different parts of the world, comparative law scholarship illuminates the similarities and differences in the ways in which different peoples, nations and civilisations solve the fundamental “law-related” problems of human society . . . . It generates the data on the basis of which legal philosophers may rest or develop their theories about what a legal system is or ought to be, about the relative merits



Calboli called on U.S. intellectual property scholars to engage more actively in comparative legal analysis.<sup>331</sup> As she explained,

[such] analysis can offer additional information about diverse perspectives on the justification of intellectual property norms and the application of these norms in different national contexts. This information is relevant to all scholars, including all of us in the U.S., for a more comprehensive evaluation of a variety of intellectual property issues, as intellectual property laws remain territorial laws despite decades of intensive international harmonization.<sup>332</sup>

Fourth, scholarship on the Chinese intellectual property system enables researchers to appreciate the significant challenges confronting the developing world as well as evaluate the potential benefits provided by intellectual property reforms. While scholarship in the first three phases has shown China's reluctance to introduce stronger intellectual property protection, scholarship in later phases reflect China's changing position. Today, there is no denying that the country "has benefited from the TRIPS-based intellectual property

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of different forms of socio-legal arrangements and institutions, and about the relationship and interaction between the legal, political, economic, social and cultural domains of human existence in society.

CHEN, *supra* note 42, at 1; see also Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 453 (2001) ("A comparativist perspective will always aid appreciation of laws. But the increasingly multidimensional nature of international intellectual property litigation may mean that only a comparativist can fully appreciate these dimensions and accord them the proper weight."); John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 690 (2002) ("[A] diverse legal system has positive externalities for other legal jurisdictions precisely because it provides information to the other jurisdictions about the value of different legal rules."); Lee, *supra* note 329, at 21 ("Diversity in IP approaches . . . provides insurance against poorly calibrated IP laws. Just as diversification can diminish the risk of loss in an investment portfolio, so too with IP laws can a diversity of approaches diminish the risk of over- or under-protecting it." (footnote omitted)).

331. See Irene Calboli, *A Call for Strengthening the Role of Comparative Legal Analysis in the United States*, 90 ST. JOHN'S L. REV. 609, 611–12 (2016) ("[C]omparative legal analysis could play a larger role compared to the one that it currently seems to play amongst U.S. intellectual property academics, and that a larger number of U.S. scholars could turn to comparative legal analysis in some instances in conjunction with other research methodologies while conducting research in intellectual property law.").

332. *Id.* at 637–38; see also Martha L. Minow, *The Controversial Status of International and Comparative Law in the United States*, in COURTS AND COMPARATIVE LAW 513, 528 (Mads Andenas & Duncan Fairgrieve eds., 2015) ("Neglecting developments in international and comparative law could vitiate the vitality, nimbleness, and effectiveness of American law or simply leave us without the best tools and insights as we design and run institutions, pass legislation, and work to govern ourselves.").

system [even though] the country would not have reached its current position had it implemented the TRIPS Agreement to the fullest extent.”<sup>333</sup> Thus far, the TRIPS Agreement has been a “mixed bag” because it can help and simultaneously hurt developing countries.<sup>334</sup> Moreover, as I noted in previous works, China is in the process of crossing over from the pirating side of the intellectual property divide to the other more promising side.<sup>335</sup> If so, the Chinese experience may inform the experience of other similarly situated, or even smaller, developing countries.<sup>336</sup> As Professor Mertha observed, “The Chinese case is instructive because China is similar to many developing and postsocialist countries and, therefore, it is possible to make inferences from the Chinese experience to explain intellectual property development (or the lack thereof) in these other countries.”<sup>337</sup>

Finally, by analyzing developments in another country, scholarship on the Chinese intellectual property system invites scholars to question intellectual property developments within their own countries or other third countries. After all, comparative legal analysis has always been a two-way street. In the context of legal transplants, commentators have noted how the transplant of a law often provides an opportunity for policymakers to undertake reform and to determine how a law should

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333. Yu, *supra* note 23, at 12.

334. See Peter K. Yu, *The Comparative Economics of International Intellectual Property Agreements*, in *COMPARATIVE LAW AND ECONOMICS* 282 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016) (critically assessing the TRIPS Agreement from a comparative economic perspective).

335. See Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 1 *WIPO J.* 1, 10–15 (2009) (discussing the existence of a “crossover point” where countries consider it to be in their self-interest to move from a pirate nation to one that strongly respects intellectual property rights); Yu, *supra* note 180, at 529–32 (noting that China is at the cusp of crossing over from a pirate nation to a country respectful of intellectual property rights); see also Suttmeier & Yao, *supra* note 169, at 6–7 (“China is . . . poised for an IP transition. Yet whether this transition will lead to greater harmonization with international IP norms and practices, toward ‘destroying the IP regime’ . . . , or to some other departure from the given order remains unclear.”).

336. As John Orcutt and Hong Shen noted,

If China is successful in developing an innovative nation that includes a robust university technology commercialization system, it will have made one of the most dramatic economic transformations in history . . . . China’s success will not only be important for the 1.3 billion people living in China, it could also prove to be the key for many in the developing world.

JOHN L. ORCUTT & HONG SHEN, *SHAPING CHINA’S INNOVATION FUTURE: UNIVERSITY TECHNOLOGY TRANSFER IN TRANSITION* 254 (2011).

337. MERTHA, *supra* note 44, at 23–24.

be adapted and assimilated.<sup>338</sup> The transplant process may also allow the recipient country to become a donor in turn by sharing valuable comparative lessons and experiences.<sup>339</sup>

#### IV. CHALLENGES

The previous Part has underscored the importance and benefits of conducting research on the Chinese intellectual property system to both China and intellectual property scholars. This Part turns to the different challenges confronting research in this area. While some challenges were particularly daunting at the formative stages of the modern Chinese intellectual property system, they have since subsided considerably. Others, however, have remained.

The challenges that scholars most widely discussed in the early days of the Chinese intellectual property system was the lack of availability of research materials concerning that system. Those challenges were particularly acute before China reopened its economy to the outside world. As George Ginsburgs observed,

The study of Communist Chinese law is fraught with many difficulties. Not the least of these is the problem of getting enough reliable data on what the law is and how the legal system operates on the mainland. Under the circumstances, watchers of the China scene have tried by various means to supplement the meagre fund of available information. Those able to visit China on more or less protracted jaunts have brought back personal impressions from conversations with ordinary Chinese citizens as well as officials and party cadres. Some have even managed to obtain permission to observe sessions of the local people's courts at work and have shared their experiences with their less fortunate colleagues. Systematic interviewing of Chinese refugees in Hong Kong and Macao has also

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338. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 35 (2d ed. 1993) (“[A] time of transplant is often a moment when reforms can be introduced.”); Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 756 (2010) (“Although legal transplantation is a process wherein laws migrate from one country to another, it is important not to ignore the fact that the transplantation process also provides important opportunities for improvements, experiments, and new developments.”).

339. See Jeremy Bentham, *Of the Influence of Time and Place in Matters of Legislation*, in *THE WORKS OF JEREMY BENTHAM* 169, 185 (Adamant Media 2005) (1843) (“That a system might be devised, which, while it would be better for Bengal, would also be better even for England.”); WATSON, *supra* note 338, at 99 (“[T]he time of reception is often a time when the provision is looked at closely, hence a time when law can be reformed or made more sophisticated. It thus gives the recipient society a fine opportunity to become a donor in its turn.”).

contributed to the sum total of our knowledge of legal life behind the so-called Bamboo Curtain. Finally, perusal of what has been published on legal developments in Communist China in foreign languages has helped further flesh out the picture.<sup>340</sup>

Even in the 1980s and 1990s, many legal or normative documents remained classified as *neibu*—that is, as internal documents that foreign researchers could neither use nor access.<sup>341</sup>

The lack of such materials not only explains the limited scholarship on the Chinese intellectual property system in the first two phases,<sup>342</sup> but also calls for considerable appreciation of the pioneering efforts that early scholars of the Chinese intellectual property system undertook. Although scholarship in this area has changed considerably—often for the better—there is no denying that later researchers, myself included, have greatly benefited from the precious scholarship of previous researchers. In the area of Chinese intellectual property research—or, more broadly, Chinese legal research—the aphorism that “we are standing on the shoulders of giants” cannot be more accurate.<sup>343</sup>

Although materials have been difficult to find in the first two phases, the accessibility of these materials has greatly increased in later phases,

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340. George Ginsburgs, *Soviet Sources on the Law of the Chinese People's Republic*, 18 U. TORONTO L.J. 179, 179 (1968). See generally CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES (Jerome Alan Cohen ed., 1970) [hereinafter CONTEMPORARY CHINESE LAW] (providing an excellent collection of articles discussing methodologies in and challenges to studying Chinese law before the country's reopening in the late 1970s).

341. See Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793, 803 (1997) (noting the need “to increase ‘transparency’ and prohibit reliance upon ‘internal’ (*neibu*) documents”); James V. Feinerman, *China's Quest to Enter the GATT/WTO*, 90 AM. SOC'Y INT'L L. PROC. 401, 404 (1996) (noting that “[f]ormerly *neibu* (internal) documents describing China's foreign trade regime were made public to the GATT/WTO Secretariat in the early 1990s” as part of China's effort to accede to the WTO); Liu Nanping, *Judicial Review in China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241, 247 n.13 (1988) (“Many ‘internal’ (*neibu*) Party documents may be enforced as law where the statutes are silent on the issues they address. These documents are unavailable to the general public.”).

342. See *supra* Sections I.A and I.B (discussing the scholarship in these phases).

343. The phrase “standing on the shoulders of giants” is often attributed to Isaac Newton, thanks to his 1675 letter to Robert Hooke. See Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1675) (“If I have seen farther, it is by standing on the shoulders of giants.”). Nevertheless, the phrase “can be traced back to philosopher Bernard de Chartres in the twelfth century.” Michal Shur-Ofry, *Non-Linear Innovation*, 61 MCGILL L.J. 563, 566 n.7 (2016); see also ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (1965) (tracing Newton's aphorism and discussing the metaphor of dwarfs perching on the shoulders of giants).

especially after China's accession to the WTO. Article 63 of the TRIPS Agreement specifically includes transparency obligations, which require the publication or making available of laws, regulations, "final judicial decisions and administrative rulings of general application."<sup>344</sup> As a result of such obligations and the related preparation for WTO accession, many of the laws, regulations, and judicial decisions concerning the Chinese intellectual property system have become accessible online. While some of these research materials appear in only Chinese, a growing volume of materials has now become available in both Chinese and English. As the quality of automated translation technology continues to improve, the linguistic barrier to research on the Chinese intellectual property system will reduce accordingly.<sup>345</sup> Better still, the WIPO Intellectual Property Laws and Treaties Database (WIPO Lex) has made available the English-language versions of many

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344. Article 63.1 of the TRIPS Agreement provides,

Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

TRIPS Agreement, *supra* note 9, art. 63.1. In October 2005, Japan, Switzerland, and the United States invoked this obligation to formally request "clarifications regarding specific cases of IPR enforcement that China has identified for the years 2001 through 2004, and other relevant cases." Letter from Peter F. Allgeier, United States Trade Representative, to H.E. Mr. Sun Zhenyu, Ambassador, Permanent Mission of the People's Republic of China to the World Trade Organization (Oct. 25, 2005). This formal request was made before the USTR filed a WTO complaint in April 2007. Japan and Switzerland also made similar requests. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S.-CHINA TRADE RELATIONS: ENTERING A NEW PHASE OF GREATER ACCOUNTABILITY AND ENFORCEMENT 14 (2006) (stating that the request was "made in conjunction with similar requests by Japan and Switzerland").

345. See NICHOLAS OSTLER, *THE LAST LINGUA FRANCA: ENGLISH UNTIL THE RETURN OF BABEL* xix (2010) ("When electronics removes the requirement for a human intermediary to interpret or translate, the frustrations of the language barrier may be overcome without any universal shared medium beyond compatible software."); James Grimmelmann, *Copyright for Literate Robots*, 101 IOWA L. REV. 657, 675-76 (2016) ("Google Translate reads superficially and in fragments; its translations aren't great, but they're good enough to make professional translators worried about the future of their profession.").

Chinese intellectual property laws and regulations.<sup>346</sup> A number of data sources and case databases, such as Beida Fabao and CIELA, have also emerged to facilitate research on intellectual property cases in China.<sup>347</sup>

The second challenge concerns the lack of understanding of the Chinese intellectual property system, attributable to factors that range from language to culture to simply distance. A vivid example is a keynote presentation that I once heard from a Nobel laureate who will remain nameless. During the question-and-answer session, I asked the expert whether his view about China would differ based on the vastly different regional developments within the country. Shockingly, the expert told me in a room full of conference attendees that he had been to only Beijing and Shanghai and his analysis about China would unfortunately have to be based on those two cities. While I respect the scholar's candor and understand his reluctance to make claims beyond what he had experienced firsthand, there are inherent problems in using Beijing or Shanghai as proxies to study China. More importantly, if this noted scholar has faced such a daunting challenge despite his firsthand experience in China, one has to imagine the even greater challenges confronting those scholars who have not yet visited China and have only obtained information from scholarly literature—or, worse, short media reports.

Indeed, as shown by the research on the historical development of the Chinese intellectual property system, it remains difficult for scholars studying this system to fully understand the politically driven or related developments unless they have a good grasp of the Chinese political landscape.<sup>348</sup> For instance, without understanding the structure of the

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346. *WIPO Intellectual Property Laws and Treaties Database (WIPO Lex)*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/wipolex/en> (last visited May 9, 2018).

347. *See, e.g.*, GORDON C.K. CHEUNG, INTELLECTUAL PROPERTY RIGHTS IN CHINA: POLITICS OF PIRACY, TRADE AND PROTECTION 39–62 (2011) (utilizing the data from official government statistical yearbooks); Brian J. Love et al., *Patent Litigation in China: Protecting Rights or the Local Economy?*, 18 VAND. J. ENT. & TECH. L. 713, 723–25 (2016) (utilizing the Chinese court records collected in the “China IP Litigation Analysis” (CIELA) database created by the law firm Rouse); Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China's Intellectual Property Regime*, 55 ST. LOUIS U. L.J. 773, 790–809 (2011) (utilizing the data provided by the *White Paper on the Intellectual Property Rights Protection in China* and the cases provided by the database Beida Fabao launched by Peking University); Xie Huijia, *Empirical Research on Criminal Copyright Infringement in China*, 8 QUEEN MARY J. INTELL. PROP. 36, 36 n.2 (2018) (utilizing over 1500 cases provided by the database Beida Fabao).

348. *See supra* text accompanying notes 275–82 (discussing scholarship covering the political developments concerning the Chinese intellectual property system). For example, Martin Dimitrov highlighted the complexity concerning those Chinese

Chinese government,<sup>349</sup> the problem relating to partial decentralization,<sup>350</sup>

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government agencies that have intellectual property enforcement portfolios:

[At the time of the book's publication], only two bureaucracies with IPR enforcement portfolios have a vertical (i.e., centralized) bureaucratic structure, the GAC [General Administration of Customs] and the STMA [State Tobacco Monopoly Administration]; both agencies serve as primary revenue generators for the consolidated national budget: centralization allows the central government to establish better control over the tax revenue it collects from these agencies. The SAIC [State Administration for Industry and Commerce], the AQSIQ [General Administration of Quality Supervision, Inspection, and Quarantine], and the SFDA [State Food and Drug Administration] are partially centralized. Other bureaucracies with an IPR enforcement portfolio are fully decentralized: the Ministry of Culture (MOC), the Ministry of Agriculture (MOA), the Ministry of Health (MOH), the General Administration of Press and Publications (GAPP), the National Copyright Administration of China (NCAC), and the MPS (known as the Public Security Bureau or PSB at the local level). [SIPO], though formally decentralized, functions in practice as a quasi-centralized bureaucracy, since it only penetrates down to the provincial level, a structure that makes monitoring easier than for bureaucracies with deeper reach.

DIMITROV, *supra* note 90, at 50.

349. See generally Li Mingde, *The Process of Intellectual Property Law Reform in China*, 8 QUEEN MARY J. INTEL. PROP. 26 (2018) (providing an authoritative analysis of the various processes that have been used to enact or amend Chinese intellectual property laws).

350. As Peter Corne explained,

Ideally, authorities are supposed to share power according to a system of dual rule (*shuangchang lingdao*). Problems that arise are supposed to be resolved by the unifying authority of the CCP at the same level, which normally has an office and a deputy secretary in charge of the area in question, and which has jurisdiction over it. In reality, however, there is no dual rule. There is rule by either *tiao tiao* or *kuai kuai* authorities depending on their relative power and the issue at hand.

PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 87 (1997) (footnote omitted); see also DIMITROV, *supra* note 90, at 42 (noting the complications created by “the principle of ‘one system of government offices, two nameplates’ (*yige jigou, liangkuai paizi*)”); Andrew C. Mertha, *China’s “Soft” Centralization: Shifting Tiao/Kuai Authority Relations*, 184 CHINA Q. 791 (2005) (discussing the institutional cleavages and fragmentation in China that have made it difficult for the government to centralize its regulatory bureaucracies). Likewise, Fred Bergsten and his coauthors declared,

Many in the United States believe that China's one-party system gives Beijing total power and control over all levels of government. The image, perhaps left over from the Maoist cult of personality era, of a single leader or core group of leaders responsible for and in command of all aspects of Chinese society still pervades the American imagination. This perception of absolute authority has led US policymakers and industry groups to focus on securing top-down commitments from Chinese leaders to resolve bilateral economic and other issues. That the leaders sometimes do not fulfill these commitments endlessly frustrates the Americans who have sought them, who view this as negligence on the part of

the handling of budgets and personnel,<sup>351</sup> and the complex conditions in local economies,<sup>352</sup> the analysis of the Chinese enforcement infrastructures is at best superficial, if not completely off base.

The third challenge pertains to the “moving target” nature of developments concerning the Chinese intellectual property system,

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Chinese leaders, lack of political will, or even outright malfeasance.

Beijing's ability to unilaterally impose its will throughout China is, however, highly limited. For a variety of reasons . . . , China's authoritarian regime lacks the capacity to implement many of its decisions throughout the polity, a limitation that has important implications for policymaking in Beijing. The leadership has to gauge carefully what it can and cannot get away with vis-à-vis local authorities; how much political capital will be required to enact controversial policies at local levels; and how much discretion to allow local authorities in policies set at the national level—recognizing that the center has no capacity to enforce absolute obedience to its edicts. The policy process can frequently result in vague national policy pronouncements that look less like hard and fast rules than abstract guiding principles—exhortations to local authorities to “do the right thing” that leave considerable latitude for local recalcitrance. Even when Beijing issues more categorical commands, local compliance is far from certain.

BERGSTEN ET AL., *supra* note 302, at 75.

351. As Professor Mertha noted,

One part of the enforcement story is the degree to which a given enforcement bureaucracy is independent of its “host,” or superior, bureaucracy . . . . [B]oth the copyright and the patent administrative enforcement agencies become increasingly absorbed in their superior bureaucracies the farther on goes down China's administrative rungs . . . . Bread-and-butter issues such as personnel and budgetary matters are managed by these superior bureaucracies, making the copyright and patent bureaucracies dependent on their “host” units.

MERTHA, *supra* note 44, at 15. Likewise, Daniel Chow observed,

Rivalries have developed among the various parallel government entities charged with public enforcement against counterfeiting. The authority to combat counterfeiting results in larger budgets and more staffing, power, and prestige. Raids are also potential revenue generating activities because the authorities confiscate cash, goods, machinery, and equipment, including cars, and then sell the confiscated goods at public auctions. Fines imposed upon counterfeiters are paid into government coffers and some administrative agencies give cash bonuses to personnel who participate in successful raids. Government authorities also routinely ask companies to reimburse the cost of lodging where travel is required, the cost of hiring trucks to load and move confiscated goods, and the cost of storing the goods if a private warehouse needs to be rented. Some government authorities will also ask companies to pay case handling fees.

Chow, *Counterfeiting*, *supra* note 114, at 31 (footnotes omitted); *see also id.* at 30–31 (discussing the importance of case fees and other payments to officials); DIMITROV, *supra* note 90, at 211–12 (discussing case-handling fees (*ban'an fei*) and bribes (*hongbao*)).

352. *See* Chow, *Commercial Piracy*, *supra* note 114, at 218–20 (using the town of Yiwu to illustrate the importance of counterfeiting activities to local economies).



similar to the challenge of studying international intellectual property normsetting through the ever-changing plurilateral intellectual property negotiations, which have moved from ACTA to the TPP to the RCEP to now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).<sup>353</sup> Since the adoption of modern Chinese intellectual property laws in the 1980s and 1990s, the patent and trademark laws have been revised three times, the copyright law twice, and the anti-unfair competition law once. At the moment, China is already exploring the Fourth Amendment to the Patent Law, while it is working hard to finish revising copyright law for the third time. In August 2008, China also introduced an anti-monopoly law,<sup>354</sup> which has serious ramifications for the protection and licensing of intellectual property rights.

The final challenge relates to the implicit bias that has crept into any discussion of the Chinese intellectual property system. As this Part has noted earlier, many foreign researchers of intellectual property laws and policies in China still have a rather limited understanding of the country.<sup>355</sup> As a result, their views have inevitably been colored by

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353. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text> [hereinafter CPTPP]. Although the United States withdrew from the TPP Agreement in January 2017, the remaining eleven TPP partners developed the CPTPP, a modified version of the original agreement. See *CPTPP vs. TPP—The Differences*, N.Z. MINISTRY FOREIGN AFFAIRS & TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/tpp-and-cptpp-the-differences-explained> (last visited May 9, 2018) (explaining the differences between the TPP and the CPTPP); see also CPTPP, *supra*, annex (listing the provisions that have been suspended from the TPP Agreement).

354. Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2008, effective Aug. 1, 2008) (China); see also H. STEPHEN HARRIS JR. ET AL., *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* (2011) (providing a treatise-length analysis of the law); Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 *ANTITRUST L.J.* 231 (2008) (discussing this law and the related competition policy reforms); Thomas Pattloch, *Chinese Anti-Monopoly Law*, in *PATENT LAW IN GREATER CHINA*, *supra* note 54, at 313 (discussing the various intellectual property issues raised by the Chinese Anti-Monopoly Law); Xu Shiyong, *Intellectual Property Protection and Competition Law*, in *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS*, *supra* note 54, at 323 (discussing issues lying at the intersection of intellectual property and competition law in China).

355. As the late William Jones reminded us:

Chinese law is very easy to misunderstand. It is not at all certain that anyone—Chinese or foreign—understands it. The reason for this is that when we think about law, we think about a formal legal system of the western type. We look at China and expect to find such things as a law of contracts, a bench and bar, and all the other paraphernalia that we associate with law. At present, one can

what they have read through scholarly literature, the mass media, or other sources. While these sources are not always biased,<sup>356</sup> the scholars' lack of understanding has made it particularly difficult for them to determine whether the views expressed by others are in line with the reality.<sup>357</sup> These challenges are the most daunting when exploring

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find such institutions in China, but they are modern imports. Until recently, they did not exist. What one found instead—and still finds—quite easily, are a vast number of statements by China's most prominent thinkers, notably including Confucius, that show great hostility to what we think of as law.

William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 7 (C. Stephen Hsu ed., 2003); see also PAUL A. COHEN, DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST 198 (1984) ("All of us are to an extent prisoners of our environments, trapped in one or another set of parochial concerns. And the truth we retrieve is inevitably qualified by the intellectual and emotional preoccupations each of us, through our vocabulary and concepts, brings to bear on the study of the past."); Nari Lee, *Intellectual Property Law in China—from Legal Transplant to Governance*, in CHINA AND EUROPE, *supra* note 93, at 5, 10 ("Researchers working on the topic of Chinese law are . . . warned of the possibility that the concept of law may be so different in China that an eager application of so-called functional comparison would lead to an incorrect observation or conclusion."); Stanley Lubman, *Methodological Problems in Studying Chinese Communist "Civil Law"*, in CONTEMPORARY CHINESE LAW, *supra* note 340, at 230, 230 ("[I]f we are to appreciate nuanced differences between institutions in China and elsewhere, we must move from presuppositions rooted in our own systems to others, more neutral."); William P. Alford, "Seek Truth from Facts"—Especially when They Are Unpleasant: America's Understanding of China's Efforts at Law Reform, 8 UCLA PAC. BASIN L.J. 177, 184 (1990) (discussing the impediments that have impaired American scholars from understanding Chinese legal development).

356. See Yu, *supra* note 6, at 1127–29 (discussing the concern about the potential exploitation of differences between China and the United States).

357. See COHEN, *supra* note 355, at 4 (arguing that most American historians ask the wrong questions about China's past); James Lilley, *Trade and the Waking Giant—China, Asia, and American Engagement*, in BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS 36, 36 (James R. Lilley & Wendell L. Willkie II eds., 1994) ("Americans have always had a propensity for misunderstanding China."); MANN, *supra* note 89, at 373 (asserting that one of the greatest misperceptions of Washington in the 1990s is that China does not understand American politics); WILLIAM H. OVERHOLT, THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPER POWER 400–01 (1993) (stating that misconceptions of China and Japan have always troubled American relations with Asia because Americans do not know as much about Asia as they do about Canada and Europe).

This lack of understanding can also go in the other direction. As the late Victor Li recounted his experience accompanying the Chinese table tennis team during its 1972 U.S. tour,

The Chinese visit coincided with our Presidential election year in which Senator Eugene McCarthy was entered in some of the primaries. Upon seeing

highly polarized topics, such as those concerning whether the United States should impose sanctions on China, file a WTO complaint, or even initiate a trade war.<sup>358</sup> Given the contentiousness of many debates concerning the Chinese intellectual property system, implicit bias will remain a continuing challenge for researchers in this area.

## V. FUTURE DIRECTIONS

Part I has identified five phases in which fairly distinct bodies of scholarship on the Chinese intellectual property system have been developed. Although new phases will appear as the system continues to evolve, the conclusion of that Part has not discussed what phase, or phases, will emerge after the fifth phase of indigenization and transformation.<sup>359</sup>

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some of his campaign literature, one of my Chinese companions asked whether Gene was related to Joe. I told him no.

He continued, “Wasn’t Eugene McCarthy purged in 1968?” No.

“What has he been doing the past several years?” At that point I began to realize that we were heading toward a misunderstanding since I had to reply that among other things, McCarthy had been teaching poetry at McAllister College.

“He was not purged, huh?” No.

“Then this was not a case of removing McCarthy on the left to balance the removal of Lyndon Johnson on the right?”

LI, *supra* note 72, at 5.

358. See Martin Farrer, *China Promises “Necessary Response” to US Tariffs as Trade War Fears Grow*, GUARDIAN, Mar. 8, 2018, <https://www.theguardian.com/world/2018/mar/08/china-promises-necessary-response-to-us-tariffs-as-trade-war-fears-grow> (“The prospect of a trade war between China and the United States has increased after Beijing’s foreign minister said it would make a ‘necessary response’ in the event of Donald Trump introducing punitive tariffs on steel and aluminium imports.”); *Trade Wars: A Lose-Lose Deal*, ECONOMIST, Mar. 17, 2018 (noting the growing worries of a looming lose-lose “trade war of attrition”); see also PETER NAVARRO, *THE COMING CHINA WARS: WHERE THEY WILL BE FOUGHT AND HOW THEY CAN BE WON* (2007) (discussing the various potential conflicts between China and the United States). See generally Daniel Chow, *China’s Coming Trade War with the United States*, 81 UMKCL. REV. 257 (2012) (examining the U.S.-China trade deficit and the major bilateral trade disputes that may arise in the next four years).

359. As Phoebe Li surmised,

I name the [next] stage the “mass innovation” stage, whereby the development agenda for a “xiaokang” society is a critical theme in striking a balance in intellectual property monopolies. The primary goal for this nascent phase is therefore not to blindly transplant foreign intellectual property infrastructure but to conscientiously build a development-oriented intellectual property institution that reflects local characteristics. A “mass innovation” patent regime should be able to redress the disparities and to balance the interests of big corporations with those of mass entrepreneurs. It should differentiate certain fields of technologies for the purpose of safeguarding the public

Indeed, it will be difficult to predict what the future will hold for not only the Chinese intellectual property system, but also the international intellectual property system. Despite the inherent difficulty in making predictions, it will be useful to offer some brief observations on the future directions of scholarship on the Chinese intellectual property system. Although these observations are inevitably personal, they draw on developments that have already begun in the area of Chinese legal scholarship or intellectual property scholarship in general.

First, scholars studying the Chinese intellectual property system are likely to pay greater attention to international intellectual property developments involving China. Thus far, a growing number of scholars have already explored the development of China's free trade agreements, the exclusion of China in both the ACTA and TPP negotiations, and China's active role in the RCEP negotiations.<sup>360</sup> In the future, scholars studying the Chinese intellectual property system will pay even greater attention to the regional or international intellectual property norms that China sought to create or shape. They will also be highly interested in any new initiatives that China has undertaken—an obvious example being the “one belt one road” or belt-and-road initiative.<sup>361</sup>

Second, scholars studying the Chinese intellectual property system will undertake more research on intra-country developments. While

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interest and not be compromised by private patent monopolies. Joseph Stiglitz elaborates on the idea that a development-oriented intellectual property regime requires special consideration to ensure effective competition, access to lifesaving medicines, the transfer of technology, and protection of traditional knowledge and genetic resources.

Phoebe Li, *Patents, Mass Innovation and the Xiaokang Society*, 8 WIPO J. 97, 104 (2017) (footnote omitted).

360. See *supra* text accompanying notes 288–95 (discussing the scholarship covering these topics).

361. See generally Lee Jyh-an, *The New Silk Road to Global IP Landscape*, in LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 417 (Lutz-Christian Wolff & Chao Xi eds., 2016) (analyzing China's “one belt one road” initiative from the intellectual property perspective and identifying its potential opportunities and challenges); Peter K. Yu, *Building a New International Intellectual Property Infrastructure Through China's Belt-and-Road Initiative*, 14 U. PA. ASIAN L. REV. (forthcoming 2019) (discussing the development of a new international intellectual property infrastructure through China's “one belt one road” initiative); see also *High Level “Belt and Road” Conference Urges Closer IP Collaboration for Economic Growth*, WORLD INTELLECTUAL PROP. ORG. (July 27, 2016), [http://www.wipo.int/about-wipo/en/offices/china/news/2016/news\\_0008.html](http://www.wipo.int/about-wipo/en/offices/china/news/2016/news_0008.html) (reporting WIPO's participation in the two-day High Level Conference on Intellectual Property for Countries Along the “Belt and Road” in Beijing on July 21, 2016).

intellectual property scholars will continue to explore issues that are important to the country as a whole, they will conduct more research on the country's internal developments, thanks to the active participation and growing support of provincial intellectual property offices in China, the arrival of new regionally based developments, and the increased volume of data concerning provinces, prefectures, counties, townships, and villages. Such a shift from nation-based analyses to finer-grained analyses will greatly enhance our understanding of the Chinese intellectual property system.<sup>362</sup> After all, the wide divergences within China suggest the pointlessness of analyzing China as if the country were homogenous.<sup>363</sup> What is true for one province often does not hold for many others.<sup>364</sup>

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362. See Yu, *supra* note 6, at 1118–22 (noting the importance of developing a more sophisticated understanding of provincial and local differences); see also Special Provincial Review of Intellectual Property Rights Protection in China: Request for Public Comment, 71 Fed. Reg. 34,969, 34,970 (June 16, 2006) (requesting public comments “to spotlight strengths, weaknesses, and inconsistencies in and among specific jurisdictions”); *Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.-China Econ. & Sec. Review Comm’n*, 109th Cong. 8 (2006) (written testimony of Myron Brilliant, Vice President, East Asia, U.S. Chamber of Commerce, Washington, D.C.) (“[T]he root of China’s IP problem resides in the provinces. It is . . . absolutely critical that we cultivate the support of the provincial/local officials, as well as local industry, if IP enforcement is to be addressed in a truly meaningful way.”); CHEUNG, *supra* note 347, at 39–62 (discussing Guangdong, Beijing, Zhejiang, and Fujian as “new ‘hot spots’ of counterfeiting”).

363. As I noted in a recent article,

Based on the 2016 figures on invention patents provided by the State Intellectual Property Office of China, Jiangsu, Guangdong, and Anhui provinces—the provinces with the three largest volumes of applications—had a total of 184,632, 155,581, and 95,963, respectively. Meanwhile, Yunnan, Jilin, and Gansu provinces had a total of only 7,907, 7,537, and 6,114, respectively. The latter figures were less than one-tenth of the figures in the more developed provinces. If one includes provinces and autonomous regions with fewer than 4,000 patent applications, such as Xinjiang, Inner Mongolia, Ningxia, Qinghai, Hainan, and Tibet, the statistical contrasts between the two groups will become even starker . . .

Peter K. Yu, *A Spatial Critique of Intellectual Property Law and Policy*, 74 WASH. & LEE L. REV. 2045, 2093–94 (2017).

364. As I noted in an earlier article,

China is “a country of countries.” The country is large, complex, diverse, and “sometimes internally contradictory.” The Chinese speak different languages, enjoy different cuisines, grow up with different cultures, and subscribe to different historical and philosophical traditions. Conditions in Beijing are often very different from those in Guangzhou, intellectual property strategies that are effective in Shanghai are likely to fail in a village in Guizhou, and the trade patterns found near the coasts are very different from those found inland.

Third, scholars studying the Chinese intellectual property system will inevitably focus more on developments in specialized areas. Indeed, Chinese legal scholarship has already become more specialized today than it was two decades ago. Gone are those books and articles studying the overall Chinese legal system, which are common in the 1960s, 1970s, and 1980s. Appearing in their stead are books and articles covering a specific body of law, or even some specific domestic legal problems.<sup>365</sup> While this type of scholarship enables foreign researchers to actively engage their Chinese counterparts on specific laws, policies, cases, and topics, the more specialized focus takes away opportunities for scholars to identify larger trends and developments concerning the Chinese intellectual property system.

Fourth, in the past decade, scholars in this area have begun to study those spillover issues that do not fit squarely within the intellectual property field. Section I.E already discusses the interrelationship between intellectual property and indigenous innovation.<sup>366</sup> In the early to mid-1990s, especially during the U.S.-China negotiations, intellectual property protection is often discussed alongside market access.<sup>367</sup> Today, policymakers and scholars have devoted considerable attention to intellectual property-conditioned government incentives—that is, measures that the government has provided to promote creativity and innovation.<sup>368</sup> As the Chinese intellectual property system becomes

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Yu, *supra* note 6, at 1118; *see also* Yu, *supra* note 94, at 173, 203–13 (discussing the wide regional and sectoral disparities in China); Yu, *supra* note 93, at 36 (“The type of intellectual property standards that work well for major cities (such as Beijing, Shanghai and Guangzhou) may not work well for the countryside. Likewise, standards that suit the prosperous coastal areas may be inappropriate for the poor rural west.”).

365. *See generally* Daniel C.K. Chow, *Trademark Squatting and the Limits of the Famous Marks Doctrine in China*, 47 GEO. WASH. INT’L L. REV. 57 (2015) (discussing the trademark squatting problem in China); Benjamin Pi-Wei Liu, *The Globalization of Patent Linkage in China*, in CHINA AND EUROPE, *supra* note 93, at 163 (providing an interesting and in-depth discussion of patent linkage in China); Wu Weiguang, *China’s CMC system and Its Problems from the Copyright Law of 1990 to Its Third Amendment*, in CHINA AND EUROPE, *supra* note 93, at 213 (outlining the defects of the system for the collective management of copyright and related rights in China and its possible changes in the forthcoming Third Amendment to the Copyright Law); Xie, *supra* note 347 (using empirical research to identify the defects of criminal copyright infringement laws in China and advancing solutions to address these defects).

366. *See supra* text accompanying notes 168–77 (discussing this interrelationship).

367. *See* ZHENG, *supra* note 54, at xxvi (“In the 1996 Sino-U.S. negotiations, what the USTR really wanted was not the impossible short term elimination of pirate copies, but access to the Chinese markets for its cultural products.”).

368. *See generally* ECONOMIC IMPACTS OF INTELLECTUAL PROPERTY-CONDITIONED GOVERNMENT

more complex, researchers will devote more time and effort to studying measures complementary to the intellectual property system.

Fifth, scholars in this area, especially those in China, will inevitably devote attention, energy, and resources to the growing waves of intellectual property problems that now arise in the developed world and at the global level. We have already seen Chinese scholars undertaking research on problems posed by the internet and the digital revolution<sup>369</sup>—problems that are explored by non-Chinese scholars and that will affect virtually any part of the world. Likewise, research concerning Big Data, Internet of Things, blockchains, 3D printing, artificial intelligence, robotics, autonomous vehicles, nanotechnology, and synthetic biology can be classified as generic. While it will still be instructive to explore whether these problems will affect China to the same extent as they will affect other parts of the world, there is no denying that much of the research in these emerging areas is global in scope. In short, scholars in China may just be conducting research on the same or highly similar topics as scholars in other countries. As a result, scholarship on the Chinese intellectual property system that we find in this area may just be a subset of the overall body of scholarship—featuring Chinese perspectives or China-based examples, perhaps.

Finally, there has been an active and growing discussion of new modes of innovation in the past decade. For instance, intellectual property scholars have explored how we can develop incentives for innovation outside the intellectual property system. Indeed, the so-called “IP without IP” literature has become increasingly important and popular in Europe and the United States.<sup>370</sup> Only time will tell

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INCENTIVES (Dan Prud'homme & Song Hefa eds., 2016) (discussing these incentives).

369. For this body of literature, see generally Du Ying, *Secondary Liability for Trademark Infringement Online: Legislation and Judicial Decisions in China*, 37 COLUM. J.L. & ARTS 541 (2014); Ke Steven Wan, *Internet Service Providers' Vicarious Liability Versus Regulation of Copyright Infringement in China*, 2011 U. ILL. J.L. TECH. & POL'Y 375; Wan Yong, *Safe Harbors from Copyright Infringement Liability in China*, 60 J. COPYRIGHT SOC'Y U.S.A. 635 (2013); Wang Jie, *Not All ISP Conduct Is Equally Active or Passive in Differing Jurisdictions: Content Liability and Safe Harbour Immunity for Hosting ISPs in Chinese, EU, and US Case Law*, 37 EUR. INTELL. PROP. REV. 732 (2015); Xie Huijia, *The Regulation of Digital Rights Management in China*, 39 INT'L REV. INTELL. PROP. & COMPETITION L. 662 (2008); Xue, *supra* note 177; Xue Hong, *Les Fleurs du Mal: A Critique of the Legal Transplant in Chinese Internet Copyright Protection*, 34 RUTGERS COMPUTER & TECH. L.J. 168 (2007); Zhu Dong, *Beyond Safe Harbour: Secondary Trademark Liability of Online Auction Sites in China*, 7 QUEEN MARY J. INTELL. PROP. 265 (2017).

370. As Amy Kapczynski recently observed,

whether scholars studying the Chinese intellectual property system will also proceed in the same direction. While Chinese scholars have often embraced research topics that are considered cutting-edge abroad—especially in Europe or the United States—the ongoing academic and policy discussions in China seem to have focused on the potential benefits and the much-needed calibration of the intellectual property system. Due to the structure of Chinese academic institutions, the funding support for research projects, and the country’s continued large-scale piracy and counterfeiting problems, Chinese academe seems to have not yet experienced the same divide between intellectual property attorneys and policymakers on the one hand and intellectual property scholars on the other.<sup>371</sup> While the former advocate a maximalist view of intellectual property protection, the latter prefer the opposite. In China, if the scholarship focuses on the limitations and exceptions in the intellectual property system, those limitations

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IP scholarship has for decades been centered on a simple account: IP is necessary to achieve the information production that we as a society desire. But over the last few years, the field has come to recognize that IP as an approach has both significant costs and substantial limits. In response, an important new scholarly literature on “intellectual production without intellectual property,” or “IP without IP” has emerged.

Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 CORNELL L. REV. 1539, 1542–43 (2017) (footnotes omitted). For scholarship in this area, see generally KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012); Jacob Loshin, *Secrets Revealed: Protecting Magicians’ Intellectual Property Without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123 (Christine A. Corcos ed., 2010); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437 (2010); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1787 (2008); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

371. See James Boyle, *Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us*, in *PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT* 97, 107–09 (F. Scott Kieff ed., 2003) (describing the “bipolar disorders of intellectual property policy”); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334 (2004) (expressing concern “that the increasingly binary tenor of current intellectual property debates . . . obscures other important interests, options, critiques, and claims for justice that are embedded in many new claims for property rights”); Maggie Wittlin et al., *What Causes Polarization on IP Policy*, 52 U.C. DAVIS L. REV. (forthcoming 2018) (investigating the source of polarization on intellectual property debates); Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 8–12 (discussing the bipolar intellectual property debate).



and exceptions tend to be justified based on the needs for either development or social equality, as opposed to new “IP without IP” innovation models.<sup>372</sup>

#### CONCLUSION

In examining the past half-century of scholarship on the Chinese intellectual property system, this study has shown how historical developments have heavily influenced scholarship in this area—both in phases and through isolated major incidents. This study has also shown that scholarship in this area has undergone an interdisciplinary turn. As a result, scholarship on the Chinese intellectual property system has become richer, more diverse, and more sophisticated.

While it is impossible to cover all scholarship on the Chinese intellectual property system in the past fifty years, this Article seeks to capture the changing developments in the field. It has also devoted greater coverage to those works that were published before the mid-1990s and in non-legal disciplines.<sup>373</sup> After all, those works tend to be

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372. Interestingly, some of the rare scholarship discussing China from the “IP without IP” angle actually came from Kal Raustiala and Christopher Sprigman, the two leading scholars in “IP without IP” literature. See Kal Raustiala & Christopher Jon Sprigman, *Let Them Eat Fake Cake: The Rational Weakness of China’s Anti-Counterfeiting Policy*, in *THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS* 263 (Sun Haochen et al. eds., 2015) (examining China’s knockoff economy and explaining why legitimate branded luxury goods and counterfeits can coexist in the country); Kal Raustiala & Christopher Sprigman, *Fake It till You Make It: The Good News About China’s Knockoff Economy*, *FOREIGN AFF.*, July/Aug. 2013, at 25, 30 (noting the need to “keep Chinese copying in perspective and recognize its upsides along with its costs”). But see Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China’s High-Piracy Environment?*, 27 *HARV. J.L. & TECH.* 467 (2014) (offering a critical response to this line of scholarship).

373. Many articles and book chapters cited in this Article were published in the United States, due to their wide availability on HeinOnline, LexisNexis, and Westlaw and through free online repositories. Their emphases could be quite different from those found in publications from other parts of the world. See Shi & Weatherley, *supra* note 118, at 448–63 (noting the differences between the China-EU intellectual property debate and the China-U.S. debate). Nevertheless, as the sources cited in this Article have shown, a growing number of non-U.S. scholars have published their works on the Chinese intellectual property system in U.S. journals. Many non-U.S. publications have also been included in HeinOnline, LexisNexis, or Westlaw. Notable European intellectual property journals that immediately come to mind are the *European Intellectual Property Review*, the *International Review of Intellectual Property and Competition Law* (formerly the *International Review of Industrial Property and Copyright Law*), and the *Queen Mary Journal of Intellectual Property*. In addition, while I struggled to locate journal articles published outside the United States, due to constraints

less familiar to scholars studying the Chinese intellectual property system, especially those in the legal discipline.

Today, China is at a crossroads concerning what type of intellectual property law and policy it should adopt. Owing to the changing political environment in the United States and the now significantly different expectations of China at the international level,<sup>374</sup> the U.S.-China intellectual property relations are also at a crossroads. The wide range of scholarship discussed in this Article will no doubt provide useful insights into the different ways to address challenges and opportunities that are slowly emerging at these crossroads. It is my hope that the systematic analysis provided in this Article will make it easier for us to locate the relevant scholarship.

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imposed by U.S. library collections and a lack of ready online access, I managed to locate many books and book chapters published in English outside the United States.

374. These exceptions are due in large part to the growing strength of China's aggregate economy. Although most commentators have placed China as the world's second largest economy, some suggested that China might already have been the largest based on select metrics. See Joseph E. Stiglitz, *The Chinese Century*, VANITY FAIR (Jan. 2015), <https://www.vanityfair.com/news/2015/01/china-worlds-largest-economy> ("2014 was the last year in which the United States could claim to be the world's largest economic power. China enters 2015 in the top position, where it will likely remain for a very long time, if not forever.").