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THE POLICY AND TARGETS OF CRIMINAL ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND THE UNITED STATES

Haiyan Liu †

Abstract: This comparative study analyzes the targets, consequences, and influence factors of the criminal enforcement of intellectual property rights in the United States and China. The analysis reveals unexpected consequences when transplanting Western intellectual property law in Chinese contexts. Similarities in criminal enforcement between the two countries indicate that economic factors that are determinant forces in both the United States and China. These factors include such business practices as: (1) vehement business lobbying and the capture of enforcement agencies by top trademark corporations; (2) the size and market concentration level of top firms in an industry; and (3) trade association lobbying efforts, including foreign copyright associations exerting pressure on China.

Political factors also influence criminal enforcement in China. These factors include: (1) state interference to protect tax interests in tobacco and alcohol industries; (2) public policies to fight against counterfeits that pose health and safety threats; and (3) other political goals, such as control of the media and importation restrictions on publications.

In order to promote IPR protection while reducing business capture, instrumental usage by the state, and unequal enforcement, this article recommends China (1) develop IP-related industries, (2) cultivate the IPR consciousness of citizens and companies, (3) establish respect for rights and rules, (4) encourage the mobilization of private rights by private entities, (5) allow citizen supervision of governmental activities, and (6) move from proactive administrative and criminal enforcement to civil enforcement.

I. INTRODUCTION

Several converging trends place tremendous pressure on countries to criminalize intellectual property (“IP”) infringement. For one, IP assets are becoming an evermore valuable and powerful component of the economy.1

† Assistant Professor, University of Macau. Thanks to Phil Parnell, Ethan Michelson, Richard Gruner, Henry Pontell, Lening Zhang, Kip Schlegel, Hal Pepinsky, Tim Ginsberg, Peter Yu, Nicholas Howson, Scott Kennedy, Michael Grossberg, Ying Wu, Wenling Liu, Ivan Sun, Doris Chu, Mingxiu Wu, as well as the OYCF Annual Meetings at the Center for East Asian Studies at the University of Chicago; the Intellectual Property Development in China Conference at the Intellectual Property Law Center at Drake University Law School; the colloquium at the Center of Law, Society and Culture, School of Law at Indiana University–Bloomington; Law and Society annual meetings; and American Society of Criminology annual meetings for comments on prior drafts.

Additionally, technological advances make it increasingly easier to create, replicate, market, and distribute IP-containing products on a global scale, even as the same technologies enable pervasive and escalating infringement. Copyright piracy and trademark counterfeiting occurs in a variety of markets, from music, movies, outfits, shoes, toys, cigarettes, and alcohol to much more sophisticated products, such as automobile parts and medicine. In response, businesses in intellectual property rights (“IPR”)-intensive industries have promoted the criminalization of IP infringement, especially in the United States and China—the two largest economies in the world.

This article seeks to illuminate the current enforcement foci, patterns, consequences, and extra-legal forces of criminal IP enforcement in the United States and China. Under the influence of several dominant economic and political factors, there is an overrepresentation in Chinese criminal IP cases of few top foreign companies, state-owned enterprises (“SOEs”) in state-controlled industries, products carrying health or safety threats, and other regulated industries such as the publishing industry. These results aid in evaluating the fairness and the level and state of democracy in politically motivated enforcement, and provide a basis for policy recommendations for enforcement reform. This research is the first to systematically describe and empirically analyze multiple aspects of the criminal enforcement of IPR in China as compared to the United States.

Part II of this article highlights the importance of the comparison of IP enforcement in China and the United States. It introduces the law and society theoretical paradigms inspiring the analysis. Part II also provides an overview of the most prominent forces shaping the overall strengths of IPR enforcement in China and the United States. The literature review of previous studies covers literature on the criminal enforcement of IPR in both the United States and China and empirical research on IP protection and enforcement in China.

Part III depicts the major research questions and explains data sources, types, and research methods. Part IV presents detailed description, interpretation, and discussion of important empirical findings and their implications. Part V considers implications of these findings for understanding the criminal enforcement of IPR, as well as larger issues of legal transplantation and law and development in an Asian and authoritarian

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state such as China. It also discusses how the findings contribute to generalizing causal and acting forces for the strength and foci of IPR enforcement in a country. Finally, Part VI discusses further policy implications of the findings.

II. BACKGROUND AND THEORY

A. The Significance of IP Enforcement in China and the United States

This study is a comparison of China and the United States. IPR enforcement in China generated broad interest across a range of professions and political perspectives due to the salience of IP, the immense size of the Chinese market, and the increasing technology transfer between China and the rest of the world. The prolonged and unusually high rates of piracy and counterfeiting in China since the 1980s (see Figure 1) have irritated and baffled the United States. For years, the United States has put China on the priority watch list in the Special 301 Report prepared annually by the Office of the United States Trade Representative. The Special 301 Report identifies a list of "Priority Foreign Countries," which include those judged to have inadequate intellectual property laws. In addition, the report contains a "Priority Watch List" and a "Watch List," containing countries whose intellectual property regimes are deemed of concern.

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5 Id.
Tension in trade between the United States and China escalated when, in 2007, the United States initiated a complaint against China in front of the World Trade Organization (“WTO”) dispute settlement body concerning China’s lack of protection and enforcement of IPR. The WTO panel rejected the claim by the United States regarding China’s allegedly- inadequate criminal enforcement of IPR.

According to BSA reports, software piracy rates are the known percentage of pirated PC-packaged software out of the total amount of PC-packaged software installed that year. See SIXTH ANNUAL BSA REPORT, supra at 17.


States did not provide credible and sufficient data to prove the case. Most of the press articles the United States provided as evidence were based on speculation, anecdotal comments, or random information concerning a particular high-profile case.

The United States has enacted new legislation, modified sentencing guidelines, and initiated large-scale political enforcement campaigns and coordination to expand criminalization. However, criminal prosecution and sanctions remain a tiny percentage of the overall volume of civil IP infringement disputes going through the judicial system each year. Such a consistent but moderate criminalization trend might be due to the existence of fairly effective civil remedies combined with the criminal justice system’s the lack of institutional capacity and the low political priority of the issue compared to other, more urgent, law and order problems.

China provides an important example of the dynamics of legal transplantation: the indigenization and appropriation of the Anglo-American IPR model in the local context of Chinese society. The ongoing transplantation of IP law to China is part of the “rule of law project” promoted by the United States in developing countries, similar to the law and development movement in the 1970s. The U.S. case represents the original IPR concepts and legal model growing out of classical liberalistic and individualistic ideas. It makes sense to compare the two in order to detect the unique characteristics of legal appropriation and modification manifested through IPR enforcement in China as well as factors within the contexts where legal change takes place.

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12 Id. at 171-75.
B. Theoretical Approaches: Law and Society Paradigms and Legal Transplant Theory

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

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

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

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16 JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 239–46 (Univ. of Wis. Press 1980).
17 Id.
18 See generally Liu, The Enforcement of IPR in China and the United States, supra note 11.
19 Id.
economic affairs within its sovereignty.\textsuperscript{21} Since IPR is an important part of the transnational business law, Tamanaha’s arguments can also apply to IP laws and enforcement model transplanted to China.

Tamanaha suggests another reason law does not mirror society is the expansion of administrative law.\textsuperscript{22} The majority of IP infringements in China are processed by administrative agencies, such as the Administration of Industry and Commerce ("SAIC") and Copyright Bureau. Applying Tamanaha’s arguments, these administrative IP laws, regulations, and policies could often be used as instruments to balance interests and promote policies and social changes, rather than reflect social norms.\textsuperscript{23}

According to Tamanaha, “[w]hen mirroring is low and monopolization is high, the law will be more subject to capture and instrumental use by select groups, especially the economic or political elite (often including the legal professionals).”\textsuperscript{24} On the one hand, in the context of IP enforcement in China, the state and enforcement agencies could directly incorporate indigenous norms or politically prioritized goals into IP law enforcement. On the other hand, top corporations, their IP attorneys, and trade associations might get involved in the capture and instrumental use of the IP enforcement system through agency participation.

C. Macro-level factors Shaping IPR Enforcement in China and the United States

Through review of IP as well as law and society literature, and theoretical analysis, this article identifies three major macro-level factors that shape the main mechanisms and levels of IPR enforcement in the United States and China.\textsuperscript{25} These factors are: (1) divergent views of human nature, property rights, and intellectual products within each country; (2) the different stages of economic prosperity and technology development; and (3) the general purpose and level of independence of the countries’ judicial systems, especially economic law systems.

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Liu, The Enforcement of IPR in China and the United States, supra note 11, at 95–112.
The cultural and political ideologies behind justifications of IPR differ in China and the United States. William Fisher concludes that one of the most important mainstream justifications of IPR in the United States is John Locke’s labor theory and his notion of possessive individualism. Additionally, Robert Merges argues that it was inconclusive whether social utilitarianism, as laid out by the U.S. Constitution, justified IPR protection. Instead, Merges recognizes “(1) Lockean (‘labor theory’ of) appropriation and (2) Kantian (liberal) individualism” as the fundamental principles of IP law. According to Merges, Kant emphasizes “the unique contribution of each creative person” in producing IP and, thus, the state acknowledges individual freedom and autonomy by recognizing IPR. Continuing this individualistic and liberalistic tone, the discourse of “romantic authorship” arose in the mid- to late-eighteenth century. In this view of creative work as property, not only the “labor” but also the “originality” and personality of the author justifies his ownership of his literary expression. Both labor theory and “romantic authorship” are deeply rooted in the Anglo-American individualistic assumption about human nature and the relationship between humankind and the environment.

In contrast, the Chinese indigenous worldview—dominated by holistic conceptions of human nature, humankind and the environment, rights/entitlements, and intellectual products—differs from the Western individualistic, classical liberalistic approaches to property rights. More

26 See generally id.
29 Id.
32 See generally Richard E. Nisbett, The Geography of Thought: How Asians and Westerners Think Differently... and Why 1–164 (Free Press 2003) (contending that cultural and psychological research shows that East Asians and Westerners think about the world differently because of differing ecologies, social structures, philosophies, and educational systems that date back to ancient Greece and China); Hanbao Ma, Law and Traditions in Contemporary Chinese Society 47, 55–56 (Nat’l Taiwan Univ. 1999) (discussing the traditional Chinese legal culture).
33 Liu, The Enforcement of IPR in China and the United States, supra note 11, at 95–112.
specifically, classical liberalistic thought considers private property rights, including IPR, as natural and inalienable. Under that view, therefore, rights are superior to interests, and individual rights are more precious than collective welfare, social harmony, and public order. In contrast, in China individual rights carry a dark intonation of “self-interest” within the context of Confucian teaching. “Entitlements” in traditional China are one’s share of the communal interest as a whole. Communal interests and harmonious relationships often are shared priorities, and individuals are expected to sacrifice their own interests if the community requires it.

In addition to Confucianism, contemporary Chinese justifications of IPR are heavily influenced by the Marxist philosophy of dialectic materialism and political economic analysis of IPR as forms of both superstructure and ideology. Marxism’s fundamental elements were indoctrinated as the dominant philosophical and political ideology in China by the political regime of the communist party—though subsequently the party abandoned the idealistic goals and aspirations of socialism turning China into a capitalist state. Moreover, stages of economic prosperity and technology development in the United States and China vary vastly. Quantitative research indicates that economic factors correlate strongly and positively with both the numbers of IPR granted and IPR enforcement strength in a nation. Economic prosperity, especially high stages of technology development, promotes the flourishing of businesses and trade

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35 HANBAO MA, supra note 32, at 55–56.
associations with strong IP interests. They provide the most direct and powerful internal pushes for the protection of IPR. The United States has a high stage of economic development and an advanced level of technology, hosting numerous large businesses and industries that have strong IPR interests and are active in business lobbying.

China on the other hand experienced a period of rapid economic growth in the past two decades, along with the gradual strengthening of industries with strong IP interests. The tremendous regional disparities of economic development in China create further obstacles to IP enforcement, especially in regions that are experiencing a rapid economic boom but that have not produced enough of their own IP products to raise their awareness of IPR protection. Finally, China does not have a tradition of legal formalism; its judiciary emphasis on substantive justice contrasts sharply with that of the relatively independent and powerful U.S. legal system.

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39 See Schroeder, supra note 38, at 238-56; see also Dimitrov, Administrative Decentralization, supra note 38, at 120–74.
40 See Schroeder, supra note 38, at 238-56; see also Dimitrov, Administrative Decentralization, supra note 38, at 120–74.
41 For example, active and powerful trade associations in copyright-intensive industries include the Business Software Alliance (BSA), the Software and Information Industry Association (SIIA), the Recording Industry Association of America (RIAA), and the Motion Picture Association (MPA) of America. They play crucial roles in implementing U.S. copyright laws and policies, both domestically and abroad. See Mertha, supra note 3, at 35–76; see generally Christopher May & Susan K. Sell, Intellectual Property Rights: A Critical History (Lyne Rienner Publishers, 2006); Joe Karaganis & Sean Flynn, Networked Governance and the USTR, in Media Piracy in Emerging Economies ch. 2 (Joe Karaganis ed., Social Science Research Council, 2011) (explaining how industry groups and business representatives “forum shop” internationally for institutions where they can pressure for stronger IP protection measures; domestically, they regularly attempt to coordinate various enforcement agencies to strengthen enforcement), available at http://piracy.americanassembly.org/wpcontent/uploads/2011/06/MPEE-PDF-1.0.4.pdf); Peter Drahos, Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach, 77 Temp. L. Rev. 401 (2004).
43 Interview with Richard S. Gruner, Distinguished Senior Professor of Law, Whittier Law School (June 23, 2010).
Politics and law are much more closely intertwined in China.\textsuperscript{46} China neither emphasizes nor seriously practices notions of judicial independence, judicial review, and rule of law.\textsuperscript{47} The court as an institution is much weaker than local governments, administrative agencies, and some other judicial agencies, such as the procuratorate.\textsuperscript{48} The procuratorate is the office of prosecutors in China. China does not have a rational law system, where the consistent and strict function of rules and procedures is highly respected.\textsuperscript{49}

The Chinese government voluntarily transplanted Western law, including IP laws.\textsuperscript{50} It was motivated by a set of historically determined political goals: modernization of the nation, development of the economy, introduction of foreign investment and advanced technology, maintenance of market order, preservation of governmental stability, and restraint of local government authority to strengthen the central state.\textsuperscript{51} Thus, China borrowed Western laws as instruments with whatever modifications are necessary to fix Chinese indigenous problems.\textsuperscript{52} As a result, the Chinese government can easily use the legal system, including IP laws and the criminal justice system, to serve its policy priorities or state interests.\textsuperscript{53}

This study centers on testing empirically the justifications and foci of the criminal enforcement of IPR in China. Anglo-American IPR and IP laws have swiftly transplanted to China despite those two societies’ fundamentally distinct philosophical worldviews, economic conditions, political interference, and legal systems.\textsuperscript{54} Given the context of IPR enforcement in China outlined above, this article identifies the major results of such an East and West collision at the criminal IP enforcement stage.

\textsuperscript{46} See Lubman, supra note 45, at 11-39; see generally LUBMAN, supra note 45 (reviewing some of the major characteristics of Chinese legal institutions as they have developed since the initiation of legal reform after Mao, including the unique characteristics of Chinese legal system).
\textsuperscript{47} See LUBMAN, supra note 45.
\textsuperscript{48} Id.
\textsuperscript{49} See generally SUTTON, supra note 36.
\textsuperscript{51} Id. at 548–52.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 9–29 (Stan. Univ. Press 1995).
D. Past Comparative IP Enforcement Studies

Scant research exists on the primary concerns of U.S. businesses: IPR enforcement itself inside China. Most work on this topic concerns the legislative history and legal analyses of IP legal codes in China, as well as Sino-U.S. trade negotiations. This section first summarizes William Alford and Peter Yu’s classical legal studies on IP protection and enforcement in China. Then it turns to the more recent important empirical studies on IPR in China conducted by Andrew Mertha and Martin Dimitrov from the perspective of political science. The literature review concludes with a brief summary of the research on the criminal enforcement of IPR in both the United States and China including the empirical criminological studies done by Mark Motivans and Jay Albanese.

Building on the groundwork Alford, Mertha, and Dimitrov have laid, this article brings knowledge of the rapidly changing field of IPR enforcement into the present. This article analyzes official U.S. datasets for about half of the federal criminal IP cases occurring from 2002 to 2007. It is thus far the most up to date and comprehensive quantitative study on this subject. While previous studies concentrated on analyzing obstacles to administrative enforcement, this article looks closely at the performance of criminal enforcement agencies, the priorities of criminal enforcement in

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58 See generally MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA (Cambridge Univ. Press 2009) [hereinafter Dimitrov, Piracy and the State]; see generally Dimitrov, ADMINISTRATIVE DECENTRALIZATION, supra note 38; see also Mertha, supra note 3.

59 See Mark Motivans, INTELLECTUAL PROPERTY THEFT, 2002, BUREAU OF JUSTICE STATISTICS (Oct. 2004); Beresford, supra note 2, at 73–74.
action, and the forces shaping enforcement patterns. Taking a grounded-
theory approach, this article is not confined to analyzing the impact of
political, institutional, structural, and bureaucratic factors on the
enforcement.

William Alford’s classical work elaborates on a rushed but vacillating
law-making process undertaken in China with the initiation of the Chinese
“economic reform (gaige kaifang 改革开放) policy under both internal and
external pressure. It asked why, during thousands of years of civilization,
China did not develop anything similar to the Anglo-American IPR model.
He suggests the answers stem from Confucian teachings that rules and ideas
come from nature, and in the critical role played by a shared past for moral
and intellectual elevation. The indispensability of communication with the
past requires free communal access to nature’s self-expressions recorded in
intellectual products. Alford’s research, however, focuses mostly on law-
making and not on enforcement.

More recently, Peter K. Yu’s writings about the legislative, enforcement, and policy-making aspects of IP laws in China also aim to
facilitate U.S. policy makers’ understanding of IPR from the indigenous
Chinese perspective and contexts. Andrew Mertha and Martin Dimitrov
concentrated on the impact of political models, administrative institutional
structures, and bureaucratic incentives on the effectiveness of IPR
enforcement, especially administrative enforcement. Mertha rejects
Alford’s arguments concerning Chinese indigenous culture and social norms.

This research completes and updates Alford’s cultural arguments in
multidisciplinary contexts and examines them against empirical data. Alford
is correct that indigenous culture and social norms play a crucial role in
explaining why transplanted IP laws were ignored and marginalized by both
the public and enforcement agencies for decades after their introduction into
China. Arguments based on institutional structures and bureaucratic

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60 ALFORD, supra note 54.
61 Id.
62 Id.
63 Id.
64 See generally Yu, The Second Coming, supra note 57, at 16-26; Yu, The Copyright
Divide, supra note 57; Yu supra note 42.
65 See generally DIMITROV, PIRACY AND THE STATE, supra note 58; DIMITROV,
ADMINISTRATIVE DECENTRALIZATION, supra note 38; see also MERTHA, supra note 3.
66 ALFORD, supra note 54.
incentives alone cannot explain the exceptionally high rates of piracy and counterfeiting in China.\textsuperscript{67}

In terms of research on the criminal enforcement of IPR, there is surprisingly little empirical study within the United States.\textsuperscript{68} *Intellectual Property Theft and Fraud* explores the definitions, impact, boundaries, elements, criminological causes, and policy recommendations of the problem as well as the relationship of IP theft to fraud, organized crime, white-collar crime, and globalization.\textsuperscript{69} Incorporating government statistics, Mark Motivans’ Bureau of Justice Statistics report summarizes the trends of IP criminal and civil cases from 1994 to 2002.\textsuperscript{70} However, without solid empirical data, most research in this book is exploratory.

Dimitrov’s study, Mertha’s analysis of sources of resistance and barriers against criminalization is grounded solely in aspects of organizational structures and bureaucratic incentives.\textsuperscript{71} Literature on the criminal enforcement of IPR in China is even scarcer. Dimitrov is the only scholar who has conducted systematic empirical work to describe and analyze the statutory bases, police structures, enforcement practices, barriers, and aggregate official enforcement statistics on the criminal enforcement of IPR in China.\textsuperscript{72} Successfully describing a large comparative terrain, Dimitrov’s research on criminal IPR enforcement lacks the benefits that a more targeted, in-depth analysis can offer.

III. RESEARCH QUESTIONS, DATA, AND METHODS

China has swiftly transplanted a whole set of Anglo-American IPR and IP laws despite those societies’ essentially discrete economic, cultural, political, and legal contexts. The mainstream justification for IPR in the US

\textsuperscript{67} See BSA GLOBAL SOFTWARE, supra note 6, at 10-11; SIXTH ANNUAL BSA REPORT, supra note 6, at 10-11.
\textsuperscript{68} See Motivans, supra note 59; see Beresford, supra note 2.
\textsuperscript{69} See Beresford, supra note 2.
\textsuperscript{70} See generally BUREAU OF JUSTICE STATISTICS, SUSPECTS IN FEDERAL CRIMINAL MATTERS CONCLUDED DURING FISCAL YEAR 2002: BUREAU OF JUSTICE STATISTICS, DEFENDANTS SENTENCED UNDER THE GUIDELINES DURING FISCAL YEAR 2002; BUREAU OF JUSTICE STATISTICS, DEFENDANTS IN CRIMINAL CASES TERMINATED DURING FISCAL YEAR 2002. Motivans’ paper uses the same type of U.S. official annual datasets that this research uses; however, his analysis only covers the annual datasets up to 2002, and he only conducted basic descriptive analyses to reveal the general trends of the annual data. Motivans, supra note 59.
\textsuperscript{71} See MERTHA, supra note 3, at 202–09.
\textsuperscript{72} See DIMITROV, PIRACY AND THE STATE, supra note 58, at 146–81; DIMITROV, ADMINISTRATIVE DECENTRALIZATION, supra note 38.
is to protect individual rights. This article hypothesizes that the main goal of criminal enforcement of IPR in China is to repress activities seriously violating “socialist market order.” The above hypothesis is tested by analyzing the types of IP infringements enforcement agencies focus on, infringement victim profiles, objectives and targets of enforcement operations, and surveys on the public perceptions of IPR, infringements, and enforcement. Additionally, this article considers the factors determining the patterns of the criminal enforcement of IPR in China and the United States through in-depth interview and documentary analyses.

In order to test the above descriptive and explanatory hypotheses, five types of empirical data were collected: (1) summary judgments of 376 Chinese criminal IP cases; (2) U.S. official annual statistics on about half of all IP criminal cases containing rich individual case information; (3) news reports on 239 U.S. IP thefts; (4) aggregate official statistics on IPR criminal and administrative enforcement in both countries; and (5) in-depth

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74 The Chinese data analyzed comes from the databases of the summary judgments that come from the largest publicized Chinese summary judgment databases. The author searched various databases, including the Beijing University Lawyee website and Chinalawinfo.com. An additional number of summary judgments were obtained directly from district courts. See generally Zhanjian Tushuguan [Zhanjiang Library], Beida Fayi Anli Shujuku Jieshao [The Introduction to Beijing University Lawyee Case Database], ZJLIB (2008), available at http://www.zjlib.com/2008/bdfy.htm.

75 The U.S. datasets on criminal enforcement are located in the “standard analysis files” (SAF) available from the Federal Justice Statistics Resource Center website. Among them, the “Defendants Sentenced” files (data name: SC09OUT) from the U.S. Sentencing Commission has been used for this research. See BUREAU OF JUSTICE STATISTICS, DEFENDANTS SENTENCED UNDER THE GUIDELINES from 2002-2008.


interviews with IP practitioners in China. The first three provided the datasets to analyze targets, roles, and consequences of criminal enforcement. The author used aggregate statistics to verify the reliability of the three datasets, and used the interviews to help interpret the statistical findings.

This article codes numerous variables from the Chinese summary judgments into its analysis. The first set of variables includes victim characteristics such as SOEs, domestic, or foreign companies. The second set of variables categorizes types of infringements. These include: the types of IPR; types and industries of merchandise; whether they are top brands/copyrights or not; consumer products or luxury goods; and whether the offense involves health, safety, governmentally controlled industries, or other politically prioritized issues. The published summary judgments are not a random sample and cannot be used for making generalizations to the national population. Nevertheless, considering the particular scarcity of IP criminal cases and the absence of other, more reliable data sources, the sample of over 300 criminal IP cases offers valuable answers to the research question.

This article additionally codes about 30 in-depth interviews conducted in Beijing in summer 2010 with IP practitioners. The practitioners include trademark and copyright agents, attorneys, judges, law enforcement officials, law professors, and senior researchers who were knowledgeable and experienced in relation to the topics of this research. The author obtained informative interviews were obtained with several top officials at copyright enforcement agencies and their research centers, with judges of Beijing high courts and lower-level courts, and with researchers at the Intellectual Property Center of the China Academy of Social Sciences.


78 Lu Hong, Legal Responses to Trafficking in Narcotics and Other Narcotic Offenses, 18 CHINA INT’L CRIM. J. REV. 212, 219 (2008).
The U.S. dataset is abundant in individual case and defendant information.\textsuperscript{79} It contains information on the vast majority of the felony defendants of IP thefts in the federal criminal justice system, including those plea-bargained, bench tried, and not convicted. About half of the IP defendants were processed by the federal system each year.\textsuperscript{80} The news releases report collected from the website of the Computer Crime & IP Section of the Department of Justice on a total of 239 IP criminal cases serve as complementary data for the official dataset.\textsuperscript{81} These news reports provide additional information on types of offenses, detailed crime descriptions, victim characteristics, and investigation processes for individual IP theft cases.

Finally, the aggregate official enforcement statistics outline a broad picture of the case distribution and processing results across civil, administrative, and criminal IP enforcement. They also show trends of enforcement rates, sanction levels, and case attrition through these processes and offer the starting point for comparison between the United States and China.

The analyses of this study are conducted from two broad theoretical perspectives: (1) law and society, and (2) enforcement and criminology. The quantitative part of this research involves descriptive analyses of the data (such as categorization, graphs, calculation of frequencies, ranges, and central tendency) using statistical software SPSS and Access. Tables and graphs are frequently used to help demonstrate patterns that emerged from the results.

IV. Results

Statistical analyses of the three main case datasets and documentary analyses address above research questions on the foci and roles of the criminal enforcement of IPR. Statistical results partially support my initial hypotheses that the role of criminal enforcement of IPR in China is to prioritize public welfare and to serve some political goals such as repressing activities that seriously violate the socialist market order. Results also indicate several distorted and unexpected consequences in applying criminal

\textsuperscript{79} Bureau of Justice Statistics, Defendants Sentenced under the Guidelines, SC02OUT (The Urb. Inst.), 2002-2008.

\textsuperscript{80} Motivans, supra note 59, at 4.

\textsuperscript{81} CCIPS Press Releases, supra note 76.
IP law in China, and reveals patterns of similarities and differences between the two countries.

A. The Foci of Criminal Enforcement

Results from the descriptive analysis of the 376 IP criminal case sample provides a nuanced picture of the roles and foci of enforcement while indicating several unintended patterns of the enforcement in China. Part IV.A.1 reveals an extremely high concentration of protected victims in a handful of economically or politically powerful companies in a few particular industries. In terms of the corporate ownership in the Chinese sample, 49% of the victims are SOEs and 44% are companies with controlling foreign shareholders or foreign IPR. In particular, the protected SOEs in the Chinese case sample converge in only a few industries: tobacco, alcohol, and publication.

The profiles of victimized companies of foreign interests in the Chinese sample are similar to the majority of victim profiles in the U.S. sample. In the Chinese sample, they are mostly foreign companies carrying products such as home electronics, computer parts, personal care products, software, and movies. In the U.S. sample, the victims concentrate in industries with products such as software, movies, music, games, leather goods, pharmaceutical products, home electronics, and computer parts.

Part IV.A.1 also reveals that the majority of infringed companies carry nationally or internationally well-known top brands or copyrights. Finally, in Part IV.A.3, the article compares the distribution of counterfeit merchandise petitioned to the administrative agency in China to the distribution of counterfeit merchandise in the criminal case sample. Generally speaking, the distribution of consumer petitions is much more widespread and diffuse.

1. Corporate Ownership, Industries, and Brands of the Victims

Above all, statistical analysis reveals an extremely high concentration of protected IP infringement victims in a handful of economically or

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82 See infra Part IV.A.
83 See infra Part IV.A.
84 See infra Part IV.A.
85 See infra Part IV.A.
politically powerful companies in a few particular industries. These companies are large corporations with the biggest market shares in the U.S. sample and large SOEs or companies of foreign interest in the Chinese sample. The majority of infringed companies in the U.S. case sample are either big domestic private companies or multinational corporations; many of them are publicly held corporations. There are no SOEs in the U.S. sample. In comparison, in the Chinese sample, 49% of the victims are SOEs (which also include a few public institutions (shiye danwei 事业单位)\textsuperscript{86} and 44% are companies with controlling foreign shareholders or foreign IPR (companies of foreign interests).\textsuperscript{87} Domestic private and collective companies constitute a very small proportion (6.7%).\textsuperscript{88}

In particular, the protected SOEs converge in only a few industries, whose markets are tightly controlled by the state and monopolized by SOEs: tobacco, alcohol, and, to a much lesser extent, the publishing industries.\textsuperscript{89} Those frequently victimized trademarks include many nationally or regionally renowned top tobacco and alcohol brands. The pirated books are usually bestsellers, dictionaries, textbooks, and complementary material published by state-owned publishers.

According to market demands, most of the pirated optical disks in China are pirated movies and software, but they also include music CDs, TV episodes, games, and other electronic publications.\textsuperscript{90} In terms of corporate ownership, these pirated optical disks are very likely to contain best-selling movies and TV episodes produced by state-owned movie studios or domestic private movie companies as well as music released by state-owned publishers.\textsuperscript{91} U.S. big cinema hits are also popular in China.\textsuperscript{92} Domestic

\textsuperscript{86} SOEs here are defined as companies dominated by state capital or state shareholders with stockholding rights.
\textsuperscript{87} Companies of foreign interests are defined to include foreign companies, companies carrying infringed foreign brands, and companies dominated by foreign shareholders with stockholding rights, including Taiwanese and Hong Kong companies, brands, or shareholders.
\textsuperscript{88} See Table 2.
\textsuperscript{89} See Table 3.
\textsuperscript{91} Id.; see also see also Guojia Xingwen Chuban Guangdian Zongju [State Administration of Press, Publication, Radio, Film and Television PRC国家新闻出版广电总局], Dianyingye Zhunru Zaifa Xingling [New Provisions on the Requirements for the Entry into the Movie
companies create or modify some of the best-selling software, but most software is foreign.\footnote{See id. at 38.}

The victimized foreign companies in the Chinese sample share key characteristics with the U.S. corporate victim profiles. In the Chinese sample, they are mostly companies carrying top brands or copyrights of such products as home electronics, computer parts, personal care products, as well as foreign software, movies, and TV series on optical disks.\footnote{See generally MICHAEL PECHT, CHINA’S ELECTRONICS INDUSTRY: THE DEFINITIVE GUIDE FOR COMPANIES AND POLICY MAKERS WITH INTEREST IN CHINA 215-26 (2006).} In the U.S. sample, the victims are highly concentrated in products such as software, movies, games, satellite-TV access cards, leather goods, name-brand apparel, pharmaceutical products, home electronics, and computer parts.\footnote{See infra Table 3.}

Finally, in most industries, the majority of the infringed IPR is concentrated in only a few well-known brands or corporations. In the U.S. sample collected, the vast majority of the counterfeited products carry top brands from big companies.\footnote{See infra Table 4. For example, the copyrighted products and company names repeatedly mentioned in U.S. press releases on IP thefts frequently include the most commonly used software of Microsoft, Adobe, Autodesk, Symantec, Macromedia, and Rockwell Automation; cinema hits produced by the five major U.S. movie studios Columbia, Disney, Fox, Paramount, and Universal. The pirated foreign copyright products in the Chinese case sample demonstrate similar concentrations. The counterfeit trademarks repeatedly mentioned in the United States are leather and luxury goods carrying brands such as Louis Vuitton, Prada, Gucci, Coach, and Chanel, name-brand apparel from Disney, Nike, and Tommy Hilfiger, pharmaceutical products from Pfizer, Eli Lilly, Bayer Corporation, Hoffman La Roche, and AstraZeneca, and Cisco network cards and connectors. In addition, the infringed foreign trademarks in the Chinese sample frequently are hair care products from Dove and Procter & Gamble, network products from AMP, D-LINK, and 3COM, printer drums and cartridges from Canon, HP, and Toshiba, and cell phones from SAMSUNG, Motorola, and Siemens.} The percentage carrying top brands in the


Fenmian, Baojie Riyongpin Digu de Chen yu Fu (宝洁：日用品帝国的沉与浮) [Proctor & Gamble: The Rise and Wane of the Daily Necessity Empire], PKU BUS. REV. (Sept. 2005), available at http://business.sohu.com/20050926/n240455956.shtml. In addition, as the consequence of heavy regulation of markets at the regional level and local protectionism for tax revenue, the tobacco and alcohol markets are highly fragmented, with numerous regional brands. Dimitrov, supra note 27, at 244. In addition, because all optical-disk piracy cases involve
Chinese sample is slightly lower: 89.7%. The domination of name-branded products is especially prominent in trademark thefts, because the demands for cultural products—such as CDs by various musicians—are more diverse.

Figure 2. Percentage Distribution of Ownership Type of Chinese Corporate Victims

numerous copyrights from multiple rights owners, each case is coded “1,” meaning that it carries copyrights from top companies in the distribution calculation. As a matter of fact, most of the pirated works do carry copyrights from top companies with the highest market shares, such as movies produced by the top five movie studios and the most commonly used software created by top software companies. However, the markets of pirated music and books are much more diverse in nature. Zhang Zhiqiang, Zhuaxingqi Zhongguo Daoban Wenti Yanjiu [Piracy in China During the Transition Period] 28–30 (2005) (unpublished Ph.D dissertation, Nanjing University, China) (on file with author).

Id.

Zhang Zhiqiang, supra note 76.

N=162. The Chinese data come from the dataset of the summary judgments of criminal IP cases in China from 1994 to 2009. The U.S. data used are the collected news releases on IP criminal cases from 2002 to 2010.
Table 2. Comparison of Victim Characteristics Between the Chinese and U.S. Criminal IP Case Samples

<table>
<thead>
<tr>
<th>Percentage of Victims Involving</th>
<th>State-Owned Enterprises</th>
<th>Companies of Foreign Interests</th>
<th>Domestic Private Companies</th>
<th>Top Brands/Copyrights</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>49.4% (N=162)</td>
<td>44.4% (N=162)</td>
<td>6.7% (N=162)</td>
<td>89.7% (N=343)</td>
</tr>
<tr>
<td>United States</td>
<td>0 (N=239)</td>
<td>Many Multinational Corporations</td>
<td>Majority</td>
<td>Over 99%</td>
</tr>
</tbody>
</table>

Table 3. China: Distribution of Infringed IPR by Industry\(^\text{101}\)

<table>
<thead>
<tr>
<th>Industry</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copyright</td>
<td>regular optical disks (software, movies, music, soap opera, and games)</td>
<td>164</td>
</tr>
<tr>
<td></td>
<td>pornographic optical disks</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>regular books</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>textbooks and complementary materials</td>
<td>5</td>
</tr>
<tr>
<td>Trademark</td>
<td>tobacco</td>
<td>58</td>
</tr>
<tr>
<td></td>
<td>home electronics and parts</td>
<td>31</td>
</tr>
<tr>
<td></td>
<td>alcohol</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>computer, software, and gaming products</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>personal care products</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>food</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>automobiles and parts</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>drugs and other medical products</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>construction materials</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>agricultural resources and equipment</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>apparel and leather products</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>other products</td>
<td>3</td>
</tr>
</tbody>
</table>

\(^\text{101}\) N=375. The Chinese data come from the dataset of summary judgments of criminal IP cases in China from 1994 to 2009.
Table 4. The United States: Distribution of Infringed IPR by Industry

<table>
<thead>
<tr>
<th>Industry Description</th>
<th>Number of Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copyright</td>
<td></td>
<td></td>
</tr>
<tr>
<td>software or software titles</td>
<td>49</td>
<td>20.5</td>
</tr>
<tr>
<td>movies</td>
<td>36</td>
<td>15.1</td>
</tr>
<tr>
<td>music</td>
<td>14</td>
<td>5.9</td>
</tr>
<tr>
<td>games</td>
<td>10</td>
<td>4.2</td>
</tr>
<tr>
<td>satellite TV access cards</td>
<td>11</td>
<td>4.6</td>
</tr>
<tr>
<td>various copyrights (including all of the above)</td>
<td>62</td>
<td>25.9</td>
</tr>
<tr>
<td>Trademark</td>
<td></td>
<td></td>
</tr>
<tr>
<td>leather goods or name-brand apparel</td>
<td>20</td>
<td>8.4</td>
</tr>
<tr>
<td>pharmaceutical products</td>
<td>11</td>
<td>4.6</td>
</tr>
<tr>
<td>home electronics or computer parts</td>
<td>9</td>
<td>3.8</td>
</tr>
<tr>
<td>jewelry or luxury watches</td>
<td>3</td>
<td>1.3</td>
</tr>
<tr>
<td>agricultural products</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>food</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>various trademarks (mostly leather goods, apparel, and jewelry)</td>
<td>9</td>
<td>3.8</td>
</tr>
<tr>
<td>other copyrights and trademarks</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Total</td>
<td>239</td>
<td>100.0</td>
</tr>
</tbody>
</table>

2. Foreign IPR-Related Businesses in China

Considering that the overall number of foreign-holding companies in China is only 2.5% in 2012, the location of 44% of corporate victims with

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102 N=239. The U.S. data used are the collected news releases on IP criminal cases from 2002 to 2010.

controlling foreign shareholders or foreign IPR in the Chinese summary judgment sample reveals a disproportionate concern with foreign interests by enforcement agencies. In contrast, IP cases with foreign interests (including corporate victims from Hong Kong, Macau, and Taiwan) concluded by civil courts constituted only 5.8% of all 23,518 civil IP cases in 2008.\footnote{104}

Administrative agencies are much more likely to transfer an IP infringement case to criminal prosecution when the case involves foreign interests. For example, SAIC and Administration of Quality Supervision, Inspection and Quarantine (“AQSIQ”) are the two major administrative agencies that transfer the vast majority of counterfeit claims for criminal process. In 2007, the prosecutors brought 796 trademark thefts indictments, among which 229 cases were transferred by SAIC and 200 by AQSIQ. Out of these 229 criminal matters transferred by SAIC, 43.7% were cases with foreign interests.\footnote{105} In comparison, administrative cases with foreign interests comprised only 24% of all trademark counterfeit and infringement cases processed by SAIC in 2007.\footnote{106}

My interview with a former IP judge from the Beijing High Court revealed that, according to an internal study that the judge supervised, corporate complaints with foreign interests have a win rate of 71% in civil IP cases, much higher than the average rate for all complaints.\footnote{107} The judge explained that the court gave certain preferential treatment to foreign companies not only because of the pressure from foreign businesses and governments, but also due to the Chinese cultural etiquette of treating foreign guests nicely in order to gain face (zheng mianzi 挣面子) for the host.


\footnote{106} See infra Table 5.

\footnote{107} Interview with an IP judge (July 5, 2010).
and build a good relationship.\textsuperscript{108} This rationale may also explain why administrative agencies, such as SAIC, transfer considerable counterfeit cases with foreign interests for criminal prosecution.

Despite the high priority and favoritism administrative agencies and judicial institutions give to IP thefts with foreign interests, detection of the majority of cases relies on people outside of the legal system, especially the corporate victims themselves. IP criminal cases are usually initiated through the following channels: transfer by IP administrative agencies,\textsuperscript{109} initiation by the police,\textsuperscript{110} and victim complaints that go directly to court (private prosecution\textsuperscript{111}). The first two types of cases are brought to the court by the prosecution, so both are public prosecutions. The criminal case sample the researcher collected indicates that private prosecutions are rather uncommon. Instead, most of the time, when a company detects theft of its IPR it will report the crime to an administrative agency or the police and ask for further investigation and public prosecution.

In the nine months between January and September of 2008, all administrative agencies combined transferred 445 IP thefts to the Public Security Bureau (“PSB”). This number constitutes 27.5% of all IP thefts the PSB accepted for investigation.\textsuperscript{112} The remaining 72.5% of IP thefts were either detected by the PSB itself or, most likely, directly reported to them. Since IP thefts are not the priority of the PSB,\textsuperscript{113} one can infer that most of the criminal IP cases were detected and reported by others, most likely the victims, since IPR are private rights. Foreign corporate victims themselves must have played a crucial role in pushing their cases for public prosecution.

Public surveys reveal foreign companies in China demonstrate much higher consciousness of IPR and invest much more heavily in establishing IPR management mechanisms when compared to SOEs and domestic private companies.\textsuperscript{114} Interviews with several top-level IP attorneys and trademark

\textsuperscript{108} Id.

\textsuperscript{109} See supra note 104, at 109.

\textsuperscript{110} Id.

\textsuperscript{111} Private prosecution applies to criminal proceedings and is usually brought before a court by an individual or private organization instead of a public prosecutor.

\textsuperscript{112} See supra note 99, at 104.

\textsuperscript{113} Gaikuang Xinx (概況信息) [Profile Information]. GONG’ANBU WANGZHAN (公安部网站) [MINISTRY OF PUB. SECURITY]. http://www.mps.gov.cn/n16/n1282/n3463/index.html?_v=1404486444125 (last visited November 11, 2014).

\textsuperscript{114} See Zhang Jun & Yang Weiguo, Woguo Qiye Zhishi Chanquan Guanli Zhuanzhang (中国企业发展管理知识产权) [A Survey on the Corporate Management of Intellectual Property Rights], 1
agents indicate that the vast majority of their clients are foreign companies. Domestic private companies and SOEs, with the exception of some top firms, either lack a specially allocated budget to pursue IP infringements or would prefer to spend much less money to hire cheaper agents or nonprofessionals.

In contrast, top foreign companies are generally aggressive at marketing and protecting their IPR. They hire top IP agencies or investigative firms to proactively look for counterfeits or pirated goods. These attorneys and agents work to seek criminal—as well as administrative and civil—processing when cases reach prosecution thresholds. Given such a high concentration of foreign companies as victims in trademark cases, it appears a number of foreign companies are particularly active in pressing for criminal prosecution of the theft of their trademarks and securing the prioritizing of their cases by local criminal law enforcement. Equipped with ample resources and extensive expertise, these IP professionals can effectively facilitate governmental agencies in the investigative and decision-making processes of their cases. Several trademark attorneys commented that they expected to “do everything themselves,” while cultivating good relationships with governmental officials and enforcement officers.

Some IP agents and attorneys from top firms in Beijing boasted of their close personal relationship (guanxi) with enforcement agency officials. Several former top administrative agency officials and judges were hired as partners or counselors of these IP law firms. These firms provide enforcement agencies with evidence or whatever legal or material (vehicles, personnel, money, or other resources) assistance they need to facilitate investigations. Moreover, rights owners frequently have to pay case-

\[\text{ZHONGGUO FAMING YU ZHUANLI [CHINA INVENTION & PAT.] (Zhongguo Faming Xiehui he Zhishi Chanquan Chubanshe, Beijing 2006).}\]

\[^{115}\text{Interview with an IP attorney (June 23, 2010); interview with an IP agent (July 6, 2010); interview with an IP attorney (July 7, 2010).}\]

\[^{116}\text{See interviews cited supra note 115.}\]

\[^{117}\text{Id.}\]

\[^{118}\text{Id.}\]

\[^{119}\text{Id.}\]

\[^{120}\text{Interview with an IP attorney (July 7, 2010); interview with an IP judge (July 6, 2010); interview with an IP attorney (June 23, 2010).}\]

\[^{121}\text{See interviews cited supra note 120.}\]
handling fees or treat enforcement officers with post-raid banquets and entertainment in karaoke bars and massage parlors.\textsuperscript{122}

Dimitrov harshly chastises these practices of “case-handling fees” and special treatments as corruption that leads to “piecemeal, expensive, and ineffective” enforcement.\textsuperscript{123} Some of the interactions that result in favoritism can be categorized as “clientelism,” in which “a sustained pattern of reciprocal (and usually illicit) exchange [exists] between a state patron and a non-state client based on personal ties and conducted via informal networks.”\textsuperscript{124} These acts may not all be corrupt according to the law. However, “guanxi” and under-the-table payments could at least lead to severely unequal treatment before the law and the capture of enforcement agencies by a small number of rich and resourceful top foreign companies.

Some trademark agents and attorneys commented that the practices noted above were so common they should not be considered corruption.\textsuperscript{125} These practices are necessary, as the reasoning goes, because enforcement agencies with limited institutional capacity often hesitate to spend large sums of tax-payer money to initiate preliminary investigations of less serious infringements.\textsuperscript{126} IPR are usually considered to be just one type of economic interest to be weighed against other interest by administrative agencies. As a result, they are not always treated as a top priority. As long as the “case-handling fees” are collected by the organization and are spent to process the case, instead of being treated as bribes by individual governmental officials, they are not viewed as “corruption,” according to law.\textsuperscript{127}

During my interviews, these trademark practitioners point out that the banquet and entertainment activities are common Chinese ways of networking to build relations with authorities.\textsuperscript{128} Sometimes practitioners have to pay the expenses of these social activities out of their own pockets instead of out of the company’s account because they are considered “personal expenses” spent socializing with friends.\textsuperscript{129} Formal rules and

\textsuperscript{122} Dimitrov, Piracy and the State, supra note 58, at 146–81; Mertha, supra note 3, at 165.

\textsuperscript{123} Dimitrov, Administrative Decentralization, supra note 38.


\textsuperscript{125} Interview with a government official in the National Copyright Administration of China (July 5, 2010).

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Interview with a government official in the National Copyright Administration of China (July 5, 2010).

\textsuperscript{129} Id.
procedures are often meticulous, bureaucratic, and slow.\textsuperscript{130} Thus, legal practitioners cut corners and seek favorable treatment through personal networking.\textsuperscript{131} However, these extra-legal practices such as “case-handling fees” and entertaining with enforcement officers might contribute to unequal treatment before the law and the capture of enforcement agencies by a small number of companies.

Foreign companies have quickly learned the Chinese way of doing business and have enjoyed the benefits of these important personal networks.\textsuperscript{132} Large companies with ample resources and especially large companies which are repeated players generally benefit more from these unequal and extra-legal practices than they are hurt by them.\textsuperscript{133} In contrast, these practices place individual infringers and small companies, especially people from the lower class, the unemployed, or members of a floating population,\textsuperscript{134} at an apparent disadvantage. This pattern of winners and losers in the process of IPR enforcement is clearly shown in the profiles of the protected victims and convicted offenders in my case samples.\textsuperscript{135}

Moreover, one could argue that the favoritism Chinese IP administrative enforcement agencies and judicial institutions show to foreign businesses results from intense diplomatic pressure, a means to attract foreign investment and technology transfer, and an attempt to save the government’s face before the international community. Of course, business lobbying is more widely acknowledged, and has more legitimate channels, in the United States than in China.\textsuperscript{136} Still, the capture of the criminal judicial system by a handful of rich and resourceful top foreign companies and copyright trade associations is unjustifiable and unfair to other infringed IPR owners who deserve criminal protection.

\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} KENNEDY, supra note 124, at 96-127.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Floating population refers primarily to migrants in China without local household registration status through the Chinese Hukou system.
Table 5. Yearly Frequency of Trademark Counterfeit and Infringement Cases (shangbiao qinquan jiamao anjian) Processed by SAIC

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of SAIC Cases</th>
<th>Cases with Foreign Interests</th>
<th>Percent with Foreign Interests</th>
<th>Transferred Cases for Criminal Processing</th>
<th>Percent with Foreign Interests</th>
<th>Transferred Cases with Foreign Interests</th>
<th>Percent of total cases/Percent of Transferred Cases with Foreign Interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>47045</td>
<td>10944</td>
<td>23.3%</td>
<td>137</td>
<td>47.4%</td>
<td>65</td>
<td>0.49</td>
</tr>
<tr>
<td>2007</td>
<td>42314</td>
<td>10148</td>
<td>24.0%</td>
<td>229</td>
<td>43.7%</td>
<td>100</td>
<td>0.55</td>
</tr>
<tr>
<td>2006</td>
<td>41214</td>
<td>9286</td>
<td>22.5%</td>
<td>252</td>
<td>50.8%</td>
<td>128</td>
<td>0.44</td>
</tr>
<tr>
<td>2005</td>
<td>39107</td>
<td>6607</td>
<td>13.4%</td>
<td>238</td>
<td>37.4%</td>
<td>89</td>
<td>0.36</td>
</tr>
<tr>
<td>2004</td>
<td>40171</td>
<td>5401</td>
<td>13.4%</td>
<td>96</td>
<td>29.2%</td>
<td>28</td>
<td>0.46</td>
</tr>
</tbody>
</table>

Figure 3. Percentage of Cases with Foreign Interests out of Total SAIC Cases and Percentage of Cases with Foreign Interests out of Cases Transferred for Criminal Processing, 2004–2008

3. Aggregate Administrative Enforcement Statistics as a Comparison

In addition to being overrepresented according to their market share, luxury goods sold by the top corporations are overrepresented in criminal enforcement vis-à-vis the administrative IP enforcement process. The SAIC

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138 Id.
processes consumer petitions submitted through the 12315 petition network, detailed in Table 6. Most (59.4% in 2008) of these petitions were disputes on product quality, which often involve counterfeits.\textsuperscript{139} This distribution of petitioned merchandise is rather distinct from the distribution of counterfeit merchandise in the Chinese criminal case sample listed in Table 3.

Generally speaking, the distribution of consumer petitions is much more widespread and diffuse: a multitude of products belong to many more industries. Some of them have significant shares among these petitions; however, they do not appear in the criminal case sample. A variety of home electronics, food, daily necessities, and household machines constituted about 80% of all petitioned products.\textsuperscript{140} In contrast, tobacco, alcohol, hair care products, and home electronics such as network products, printer parts, and cell phones were highly overrepresented in the criminal case sample.\textsuperscript{141} Furthermore, as described at the end of Part IV.A.1, these criminally processed counterfeits are greatly concentrated in top brands produced by only a few leading companies in the industry (such as hair care products from Dove, and Procter & Gamble brands such as Pantene and Rejoice); while the distribution of infringed products reflected by the petitions is much greater.\textsuperscript{142}

Similarly, the distribution of counterfeits processed by the AQSIQ is also rather distinct from that of counterfeits in the criminal case sample. The top industries subject to counterfeits processed by AQSIQ in 2007 were food, construction material, and agricultural resources.\textsuperscript{143} Although there exists a high concentration of tobacco, alcohol, and personal care products counterfeiting among criminal trademark cases, tobacco-counterfeiting cases make up only 0.2% of those processed by AQSIQ. In comparison, alcohol and drinks together constitute 5.9%. Cosmetics and personal care product comprise only 0.6% (see Table 7). Clearly the majority of counterfeits processed by AQSIQ (59.5%) either carry health or safety threats (food,
construction material, personal care products, and automobile parts) or involve other public welfare concerns (agricultural resources, cotton, and other fiber products). Finally, aggregate official enforcement statistics show that administrative agencies handled the vast majority of IP infringements each year; the proportion of IP cases processed by the criminal judicial system comprise was just the tip of that iceberg.

In contrast with trademark counterfeiting, the distribution of administrative piracy cases is essentially similar to that of criminal copyright cases in the Chinese sample. This finding is not surprising; piracy vendors carry numerous copyrighted works of a multitude of authors or producers and they respond to market demands. Enforcement raids and seizures of pirated goods can seldom specifically target a single type of product or products of a particular industry.

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144 Id.
145 For example, in 2007, the number of All Concluded Cases Involving IP Offenses was only 2,684, compared to more than 100,000 IP infringements sanctioned by various administrative agencies. Haiyan Liu, The Criminal Enforcement of Intellectual Property Rights in China: Recent Developments and Implications, 5 ASIAN J. CRIMINOLOGY 137, 141 (2010).
Table 6. Percentage Distribution of Industries of Consumer Petitions (shensu) processed by SAIC through 12315 Web sites\(^\text{146}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Petitions</th>
<th>Home Electronics</th>
<th>Daily Necessities</th>
<th>Food</th>
<th>Household Machines</th>
<th>Construction Materials</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>515543</td>
<td>199330</td>
<td>112766</td>
<td>64908</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Percent</td>
<td>38.7%</td>
<td>21.9%</td>
<td>12.6%</td>
<td>N/A</td>
<td>Below 10%</td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>522561</td>
<td>208654</td>
<td>113666</td>
<td>63065</td>
<td>46607</td>
<td>26592</td>
</tr>
<tr>
<td>Percent</td>
<td>39.9%</td>
<td>21.8%</td>
<td>12.1%</td>
<td>8.9%</td>
<td>5.1%</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>539365</td>
<td>218352</td>
<td>126490</td>
<td>60575</td>
<td>46399</td>
<td>26026</td>
</tr>
<tr>
<td>Percent</td>
<td>40.5%</td>
<td>23.5%</td>
<td>11.2%</td>
<td>8.6%</td>
<td>4.8%</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>552971</td>
<td>199766</td>
<td>123250</td>
<td>93755</td>
<td>41919</td>
<td>27240</td>
</tr>
<tr>
<td>Percent</td>
<td>36.1%</td>
<td>22.3%</td>
<td>17.0%</td>
<td>7.6%</td>
<td>4.9%</td>
<td></td>
</tr>
</tbody>
</table>

More 2008

<table>
<thead>
<tr>
<th>Type</th>
<th>Total</th>
<th>Home Electronics</th>
<th>Daily Necessities</th>
<th>Food</th>
<th>Household Machines</th>
<th>Construction Materials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural Production Source</td>
<td>17483</td>
<td>5407</td>
<td>6129</td>
<td>29820</td>
<td>44151</td>
<td></td>
</tr>
<tr>
<td>Medicine and Medical Items</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wine (among Food)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal Auto (among Household Machines)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Others</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Percent

Table 7. Percentage Distribution of Industries of Counterfeit Cases Processed by AQSIQ, 2007\textsuperscript{147}

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

B. Differences and Unexpected Consequences of Enforcement

After comparing the subtleties of the corporate ownership, industries, and brands of the infringed IPR, this research reveals patterns of similarities and differences between the two countries. To summarize, despite the vastly different macro-level factors and the big picture of rampant infringements and ineffective enforcement in China, the profiles of victimized trademark companies of foreign interests in the Chinese sample are very similar to the victim profiles of the U.S. sample.

The industries of the infringed copyright products in China also are rather similar to those of the United States. Most of them are optical disk products with only two exceptions. First, 10.7% of the cases in the Chinese copyright case sample involve pirated books; in contrast, the U.S. news sample includes no book piracy. In 22.4% of these Chinese pirated book cases, the products are pirated textbooks and complementary material, which are an important target of Chinese law enforcement. Second, 6% of U.S.

copyright thefts involve modification of a satellite television access card, while Chinese state-owned TV stations do not seem to have pushed for the criminal processing of such cases, despite the frequent occurrence of such copyright thefts.\textsuperscript{148}

This section elaborates on the major differences of criminal enforcement in the two countries. Most importantly, statistical results partially support my hypotheses that the role of criminal enforcement of IPR in China is to prioritize public welfare and to serve some political goals such as repressing activities violating the socialist market order. A substantial percentage (44\%) of Chinese criminal IP cases concern products with health or safety risks, while only 9\% of the cases involve such products in the U.S. dataset. Moreover, 52\% of Chinese trademark thefts and 11\% of copyright thefts involve products of regulated industries. Some of these industries also involve SOE monopolization or domination, including tobacco, alcohol, pharmaceutical manufacture, and book publication industries.

1. \textit{Products with Health or Safety Risks}

Important differences in terms of the enforcement foci remain between China and the United States. Counterfeits raising health concerns have become a prominent and notorious problem in China and occupy tremendous attention of both the criminal and administrative enforcement agencies.\textsuperscript{149} To put this in perspective, 19\% of U.S. trademark thefts belong to this category (see Table 8) while as many as 63\% of the Chinese counterfeit cases involve products that could cause health risks.\textsuperscript{150} Products

\textsuperscript{148} See supra IV.1.A.; See supra Table 3.


\textsuperscript{150} Counterfeits that might cause health concerns are inferior quality food (tobacco, alcohol, salt, and other food), drugs and other medical products, dietary supplements, and personal care products (hair care products and toothpaste). Counterfeits that pose potential safety risks include automobiles, auto parts, construction material, and certain home electronics (relay sockets, electronic wiring, and residual current circuit-breakers). Admittedly, not all counterfeit products pose physical harm or health threats; for example, many food vendors counterfeit the more marketable brands of others to increase sales, selling perfectly safe and healthy food. In addition, the offense of Manufacturing and Selling Fake and Shoddy Goods charges are to specifically deal with crimes involving health or safety threats; however, trademark offenses are sometimes used either because they are easier to prove in court or because more than one charge is applicable. See CHEN CHUANYI, supra note 149 at 58–142, 215-61.
with safety concerns do not seem to be as big a focus of enforcement in the sample as those with health threats. After establishing the 2004 Intellectual Property Task Force, the United States started to prioritize the prosecution of IP cases involving threats to public health and safety.\(^{151}\) However, very few of these cases have been prosecuted.

Although 44% of criminal IP cases in China concern products posing health or safety threats—a sizable proportion of cases—only 47% of these health or safety threat cases are actually tobacco and alcohol counterfeits. Other equally serious types of IP thefts comprise much smaller percentages.\(^{152}\) For example, all other food counterfeits make up only 5.5% of all criminal cases carrying public welfare threats in China; pharmaceuticals and other medical counterfeits constitute just 4.4%.\(^{153}\)

China cracks down heavily on crimes that seriously undermine the socialist market economy. Although IPR is defined mainly as a private right in U.S. law, IP criminal offenses are considered crimes against the public in China and are listed in the Chinese Criminal Code under “Chapter III Crimes Undermining the Order of the Socialist Market Economy.”\(^{154}\) Thus, this strong public welfare focus is a planned and unique characteristic of Chinese criminal IP law.


\(^{152}\) See infra Table 3.

\(^{153}\) Id.

### Table 8. Comparison of Percentages of Cases concerning Products of Political or Public Priorities between the Chinese and the U.S. Criminal IP Cases

<table>
<thead>
<tr>
<th>Percentage Products Involving...</th>
<th>Number of Cases</th>
<th>Political or Public Priorities</th>
<th>Including...</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Health Concerns</td>
<td>Safety Concerns</td>
<td>Governmentally Controlled Markets</td>
</tr>
<tr>
<td>China IP Thefts:</td>
<td>375</td>
<td>43.5%</td>
<td>27.7%</td>
<td>2.9%</td>
</tr>
<tr>
<td>Copyright</td>
<td>210</td>
<td>19.5%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Trademark</td>
<td>165</td>
<td>74.5%</td>
<td>63%</td>
<td>6.7%</td>
</tr>
<tr>
<td>U.S. IP Thefts:</td>
<td>239</td>
<td>8.8%</td>
<td>5.4%</td>
<td>2.5%</td>
</tr>
<tr>
<td>Copyright</td>
<td>178</td>
<td>0.5%</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Trademark</td>
<td>61</td>
<td>29.4%</td>
<td>19.1%</td>
<td>8.8%</td>
</tr>
</tbody>
</table>

2. **State Regulation of SOE Monopolized Markets in China**

The second unique aspect of the focus of IP criminal enforcement in China is the heavy presence of SOEs among the corporate victims. In the Chinese IP criminal case sample, 49% of the victims are SOEs, which means that as many as 88.5% of the domestic corporate victims are SOEs.\(^{156}\) This is a rather high percentage considering state-holding companies constitute only 3.3% of all registered corporations in China in 2012.\(^{157}\) Additionally, these SOEs converge in only a few industries (tobacco, alcohol, and book industries) that are monopolized by SOEs and are tightly controlled by the state. This unusually high percentage of SOE victims indicates that the Chinese government has used criminal IP law to ensure state tax revenues instead of protecting the private IPR of domestic companies. The state pursuit of tax revenues through such unexpected means coincides with Tamanaha’s argument that when law does not mirror a society, the law will


\(^{156}\) See supra Table 2.

be more subject to instrumental use by select groups, especially the economic or political elite.\textsuperscript{158}

While tobacco and alcohol counterfeiting can sometimes cause serious physical harm,\textsuperscript{159} tobacco and alcohol counterfeit cases receive far more enforcement attention in comparison to other similarly dangerous crimes, such as food counterfeiting. As a matter of fact, most counterfeit cigarettes and alcohol do not cause worse health problems than do genuine products. Most counterfeit or illegal cigarettes on the market are smuggled top luxury brands or cigarettes manufactured by well-equipped underground factories.\textsuperscript{160} On the other hand, some are low-end cigarettes posing as luxury brands.\textsuperscript{161} But even with these low-end cigarettes, only a very small proportion is handmade or made with inferior quality tobacco.\textsuperscript{162} Most counterfeit alcohol products pose as top luxury brands while using either low-end or homebrewed alcohol.\textsuperscript{163} Even so, extremely rare cases involve deadly or poisonous alcohol.\textsuperscript{164}

What is worse, the state frequently uses anti-piracy crackdowns and the offense of Unlawful Business Operation to enforce media censorship.\textsuperscript{165} Although the majority of publications seized by the Anti-pornography and Illegal Publications Office (APIPO)—the most powerful agency handling antipiracy enforcement—are pirated, the designated responsibilities of APIPO are to tackle pornography and illegal publications (sao huang da fei 扫黄打非) and regulate and macromanage the publishing industry.\textsuperscript{166} Not until 2003, and only under intense international pressure, did the APIPO and Copyright Administration start to transfer more piracy cases for criminal processing.\textsuperscript{167}

\textsuperscript{158} TAMANHA, supra note 20 at 235–36.
\textsuperscript{159} See CHEN CHUANYL, supra note 149 at 58–78.
\textsuperscript{160} Si Yu (思雨), Jia Yian de Jiben Leixing (假烟的基本类型) [The Basic Types of False Smoke], REALLY100.NET (Apr. 13, 2010), http://www.really100.net/index_new/show_news.asp?id=9342.
\textsuperscript{161} See CHEN CHUANYL, supra note 149.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} See MERTHA, supra note 3, at 202–09.
\textsuperscript{166} Id.
\textsuperscript{167} See LIU, supra note 11, at 137, 146.
3. Additional Regulated Products in China

In the Chinese sample, 51.5% of trademark thefts and 10.5% of copyright thefts involve products of government-controlled markets. Although the U.S. government regulates certain industries out of various public policy considerations, to some degree the strict government control of markets is a phenomenon unique to the Chinese economy. The regulated markets include most domestic pharmaceutical manufacture, tobacco, alcohol, and book publication.

In total, as many as 74.5% of the Chinese trademark thefts involve infringed products either with public welfare concerns or in governmentally controlled markets. In addition, 19.5% of the Chinese copyright thefts involve products that are considered prioritized enforcement targets such as pornographic optical disks, textbooks, and complementary material. In comparison, only 29.4% of the trademark thefts and almost none of the copyright thefts in the U.S. dataset involve these prioritized industries, and they are all counterfeits that could incur health or safety risks.

The results in Part IV.B reveal that the role of criminal enforcement of IPR in China is to prioritize collective interests and public welfare and to serve politically prioritized goals such as repressing activities that seriously violate the socialist market order. Previous findings of the foci of U.S. criminal enforcement protecting top companies in a handful of industries confirms that the primary goal of criminal enforcement of IPR in the United States is to protect private property rights, especially the interests of large IPR-intensive businesses. Since the overall enforcement of IPR in China is highly proactive and is only one of their many responsibilities, the enforcement agencies, including the criminal judicial institutions, have tremendous discretion to select their enforcement priorities and reject other cases. In this context, the overall strength, foci, and patterns of enforcement

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168 See supra Table 8.
169 Optical-disk markets are not listed because software, audio-video, and gaming industries are not as strictly regulated.
170 See supra Table 8.
171 Id.
172 Besides the types of products mentioned before, these socially or politically prioritized enforcement targets in the Chinese case sample also include salt, agricultural resources and equipment, optical-disk production lines, pornographic optical disks, and Olympic products.
173 See supra Table 8.
174 See supra Part IV.B.
175 See supra Part IV.A.1.
tell us much about the operation of institutions relating to IP enforcement and the forces behind them.

V. THEORETICAL IMPLICATIONS

The analysis in the previous section reveals significant similarities, differences, and unintended consequences of the indigenization of IP. The following section considers how my findings contribute to an understanding of IP crime and the criminal enforcement of IPR, and explores their theoretical implications for larger issues of legal transplantation and legal pluralism.

Beyond the questions on the characteristics, foci, and consequences of enforcement in practice, what are the most important factors that determine the major patterns of criminal enforcement in China and the United States? Current analysis illustrates that various industry-level economic, technological, political, situational and institutional factors are involved in the criminal enforcement of IPR on the ground.

The nuances of Chinese criminal IP enforcement differ from what the proponents of legal transplantation intended and are subject to the influence of many mid-level situational factors and industry characteristics. In particular, the narrow foci and evident enforcement patterns indicate that the following forces have an overwhelming effect on criminal enforcement of IPR in China: (1) vehement business lobbying by a handful of foreign trademark corporations; (2) the size and market concentration of top firms in an industry; (3) trade association lobbying efforts; (4) state tax interests in a few industries; (5) public welfare and public policy concerns; and (6) other political goals, such as control of the media and importation restrictions on publications.

This summary of the forces behind the criminal enforcement of IPR confirms David Sugarman’s views on the possible consequences of legal transplantation when law does not fit in with the indigenous context.¹⁷⁶ When, in practice, the legitimacy of law is not acknowledged, decisions to observe or enforce the law by citizens and state officials can be influenced by numerous extra-legal factors.¹⁷⁷ Under the influence of the six extra-legal factors summarized above, a disproportionately high percentage of criminal


¹⁷⁷ Id.
IP enforcement in China involve a small number of foreign companies, SOEs in particular state-controlled industries, products posing health or safety threats, or other regulated industries, such as publishing.  

Foremost, the great similarities across the foci of criminal enforcement in the United States and China described in Section IV.A.1 demonstrate that business factors are dominant factors not only for the overall IP enforcement strength of a country, but also for enforcement priorities. First, copyright-related industries are more active in using associations to fight piracy due to the diverse nature of cultural and media products and the suffusion of small businesses in these industries. When comparing copyright thefts to trademark thefts, even a small-scale piracy case tends to involve numerous pirated works, such as books or optical disk publications of various producers and copyright owners. Thus, copyright enforcement requires a collective business lobbying strategy by copyright companies/owners acting through their trade associations or other copyright collective-management organizations. As Scott Kennedy’s study on business lobbying indicated, industries full of small firms with low market concentration and regular interfirm technical and business cooperation, such as the software industry, developed more associations that functioned well in China.

In contrast, criminal-counterfeiting cases involving home electronics, computers and parts, and personal care products concentrated in the top brands of the largest firms in these industries as a result of vehement lobbying activities of individual firms. Large foreign firms dominate these industries in China. Similar to the Chinese enforcement foci, in the United States, the criminal enforcement of trademarks was captured by a few of the most successful large firms in the following industries: leather

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178 See supra Section IV.A. and Section IV.B.
179 See MERTHA, supra note 3, at 118-163.
180 Major copyright trade associations in the United States include the Business Software Alliance, the Software & Information Industry Association, the Recording Industry Association of America, and the Motion Picture Association of America. These associations also are actively involved in lobbying for U.S. foreign trade policies, including the reform of IP law and enforcement in China. Top foreign companies with markets in China also are active in using associations to network with Chinese IP enforcement agencies and governmental officials to gain political advantage and to promote stronger enforcement. A group of foreign copyright-intensive firms in China established the International Intellectual Property Alliance (IIPA) and the Software Publishers Association (SPA). See MERTHA, supra note 3, at 118-163
182 Id. at 96-127.
goods, pharmaceutical products, home electronics, computer parts, jewelry, and luxury watches.\footnote{183} Further research reveals that large firms in highly concentrated markets possessed ample resources and substantial clout to directly interact with and influence governmental agencies, instead of relying on business associations.\footnote{184} The size of the chief firms and related market-concentration level in an industry played crucial roles in shaping the mode of business lobbying for that industry.\footnote{185} For example, the large size of top companies in the consumer electronics industries enabled those firms to act more aggressively when lobbying the government for favorable policies.\footnote{186} The tremendous impact these firms had on the local economy in a region gave them considerable clout during negotiations with the local government.\footnote{187}

In trademark industries where large firms prefer direct contact with governmental officials, the function of associations is limited.\footnote{188} Unlike the International Intellectual Property Alliance, the International Trademark Association in China missed important opportunities to shape Chinese trademark law at its critical lawmaking stages before 1993.\footnote{189} As a result, foreign companies carrying leading trademarks in China set up the Quality Brands Protection Committee in 2000, which has lobbied at the ground level and frequently updates Chinese governmental agencies in order to facilitate the tackling of counterfeiting issues.\footnote{190}

In Chinese tobacco and alcohol industries, the function of trade associations is almost irrelevant for anti-counterfeiting enforcement. Tobacco and alcohol industries have low market concentration and are permeated with SOEs of various sizes. Kennedy reports consistent findings that the function of associations in the steel industry in China is marginal for policy changes.\footnote{191} Likewise, the steel industry is dominated by SOEs, which

\footnotesize{\textsuperscript{183} See supra IV.A.1.} 
\footnotesize{\textsuperscript{184} See id. at 96–127} 
\footnotesize{\textsuperscript{185} See id.} 
\footnotesize{\textsuperscript{186} See id.} 
\footnotesize{\textsuperscript{187} See id.} 
\footnotesize{\textsuperscript{188} However, foreign companies in China established the International Trademark Association (INTA), the International Anticounterfeiting Coalition (IACC), and the Pharmaceutical Research and Manufacturers Association (PhrMA). Among these, only PhrMA has been particularly successful in demanding that China impose top-down legislative and policy changes to protect their members’ IPR through Office of the United States Trade Representative (OUSTR) Special 301 reports and trade negotiations.} 
\footnotesize{\textsuperscript{189} MERTHA, supra note 3, at 63–65.} 
\footnotesize{\textsuperscript{190} Id. at 205–09.} 
\footnotesize{\textsuperscript{191} See KENNEDY, supra note 124, at 64–77.}
all have direct ties with the government. As a result, these SOEs can initiate negotiations on policy issues prior to the government’s promulgation of policies.

The dominance of business factors and the consequent similar enforcement foci in the two countries verify Tamanaha’s arguments that transnational commercial rules—including IPR—are founded on market-based business factors and demands and not different national or local norms and practices. Transnational commercial rules and trade associations are created to advance business interests or to circumvent the state’s power to control economic affairs.

Political factors comprise the second most important determinants of the foci of criminal enforcement in China. These include political interference by the state to protect state tax revenue in luxury goods, especially in the tobacco and alcohol industries, and public policies to fight against counterfeits posing health and safety threats. What's more, strict media control, and importation restrictions on foreign books, periodicals, audio-visual publications, and other media products highly limits citizens’ access to these publications through the legal channel; pirates take full advantage of this situation.

Previous sections of this article discuss the incentives and deep cultural roots of these political factors. Political factors exert a strong direct impact on the Chinese criminal judicial system due to the lack of judicial independence and the close involvement of politics in law. On the books, the criminal enforcement of IPR is a legal action that could be influenced by legal factors and by administrative agencies’ structures and activities. This empirical scrutiny reveals, however, that the actual foci of enforcement are largely determined by situational-level business factors, political priorities, and public welfare concerns.

Finally, technological development and digital publications and audio-visual products play a crucial role in changing the format of copyright

192 Id.
193 Id.
194 See Tamanaha, supra note 20, at 121-32.
195 Id.
196 See supra IV.B.1. and IV.B.2.
198 See supra II.C., IV.B.1., and IV.B.2.
199 See Zhu Suli, supra note 50, at 533, 548–52.
infringements and enforcement foci. Since 2005, along with the dramatic increase in internet access and the prosperity of web media, there has been a rapid decrease in seized pirated publications on the street and increasingly frequent and large-scale online anti-piracy crackdowns.\textsuperscript{200} Case samples from the two countries demonstrate a greater proportion of the counterfeiting, marketing, and trading activities have also moved to the virtual space.\textsuperscript{201}

VI. POLICY RECOMMENDATIONS

Analysis of counterfeiting and piracy problems in China illustrates that current IP infringements arise in the context of entrenched economic, cultural, political, legal, and institutional factors and interests. It is unreasonable for foreign companies to expect enforcement agencies with limited institutional capacity to make fundamental changes to the influence of these macro-factors in a short period of time. Worse yet, ongoing rapid criminalization and politically motivated enforcement crackdowns bring little change in the context of these macro-factors, while at the same time reinforcing social inequality and exacerbating problems embedded in the criminal judicial system.\textsuperscript{202}

Civil society and social activists have long worried about the legitimacy of the aggressive expansion of levels and boundaries of IPR protection globally.\textsuperscript{203} Some IPR legal scholars, economists, and social


\textsuperscript{201} Interview with an IP Judge (July 6, 2010).


activists argue there should be a fine balance between the “rights of IPR owners and creators” and the “rights of users.” That is, the balance between offering economic incentives for more market-oriented creation and lowering transaction costs to promote dissemination and public enjoyment of the creation, which could in turn stimulate more creation. Legally speaking, Chinese law has granted IP owners comprehensive rights and high-level protection as required by the TRIPS Agreement. These legal changes are unlikely to be reversed given that the Chinese government has been somewhat persuaded that these IP laws are beneficial for economic development.

Considering these public policy, social justice, and current development points, the practical goal is to improve IPR protection while reducing business capture, illegitimate state intervention, unfair and unequal enforcement, and the consequent abuse of taxpayers’ money. To achieve these goals, China must encourage and promote growth of the economy and IP related industries, establish respect for rights and rules in general, cultivate the IPR consciousness of right-owners and companies, encourage the mobilization of private rights, allow citizen supervision of governmental activities, and adopt reactive enforcement policies.

First, China needs to continue to encourage and promote the growth of the economy and of IP-related industries. Some Chinese, including some of the IP attorneys the author interviewed, believe that because of low economic development and enormous regional disparity in China, it is understandable that startup businesses would counterfeit top brands since they lack adequate capital and retail chains to build up their own competitive brands. As local businesses grow and become better able to establish their own brands, society will become more trademark conscious, and the overall counterfeit rate will drop. For example, there were several localities notorious for their rampant local counterfeit markets and businesses in Zhejiang Province. Today, the local counterfeiting has declined, along with the legal environment and the performance of administrative agencies

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204 Fisher, supra note 27, at 184-92.
205 Id.
207 Interview with an IP researcher (June 23, 2010).
209 Interview with an IP researcher (June 23, 2010).
that tackle infringements. Empirical studies support the positive correlation between economic and technological growth with IPR awareness and protection at the macro-level. Obviously, it will take time for China to build up its economy, develop its own brands, and overcome regional disparities. However, for a country as vast as China, one needs to be aware of the tension created by regional disparity and uneven development. While economic growth could reduce piracy and counterfeiting, highly uneven development sparked by economic growth might fuel piracy and counterfeiting, at least temporarily.

Second, to reduce infringements, the more effective solution than proactive enforcement is to cultivate the IPR consciousness of citizens and companies and encourage the claiming and mobilization of private rights by private entities. Due to the vehement educational and propaganda campaigns and highly publicized enforcement operations carried out by the Chinese government after China joined the WTO in 2001, the majority of Chinese citizens now seem to have some knowledge about IP, piracy and counterfeiting activities, and the existence of IP law. Nevertheless, piracy and counterfeiting are rampant, and an unusually high percentage of people would not hesitate to buy pirated or counterfeit goods. It would not be a quick task to cultivate the IPR consciousness of common citizens and to establish their respect for rights and rules. Only large-scale and sustained education and outreach programs for rights owners, the populace, and especially the younger generation are likely to gradually reshape people’s conceptions of IPR; though one has to question the legitimacy of attempting to convert people away radically from their indigenous social norms. It will

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210 Id.
211 See Schroeder, supra note 38, at 238–56; see also Dimitrov, Administrative Decentralization, supra note 38, at 120–74.
213 See id. at 173-77.
take at least a whole generation for new ideas and norms to be indoctrinated into a new generation from their early years.\footnote{One can observe the gradual but slow decline of piracy rates in Hong Kong in the past few decades from the results of HK government surveys on public awareness of IPR protection.}

Third, in terms of enforcement mechanisms, the Chinese government should continue to use and promote reactive enforcement methods such as the civil enforcement. The central government has already been experimenting to move from proactive administrative and criminal enforcement to more reactive enforcement on a small scale. One interviewee from the China Academy of Social Science explained that civil remedies were the main IP enforcement mechanism in most developed countries, including the United States. In contrast, the dominance of the administrative enforcement mechanism in China was a necessity because the IP law transplanted by the state can only be proactively implemented on the ground.\footnote{Interview with an IP researcher (June 23, 2010).} With the rapid increase of the institutional capacity of the Chinese civil IP system, the central government realizes that the time has come to shift from proactive enforcement to more reactive enforcement.\footnote{Id.} This reform direction is consistent with the state’s reform goal to streamline and simplify the government and focusing on providing services according to the needs of businesses and citizens, as defined by the latter.\footnote{Id.} One reform emphasis is on reducing governmental power and functions—which includes many IP-administering and anti-infringement responsibilities—that can induce rent-seeking behavior out of agency self-interest.\footnote{See Zheng Ce, *Shenzhen Da Buzhi Gaige Jianshao Jing 1/4 Juji Ganbu Bianzhi* [Super-ministry Reform Reduced Bureau-level Cadre Position One by Four in Shenzhen], CHINA.COM.CN (Apr. 23, 2012), http://www.china.com.cn/policy/txt/2012-04/23/content_25210017.htm.}

Small-scale experiments to slim down the enforcement teams of various IP administrative agencies and combine at the local level have been quite successful. For example, Shenzhen City established the Market Supervision Administration of Shenzhen (*Shenzhen Shi Cháng Jiāndù Guānli Ju* 深圳市市场监督管理局) by combining the administrative functions of the original SAIC, AQSIQ, Intellectual Property Office, and the food and pricing supervision functions of the Food and Drug Administration (*Shipīn Yaòpǐn Jiāndù Guānli Ju* 食品药品监督管理局) and the Bureau of
Health. The Intellectual Property Protection Office (Zhishi Chanquan Baohu Chu 知识产权保护) under the Market Supervision Administration became the single office that protects and enforces copyrights, trademarks, patents, trade secrets, and geographical indications all together. Despite the substantial reduction in the number of administrative agency units, staff, and as many as three quarters of the cadres, the administration and protection of IPR were reported to have been strengthened after the reform. Similar experiments have been carried out in Chongqing City, Fuzhou City, and Guangdong Province.

Although the time seems ripe for promoting reform on a larger scale, institutional and bureaucratic obstacles have been tremendous, especially in the area of trademark administrative enforcement. The huge and powerful SAIC, AQSIQ, and their local offices are unwilling to slim down, especially since a great proportion of their cadres would be either demoted or transferred. Both agencies are well-established, with substantial political influence and powerful party leaders at the top; thus, their opposition is the biggest reform obstacle. In addition, the Patent Office inside the State Intellectual Property Office makes a reasonable argument that patent protection is too complex and technical for its office to merge with other enforcement teams.

Fortunately, there are far fewer obstacles to reform in the area of copyright enforcement in terms of switching from administrative enforcement to judicial enforcement. Copyright enforcement has been sluggish and sporadic due to the very limited institutional capacity and the

223 Id.
224 Id.
225 Interview with a government official in the National Copyright Administration of China (June 21, 2010); interview with a government official in the National Copyright Administration of China (July 5, 2010);
226 Interview with a government official in the National Copyright Administration of China (June 21, 2010); interview with a government official in the National Copyright Administration of China (July 5, 2010); interview with an IP judge (July 5, 2010).
227 See interviews cited supra note 226.
political salience of the Copyright Administration.\textsuperscript{228} In addition to the absence of bureaucratic obstacles, copyright officials tend to regard their agency as a service institute for copyright owners instead of a proactive enforcement agency.\textsuperscript{229} The officials know that one should not expand the agency’s enforcement capacity just to strengthen its institutional power.\textsuperscript{230} Consequently, the numbers of IP infringement processed in civil courts each year have expanded more rapidly than the annual numbers of administrative cases. Hence, the overall direction of the reform of IP enforcement in China is rather clear, but the expansion of such reform on a larger scale faces tremendous obstacles. The central government needs to act in order to overcome the political and institutional obstacles discussed in this article.

Fourth, Chinese citizens lack the power to supervise governmental activities and to ensure the use of its enforcement powers serve state interests only.\textsuperscript{231} The concentration of IP thefts in the tobacco, alcohol, and publication industries speaks strongly to how easily the Chinese government can intervene in the criminal judicial system and use various enforcement resources in creative ways to blatantly work for state interests and to control the media.\textsuperscript{232} Such abuse of public resources is unfair to taxpayers and to IPR owners whose rights deserve criminal protection. Chinese citizens need more effective channels to hold the government accountable and the activities of the administrative agencies regulating these industries need to be made more transparent.

Fifth, and most problematic, current punitive enforcement in these areas does not address the roots of rampant piracy and tobacco and alcohol counterfeiting.\textsuperscript{233} These problems are grounded in incentives embedded in broader-level industry arrangements, political policies, and enforcement institutions. Some of these problems call for large-scale reforms or a fundamental overhaul of the system. Copyright enforcement cannot be improved by a few sporadic and superficially result-oriented campaign-style crackdowns each year. Local anti-piracy enforcement teams and civil IP tribunals under the prefecture level should be established extensively to

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\textsuperscript{228} See MERTHA, supra note 3, at 118-163.

\textsuperscript{229} Interview with a government official in the National Copyright Administration of China (June 21, 2010).

\textsuperscript{230} Id.


\textsuperscript{232} See supra Part IV.B.2.

\textsuperscript{233} Liu, \textit{The Enforcement of IPR in China and the United States}, supra note 11, at 206–32.
handle consistent, regular enforcement and implementation and to focus on habitual offenders and large-scale infringements. The Chinese government should open its restriction on the importation and distribution of U.S. blockbusters and other foreign movies so people will not have such strong incentives to buy or download pirated DVDs of foreign films.

Finally, China should establish monitoring mechanisms to regulate corporate lobbying activities in order to prevent corruption and attempts to capture the system. The Chinese government should have stricter regulation of business lobbying, especially business lobbying in highly concentrated markets and policy negotiations by SOEs. The purpose of such regulation should not be simply to prevent and punish corruption. Rather, it should monitor business capturing attempts and systematic unequal enforcement, which exacerbate existing social stratification. Moreover, governments should reserve a proportion of resources to protect the IPR of small businesses and individuals, and the fair use and other rights of IPR users given their rights have largely been disregarded by enforcement agencies.

If enforcing private IPR is not the priority of an enforcement team, it might be reasonable sometimes for agencies to collect “case-handling fees” to cover costs and to require assistance from rights owners. In such a case, the fee should be standardized and the procedure should be transparent. Otherwise, the fee could become a secret bid for prioritized enforcement among multiple rights-owners and provide corrupted officials or agencies opportunity to extract bribe from businesses and IPR owners. Lack of regulation and transparency on these matters contributes to corporate clients’ serious dissatisfaction with the performance of enforcement agencies.234

VII. CONCLUSION

In sum, the narrow foci and obvious enforcement patterns that emerged in the analysis indicate that the following forces have an overwhelming effect on criminal IP enforcement in China: (1) vehement business lobbying by a handful of powerful foreign trademark corporations; (2) trade association lobbying efforts, including foreign associations exerting external pressure; (3) the size and market concentration of top firms in an industry; (4) state interests in industries regulated by the state and monopolized by SOEs; (5) designated enforcement priorities, including

234 Interview with an IP attorney (June 22, 2010).
public welfare and public policy concerns; and (6) other political goals, such as control of the media and importation restrictions on publications. As a result, a disproportionately high percentage of the protected IP theft victims in China involves foreign companies, SOEs in state-controlled industries, companies carrying health or safety-related products, and companies in regulated industries (such as publishing).

Currently, the practical goals for China are to promote IPR protection while reducing business capture, instrumental usage by the state, and unequal enforcement. In order to achieve these goals, the root solutions are to develop IP-related industries, to cultivate the IPR consciousness of citizens to encourage the mobilization of private rights by private entities, to allow citizen supervision of governmental activities, and to move from proactive enforcement to more reactive enforcement. Other preventative and monitoring mechanisms should also be established beyond enforcing IP, such as stricter regulation both of counterfeits that pose health or safety threats and of corporate lobbying activities to prevent corruption and capture attempts. Expanding criminalization and intensifying criminal enforcement will not effectively lead to better IP enforcement and would incur expensive social costs and raise serious questions of justice.