THE ECONOMICS OF MODERN CHINESE INTELLECTUAL PROPERTY STANDARDS: FROM NOTORIOUS COUNTERFEIT GOODS TO INTERNATIONAL HIGH-TECH EXPORTS

LUCAS COSTA DOS ANJOS
RAFAEL MACHADO DA ROCHA

Abstract

This study aims to analyze the manner in which China leads the contemporary economic order, in addition to the role its diplomatic corps plays in the political setting of international economy. Not only did China doubled its per capta income from 2005 to 2012, but it also reached an economic growth of about 10% a year and it became a major exporter of high-technology goods. Such transformations have somewhat shifted China’s international stances in fora such as the IMF, the WTO and WIPO.

It is increasingly necessary that other countries and international organizations alike effectively understand and communicate with China’s diplomatic body and entrepreneurs in order to achieve consensus, coordinate policies and reach agreements. Hence, this study assesses the current state of the art of Chinese international economic politics, supported by, but not limited to, the work of authors such as Alice Amsden, Ha-Joon Chang, Beina Xu and Jianfu Chen. Chinese economy and international trade will also be examined by means of the country’s engagements in the World Trade Organization, in the international financial sector and in major markets worldwide.

With regard to political aspects, China’s contemporary role in international groups and institutions with economic attributes, such as the BRICS and the UNCTAD, will be better determined. As far as technological and innovative legal frameworks are concerned, this study aims to understand the contradictions that make China one of the world’s most relevant countries in terms of patent applications, and, nevertheless, a one that still offers various bureaucratic challenges to entrepreneurs, companies and academic researchers. On a final note, what are the predictions regarding China’s international economic politics? What can we expect from the Asian giant concerning intellectual property rights and technological innovation? Are financial and economic interests able to overcome state meddling and political disputes with the West?

Key words: China; economy; intellectual property; politics.
1 Introduction

According to recent studies of the Organization for Economic Cooperation and Development - OECD, China managed, between 2005 and 2012: to increase its per capta income from US$ 4,950 to US$ 10,924; to grow its economy at a 10% a year rate (average); to quadruple foreign investments in the country; to more than double its exports in the technology and communication fields; and to reduce its infant mortality rates by half, among other impressive development indicators.

Nowadays, due to its economic and social growth, China has a prominent role in the major international fora, from discussions regarding sustainable development at the United Nations Environmental Pannel – UNEP, to matters of financial coordination and regulation at the International Monetary Fund. Regardless of the field, it is ever more necessary that States and other international actors dialogue with China’s diplomatic corps and businessmen, in order to reach consensus, to sign agreements and to coordinate politics.

In the field of intellectual property (IP), according to a Thomson Reuters report, China became, in 2011, the country that most filed patent requests in the world, surpassing traditional markets, such as the United States and Japan. Even though this suggests that there is more incentive to innovation in the country and that there is a strong tendency to turn the “made in China” to the “designed in China”, it is yet to be overcome the international reputation as a notorious counterfeiter of goods.

This subject is particularly relevant in the current context of international trade, in which China is the largest economy worldwide and exerts great influence over international financial flows. With regard to intellectual property, the

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transition from counterfeiter of consumer goods (1980s and 1990s) to international reference on scientific and technological innovation (2000s and following) is further incentivized by abundant governmental subsidies in the fields of research & development – R&D.

Over the last two decades, China undertook legal reforms that increased the scope of protection given to private property, elevating the number of guarantees for foreign investors, even though the public sector is of the utmost importance for the national economic market. In practical terms, private investment is still very much subjected to political regulations and governmental conditionalities, which substantiates legal insecurity and the risks of entrepreneurship when investing in China. Just like other legal fields in China, property law, whether intellectual or real estate, still tries to overcome the battle between public and private.

In order to analyze these central matters of investigation, this paper is divided into four sections. Alongside this introductory item, the next section analyses property law under the Chinese perspective, by means of its contextualization according to the principles of its Constitution (1982) and its Property Law (2007). On the following section, intellectual property will be examined as a category of property right in the country, especially with regard to recent legal transformations taken place. Following this item, the main categories of intellectual property rights will be analyzed taking into consideration its particular traits in comparison to other international protection frameworks worldwide.

On a final note, initial impressions of recent legal transformation will be considered in light of the new trend of technological growth in the country, of the challenges intellectual property enforcement still face in China and of the country’s future in the context of intellectual property.

2 Property Rights in China

Regarding this topic, it is important to highlight Jianfu Chen’s thoughts about the terminology used in China:

In examining property law in the PRC, two different terms, “suoyouzhi” (所有制) e “caichan suoyouquan” (财产所有权), have to be distinguished. These two terms are reminiscent of the two different definitions of the term “ownership” as used in other socialist countries. The term “suoyouzhi”, literally meaning ownership system, refers to the politico-economic system of the state, e.g. ownership by the whole people and the collective ownership of the working people. The term “caichan suoyouquan”, literally meaning rights of property ownership, denotes property rights of the property owner as provided by the law.

In the millennia that preceded century XX, the power of the Emperor determined the destination and the use of all forms of property in China. Just like individual freedom, objects and lands were property of the Emperor, whose private interests with regard to proprietary rights in China.

supremacy halted the development of a private property concept. According to Mo Zhang:

Historically, China was a country where the “imperial power” or the “power of emperor” was the supreme authority of the land. Pursuant to Confucianism, to rule a country is like to rule a family where the father has absolute power to decide everything for the family, and each individual member in the family must subordinate his or her own interest to the family interest. Therefore, it was imperative that the family was held together and all individuals were subject to it.

The government of Chiang Kai-Shek tried to implement a Civil Code in 1930, but military disputes against Japan made its enforcement harder. When it took office in 1949, the Communist Party annulled the Civil Code and restricted to a minimum any private and individual rights. The Cultural Revolution sought to implement the feeling that individual rights and private property were direct opposites of socialist principles, thus favoring collective and state property.

The cornerstone of private property in China took place in the 1980s, with the partial opening of the country with the Special Economic Zones, especially in the Southeast of its territory. In addition, there were several economic reforms under the ruling of Deng Xiaoping. The objective of these transformations was to turn the rigidly government-planned economy into a market economy, even though just for certain sectors and in a controlled manner, according to the interests of the Communist Party (socialist market economy).

Although Deng Xiaoping’s reforms allowed capitalist ventures in specific areas, the Communist Party tried to unify the country politically and ideologically by means of the Four Cardinal Principals Declaration, which were the central values that China was supposed to follow during its modernization:

1. We must keep to the socialist road;
2. We must uphold the dictatorship of the proletariat;
3. We must uphold the leadership of the Communist Party;
4. We must uphold Marxism-Leninism and Mao Zedong Thought.

Reforms in the property system were necessary for the modernization and effectively begun by menas of the Chinese Constitution (1982, and amendments) and of the General Principles of Civil Law (1986). With regard to the Chinese Constitution, property protection is set in articles 12 and 13, which rule, respectively, state and private property:

Article 12. Socialist public property is sacred and inviolable. The state protects socialist public property. Appropriation or damage of state or collective property by any organization

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11 ZHANG, Mo. From public to private: the newly enacted Chinese property law and the protection of property Rights in China, cit., p. 3.

12 ZHANG, Mo. From public to private: the newly enacted Chinese property law and the protection of property Rights in China, cit., p. 9.

13 These reforms represent the beginning of a silent revolution, in addition to its international insertion in economic terms, which has been opening the country up to foreign social influence, to Western habits and to Civil Law and Common Law legal practices.

or individual by whatever means is prohibited\(^{15}\).

**Article 13.** The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects by law the right of citizens to inherit private property\(^{16}\).

It is important to highlight that, only in 2004, by means of an amendment to the 1982’s Constitution, did the protection of private property become institutionalized in China. The 1988 amendment, for example, allowed the “the private sector of the economy to exist and develop within the limits prescribed by law”, recognized the private sector of economy as “a supplement to the socialist public economy,” and protected “the lawful rights and interests of private sector of economy,” but did not use, in a literal way, the term “private property”\(^{17}\).

Despite such protection, Article 6 of the Constitution says that:

The basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of ‘from each according to his ability, to each according to his work’\(^{18}\).

In addition, article 7 characterizes the socialist economy as “the leading force in the national economy. The state ensures the consolidation and growth of the state economy”\(^{19}\). These articles demonstrate that, despite legal protection given to private property, there is supremacy of collective and state categories of property in the country, which indicates a certain incompatibility among constitutional aspects with regard to property.

The General Principles of Civil Law in China, in its fifth chapter (Civil Rights), mention property rights, intellectual property rights, accessory rights to property rights, obligations and individual rights\(^{20}\). According to article 71, “’property ownership’ means the owner’s rights to lawfully possess, utilize, profit from and dispose of his property”\(^{21}\). Such autonomy for the owner to freely dispose of its property is a direct consequence of the capitalist model of productive organization, which in China is able to come into conflict with the current institutions of its proprietary system.

As far as intellectual property is concerned, the law mentions the possibility of protection to copyrights, patents, trademarks, among others, but it does not establish the time and parameters of


\(^{17}\) ZHANG, Mo. From public to private: the newly enacted Chinese property law and the protection of property Rights in China, cit., p. 17.


protection. The bill focuses on the cases of state and collective property. Yet, the enforcement of such principles was very narrow and rarely put into practice.\(^{22}\)

In 2007, the Chinese Property Law came into force. Its uniqueness and importance are due to the fact that, for the first time, one does not observe the supremacy of state and collective property over private property. In article 1 of such law, the legislator specifies its objectives and the law’s constitutional submission:

This Law is formulated with a view to maintaining the national basic economic system and the economic order of the socialist market, clarifying the ownership of property, giving full effect to the meaning of property, [...] in accordance with the Constitution.\(^{23}\)

The Property Law establishes that only obligations and property rights set by law will be valid. This rule lessens the individual freedom to create contractual relations related to proprietary rights. It also determines that “the urban lands are owned by the State. Such rural land and the land on the outskirts of the city as belonging to the State according to law shall be owned by the State.”\(^{24}\)

The right of usufruct of the land and of edifications is the ones that are negotiated in transactions involving real estate. This confusion between the concepts of possession and of property is a reflection of the private and public clash, whose prevalence is yet to be determined in the Chinese courthouses. Therefore, the interference of the State over individual rights occurs also by means of proprietary rights, which are limited.

A common scene in the current urban setting of China is the nail houses, which are old buildings whose tenants refuse to abdicate their right of usufruct. Since most of their neighbors yield governmental pressure, it is quite usual to see grand real estate projects surrounding these houses, which stand out like nails among other buildings.\(^{26}\)

Many norms and regulations that currently are in force are yet to be modified in order to concur with this law. Generally speaking, the Property Law represents and advancement for China’s legal system, the base of a true market economy, even though its enforcement demands alteration of restraining practices that exceed legal boundaries and giving space to experimentation by formulating intentionally unclear policies and laws”. HO, Peter. Who Owns China’s Land?. In: The China Quarterly. Available at: <http://www.jstor.org/discover/10.2307/3451163?uid=364382551&uid=3737664&uid=5909624&uid=2&uid=37572&uid=67&uid=62&sid=2110401677947>. Access in May 19, 2015.


\(^{25}\) Regarding this topic, Peter Ho says that “the question is how far privatization can proceed before corrupting the Marx-Leninist principles of state and collective land ownership. Land and policy-making is, therefore, an alternation of restraining practices that exceed legal boundaries and giving space to experimentation by formulating intentionally unclear policies and laws”. \(^{26}\) MOORE, Malcom. China moves to calm unrest over property seizures. In: The Telegraph [on line]. Available at: <http://www.telegraph.co.uk/news/worldnews/asia/china/7103231/China-moves-to-calm-unrest-over-property-seizures.html>. Access in: April 21, 2015.
more effectiveness in the future. According to Jianfu Chen:

Despite certain shortcomings, the Law now lays down an outline and a structure of legal principles governing property rights (especially in the general notion of usufruct), allowing further development to occur. Most importantly, the Law now firmly and comprehensively establishes the notion of ‘property rights’ in the Chinese legal system. This, in a nominally socialist country, represents no less than a revolution in legal thought and legal development.

3 Intellectual Property in China

First of all, it is important to highlight that proprietary rights may be of material goods (res corporalis) and of immaterial goods (res incorporalis). Intellectual property is an immaterial good, a result of human creativity, whether artistic, scientific, literary or industrial. According to a more traditional approach, by granting exclusive rights over such goods (and, therefore, the monopoly over the commercial use of an idea), the creator is allowed to freely explore the economic potential of his or her creation. The financial profitability is the counterpart for the inventive work accomplished, which then fosters market development.

In China, the progress of intellectual property protection started especially in the 1980s, as part of the reforms destined to insert the country into the international trade system. Just like Brazil, which faced difficulties attracting capital and direct investments, China resisted the need to broaden the scope of protection to patent and copyright owners. They feared that granting exclusivity to foreigners would damage the national industry. However, installing foreign companies in the Special Economic Zones and developing the national technological industry depended on minimum standards of intellectual property protection.

Therefore, in 1970 a bill regarding Chinese-foreign joint ventures was passed. In 1980, China became a member of the World Intellectual Property Organization (WIPO). In Trademark bill was passed, and in 1985 the Patent Law came into force. Laws regarding software and copyright protection came into force in 1990. Despite a robust legislation, Western countries, especially the United States and the European Union still criticized China due to its timid enforcement nationally, which contributed to China’s international depiction as the world’s top counterfeiter.


Despite its legislative adequacy in the 1980s and 1990s, the Chinese government rarely enforced these provisions. In a way, this allowed China time to adapt to international protection standards. For this reason, entrepreneurs still absorbed new production methods, assimilated modern innovation techniques and were able to train its employees in research and development fields of incipient industries.

As a response to Western pressure, China amended its patent law, its trademark law and its criminal law (forgery became a crime), in 1992 and 1993. The country also ratified the Madrid Agreement (1981)\(^\text{31}\) and the Bern Convention (1886, followed by its revisions and amendments)\(^\text{32}\), among other international treaties. The adoption of these treaties shows that, in the mid-1990s, the country had the intention to better adapt to international regulation regarding intellectual property.

Specialized courts and tribunals were set in 1990s, with the aim of assuring more effectiveness to legislation that had recently come into force. Much in the same way, internal branches, such as the State Intellectual Property Office (SIPO), were created in order to examine patent, trademark and copyright requests, among others. Ever since its creation, requests have been growing exponentially.

These adaptation efforts were broadened when China requested to be included as a member in the World Trade Organization (WTO), in the 2000s, which demanded that the Trade Related Aspects of Intellectual Property Agreement (TRIPS) be signed\(^\text{33}\). The need of compatibility with the TRIPS Agreement gave rise to new legislative reforms. Therefore, China’s ascension to the WTO represented a cornerstone in the country’s participation in international trade.

Once at the WTO, China is subjected to the organization’s dispute settlement procedures. Since the WTO can also analyze disputes in the field of intellectual property, (the TRIPS Agreement is part of the “single undertaking rule”), China had even more incentives to improve its enforcement standards for IP rights.

In 2007, the United States demanded that a panel be established against China at the WTO with regard to the measures it took to protect intellectual property, which were deemed insufficient\(^\text{34}\). The panel confirmed most American allegations\(^\text{35}\).

At this specific case, several inconsistencies regarding intellectual protection in China were subjected to new standards established

\(^{31}\) This agreement discusses the international registry of trademarks.

\(^{32}\) This convention discusses copyrights regarding literary and artistic works.


by TRIPS. The decisions of the Dispute Settlement Body were adopted by China, but the country needed a reasonable period to put it into practice. It was agreed with the United States that a 12 months deadline would be granted for such adaptation (until March 2010). A day before its deadline, China informed the United States that its National People’s Congress had approved alterations in their copyright law and that the State Council would review its Customs Protection Regulations for Intellectual Property Rights.

China’s ascension to the WTO is also one of the main causes that the international trade has grown over the last decades, both in terms of exports and imports. However, tools and guarantees to ensure the observance of international regulations, such as WTO rules and China’s acceptance of its dispute settlement system followed the strengthening of commercial relations internationally.

4 Intellectual Property Categories in China

The legal framework established by the Chinese legislation and by China’s ascension to the WTO system provides a protective scenario that is very similar to the one in developing countries and, in some cases, even similar to the one in developed countries, as it will be explained in the following items. It is yet to be determined if the quick ripening of China’s legal system will be followed by an effective protection of these intellectual property rights and, therefore, more incentives to research, development and technological innovation. Over the next few items, we will analyze some categories of intellectual property in China, not all of them, but in order to highlight their main singularities in the country.

4.1 Patents

The Chinese national patent registry office, the State Intellectual Property Office (SIPO), is also the governmental body responsible for the international cooperation in matters of intellectual property. This suggests the type of international politics taken on by China in its international relations with regard to intellectual property, which is more directed to technical and economic matters, such as the case of negotiations involving patent matters.

At first, the Patent Law forbade the registry of food products, beverages, condiments, pharmaceutical and chemical products. The 1992 reforms altered these provisions and increased the scope of protection, both with regard to the period of protection and to the products and processes that are patentable. Such legislative alteration suggests China’s stand with regard to an increase of protection and, consequently, of the incentives to technological innovation there. By granting more standards of patent protection for pharmaceutical products, research and development sectors will have greater propensity to invest in innovation.

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36 LIEGSALZ, Johannes. The Economics of Intellectual Property Rights in China: patents, trade, and foreign direct investment, cit., p. 87.

In China, the period of protection to patents related to inventions is 20 years, while the protection period for utility models is 10 years. This shows congruency with other country’s legislations. Since 2001, the country also protects by means of patents new species of plants, according to the TRIPS Agreement and the Convention for the Protection of New Varieties of Plants (1961).

4.2 Copyright and Software

Chinese Copyright Law determines the protection of literary, musical, architectural, photographic, cinematic works and software programs, among others. Just like in other countries, most copyright is protected during the author’s lifetime and after his or her death, for 50 years. Despite the fact that there is a protection for audiovisual products, the reality is that counterfeiting of CDs and DVDs is one of the major issues regarding intellectual property violation in China.

The protection of software programs has some singularities with regard to its developers. Software created by Chinese nationals is protected, regardless of its register and publication. Foreign software, however, is only protected in Chinese territory if the author’s country of residence (or origin) is part of specific multilateral or bilateral agreements with China. In 2013, there was a reform in the national regulation regarding the protection of software, whose article 24 broadened the cases of copyright violation. In addition, it established fines and compensation in cases of piracy.
The violation of copyrights is one of the main complaints against China internationally. To fight these ever-growing practices, the country established an Anti-Piracy Commission in 2002, which is responsible for conducting investigations, firming alliances against piracy and to take matters to court at the request of copyright owners.

**4.3 Geographical Indications**

Legal tools specifically design to protect geographical indications were adopted by the Chinese government since 2005 and are, in most part, the result of bilateral efforts undertaken alongside the European Union. Just like other municipal systems, the protection of geographical indications is also a result of Competition Law, which tries to halt the misrepresentation of product origin in international and local trade.

Unlike what is the rule of thumb in Brazil, there is no certification of traditional services by means of geographical indications, just of traditional products. The main Chinese geographical indications are the Shaoxing Yellow Wine (绍兴黄酒) and the Longjing Tea (龙井茶), which has been subjected to forgery in the country before.

**5 Final Thoughts: Implementing Minimum Protection Standards, International Adjustments and Chinese Innovation**

In spite of all legislative reforms taken on in China since the 1980s, there are still challenges as to the enforcement of such laws. Just as in other emerging countries, the Chinese economic, political and social circumstances have been undergoing rapid transformation and are responsible for several other issues, which are not always adequately answered by means of legislative reforms. On many occasions, the economic market itself tends to regulate these matters.

Regardless of the meaning of the expression “socialistic market economy”, the increase on the trade flow of China has turned its economic practices (national and international) fundamental for the international community. In pragmatic terms, the risks of not establishing trade relations with China and of ignoring its vast consumer’s market are greater than those of not
cooperating with the country to develop public and private policies, especially in the field of intellectual property. Therefore, the country’s participation at the WTO tends to increase, whether in its dispute settlement body, whether in the negotiation of new agreements at the Doha Round.

It is important to consider regional singularities and the brief period of time that China had to assimilate and to implement its recent legislative reforms. Thus, the recognition and the increase of property rights (real estate or intellectual) represent a greater political effort in the sense of building a legal order that is more suited to contemporary standards of the international community.

These efforts have guaranteed good results to China, even though more effectiveness is still necessary in the enforcement of these laws. The economic results and the technological turn that the country is going through are the living proof of a trend in the research and development fields of Chinese companies, as well as of its technological innovation. Besides being one of the largest consumer markets worldwide nowadays, China has quickly consolidated its space in the order of international trade as an innovation pole and of intellectual productivity.

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